# 12-1460

IN THE
**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

DANIEL T. WARREN

*Plaintiff-Appellant*

_____ v. ____

UNITED STATES OF AMERICA, INDIVIDUALLY, AND AS TRUSTEE OF THE GOODS, CREDITS AND CHATTELS OF THE FEDERALLY RECOGNIZED INDIAN NATIONS AND TRIBES SITUATED IN THE STATE OF NEW YORK, KEN SALAZAR IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, DONALD LAVERDURE, IN HIS OFFICIAL CAPACITY AS THE ACTING ASSISTANT SECRETARY OF THE INTERIOR FOR INDIAN AFFAIRS, UNITED STATES DEPARTMENT OF THE INTERIOR, TRACIE STEVENS, IN HER CAPACITY AS CHAIRMAN OF THE NATIONAL INDIAN GAMING COMMISSION, NATIONAL INDIAN GAMING COMMISSION, ANDREW M. CUOMO, AS GOVERNOR OF THE STATE OF NEW YORK, JOHN D. SABINI, AS CHAIRMAN, OF THE NEW YORK STATE RACING AND WAGERING BOARD,
*Defendants-Appellees*

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**On Appeal from the**
**United States District Court for the Western District of New York**

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Brief of Appellant Daniel T. Warren

Submitted By:
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West Seneca, New York 14224

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## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiff brings this action under the Constitution and the laws of the United States; 10th Amendment to the United States Constitution; Article 1, § 8, Clause 3 of the United States Constitution (Indian Commerce Clause); 5th Amendment to the United States Constitution; Administrative Procedure Act (APA), 5 U. S. C. § 551 et. seq., Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 et seq., and seeks injunctive and declaratory relief pursuant to 28 U.S.C. §§ 2201, 2202. The district court had jurisdiction under 28 U.S.C. § 1331.

The final judgment of the District Court was entered on March 14, 2012 (SPA-1) and a timely notice of appeal was filed on April 10, 2012 (A-561).

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

## ISSUES PRESENTED

1. Does the complaint, in whole or in part, state a cause of action?
2. Does Plaintiff have standing to bring and maintain this action?
3. Did the District Court err in denying Plaintiff's motion to amend and add parties as futile?

## STATEMENT OF THE CASE

Plaintiff commenced this action by filing a Complaint, on April 6, 2006, against the United States of America, United States Department of the Interior, National Indian Gaming Commission ("NIGC"), and various individual federal officials (together, the "Federal Defendants"), and the Governor of the State of New York, the Chair of the New York State Racing and Wagering Board (together, the "State Defendants"). Plaintiff subsequently filed an Amended Complaint on August 16, 2006.

The State Defendants moved to dismiss the Amended Complaint on August 20, 2006 (A-295 – A-297), and the Federal Defendants followed suit on August 25, 2006 (Docket No. 23).

In moving to dismiss the Amended Complaint's Second and Third causes of action, the State Defendants urged that: (1) the court lacks jurisdiction over the claims pursuant to the Eleventh Amendment, (2) the claims are barred by res judicata, (3) the claims are time-barred, and (4) they do not state a cognizable claim for relief.

The Federal Defendants moved to dismiss the Amended Complaint's First and Fourth claims on the ground that Plaintiff lacks standing to bring either a Tenth Amendment or an IGRA claim.

Thereafter, on October 2, 2006, Plaintiff moved for leave to file a second amended complaint. (Docket No. 28). That motion was rendered moot by Plaintiff's subsequent motion for leave to amend the amended complaint, filed on October 5, 2007. (Docket No. 43.) That motion, in turn, was rendered moot by Plaintiff's further motion to amend and supplement the complaint, filed on March 16, 2009. (A-325)

The State Defendants opposed the amendment of the complaint on the grounds that the amendment, at least as to them, may be futile on the grounds raised in their motion to dismiss (A-482 – A-488).

The Federal Defendants opposed the amendment of the complaint only in so far as it sought to add the proposed new defendants (Docket No. 81).

The Seneca Nation of Indians appear as Amicus Curiae to oppose only the motion to amend and supplement arguing that its sovereign immunity extended to the proposed new defendants: the Seneca Gaming Corporation, the President of the SGC and the then president of the Seneca Nation of Indians ( hereinafter "Proposed New Defendants") (A-489 – A-525) .

By decision and order issued March 13, 2012 (SPA.1-12), reported unofficially at 2012 U.S. Dist. LEXIS 33686, Judge Skretny granted the motions to dismiss on the grounds of failure to state a cause of action and standing and denied Plaintiff's motion to add the proposed new defendants on the grounds of tribal

sovereign immunity and futility. A clerk's judgment was entered upon the order on March 14, 2012 (SPA.13). This appeal ensued (A-561).

This action seeks to challenge in:

1) The First Cause of Action in the proposed amended complaint alleges that the Federal Defendants determination to allow the compact to become approved by operation of law as being in excess of constitutional authority or jurisdiction (5 U.S.C. § 706(2)(B & C));

2) The Second Cause of Action in the proposed amended complaint also challenges the determinations of the federal defendants to neither approve or disapprove the compact and allow it to be deemed approve (25 U.S.C. § 2710(d)(8)(C)) that would permit games that are not permitted for any purpose by any person, organization, or entity as required by 25 U.S.C. § 2710(d)(1)(B) (5 U.S.C. § 706(2)(A, C & D));

3) The Third Cause of Action in the proposed amended complaint seeks to enjoin the defendants-appellees from acting in excess of their authority and in violation of the Indian Gaming Regulatory Act by condoning, allowing, permitting or otherwise furthering commercialized gambling pursuant to tribal-state compacts that are void and not in effect as required by as required by 25 U.S.C. § 2710(d)(1)(C) because the State Defendants did not have the authority under state law to enter into them 25 U.S.C. § 2710(d)(1)(C) (5 U.S.C. § 706(2)(A, C & D));

4) The Fourth Cause of Action in the proposed amended complaint also challenges the determinations of Defendants Hogen and National Indian Gaming Commission's determination approving a gaming ordinance permitting gaming under a tribal-state compact that is not lawfully in effect as required by 25 U.S.C. § 2710(d)(1)(C) because the State Defendants did not have the authority to enter into it and would permit games that are not permitted for any purpose by any person, organization, or entity as required by 25 U.S.C. § 2710(d)(1)(B) and was made without observance of procedure required by law and/or their actions were arbitrary, capricious, an abuse of discretion and not in accordance with the law (5 U.S.C. § 706(2)(A, C & D));

## STATEMENT OF RELEVANT FACTS

In this action the proposed amended complaint alleges, and the Defendants have not asserted otherwise in the District Court, that I work full time at a location within one and one half miles and reside within 6 miles from the proposed casino site as well as that I am a registered voter (A-330 ¶ ¶ 5,6, A-331 ¶ 9) I also travel within 1,000 feet of the Buffalo casino on a regular basis (A-331, ¶¶ 9, 10 ). I also reside in the same county as the Buffalo Site for the Seneca Nation's casino (A330 ¶ 5 and A-120 (¶ 11(a)(2) of the Nation-State Gaming Compact Between the Seneca Nation of Indians and The State Of New York)) that will conduct Class III gaming and I assert interest in not being exposed to the blight that such a facility

may cause, the increased risk of being a victim of crime or exposure to crime (A-331 ¶ 13), that will emanate from such a facility (incorporated by reference into the complaint are two studies that demonstrate that crime increases in areas surrounding casinos of this type), the lack of parking and the increase in traffic it will create which will increase the risk of being a victim of a motor vehicle accident, air pollution and noise as the result of having a 24-hour-a-day casino attracting millions of customers per year (A-331 – A-332 ¶¶ 13, 15, 16). The study by Earl Grinols and David Mustard entitled "Measuring Industry Externalities: The Curious Case of Casinos and Crime" (March 2001) (A-365 – A-401, Complaint Exhibit "A"; hereinafter "Grinols and Mustard Study") concludes that the data indicates an 8% increase in crime in counties that have a casino versus those that do not and that the data from counties that surround a county with a casino indicate that the casinos create crime, not merely move it from one area to another. Further the study concludes that this increased crime spills over into neighboring counties. The study entitled "Gambling and Crime Among Arrestees: Exploring the Link" published by the United States Department of Justice, National Institute of Justice, July 2004 concluded that the percentage of problem or pathological gamblers among arrestees were three to five times higher than the general population and that nearly one-third of arrestees identified as pathological gamblers admitted

having committed robbery in the previous year and approximately 13 percent had assaulted someone for money ((A-402 – A-415, Complaint Exhibit "B").

Historically New York has prohibited commercialized gambling. This prohibition is in the Bill of Rights of the New York State Constitution in Article I § 9. Gambling was first banned in the Second Constitution of the State of New York ("The 1821 State Constitution") in Article VII § 11 which provided "No lottery shall hereafter be authorized in this state; and the legislature shall pass laws to prevent the sale of all lottery tickets within this state, except in lotteries already provided for by law."

(http://www.nycourts.gov/history/constitutions/1821_constitution.htm (Last visited 7/25/2012). The Third Constitution of the State of New York ("The 1846 Constitution") in Article I § 10 provided "nor shall any lottery hereafter be authorized, or any sale of lottery tickets allowed within this state"

(http://www.nycourts.gov/history/constitutions/1846_constitution.htm (Last visited 7/25/2012)). The Fourth Constitution of the State of New York ("The 1894 Constitution") in Article I § 9 provided "nor shall any lottery or the sale of lottery tickets, pool-selling, book making, or any other kind of gambling hereafter be authorized or allowed within this State; and the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section"

(http://www.nycourts.gov/history/constitutions/1894_constitution.htm (Last visited

7/25/2012)). The Constitutional Convention of 1938 did not write a new Constitution. It did succeed in getting voter approval of a number of significant amendments to the Constitution none of which affected the prohibition on gambling. Since 1938 this State Constitutional provision that prohibits gambling has been amended to allow only limited gambling for the support of charitable organizations, education and the support of state government.

New York's Penal Law prohibits profiting or the advancement of gambling (N.Y. Penal Law Article 225).

Unlawful gambling activity has been defined as any gambling activity that is not explicitly authorized by the State of New York (N.Y. Penal Law §§ 225.05-225.20 & 225.30; N.Y. Op.Atty.Gen. 81-68).

N.Y. General Municipal Law § 195-k criminalizes as a misdemeanor unlawful games of chance.

N.Y. General Obligations Law § 5-417 provides: "All contracts, agreements and securities given, made or executed, for or on account of any raffle, or distribution of money, goods or things in action, for the payment of any money, or other valuable thing, in consideration of a chance in such raffle or distribution, or for the delivery of any money, goods or things in action, so raffled for, or agreed to be distributed as aforesaid, shall be utterly void". The Court of Appeals has held that "All contracts and dealings in respect to lotteries, and tickets in lotteries, being

illegal, no right of action can accrue to a party, by reason of such contracts and dealings" (*Thatcher v Morris*, 11 N.Y. 437, 438). The Appellate Division, First Department of the New York State Supreme Court in *Intercontinental Hotels Corporation (Puerto Rico) v. Golden*, 18 A.D.2d 45, described New York's public policy against gambling as "The anti-gambling clause of the State Constitution is of the same venerable vintage as the wrongful death action provision and has also been included in all later revisions of the Constitution. Thus the prohibition against gambling represents, not just a temporary fancy, but a deep-rooted policy to which courts should give constructive effect." This public policy is so strong and deep rooted that our law in recognition that title to property or money does not pass when it is obtained through illegal gambling activities and that in derogation of the common law provides that a person who places a bet or loses money or an object of value in excess of $25.00 may sue to recover it (N.Y. General Obligations Law §§ 5-419, 5-421).

Furthermore the places where unlawful gambling takes place is considered a criminal nuisance (N.Y. Penal Law § 240.45)

The Indian Gaming Regulatory Act was enacted in 1988 for the express purpose of making Indian tribes economically self-sufficient through Class III gambling and to temper the U.S. Supreme Court's holding in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 which held that Indian nations and tribes may

engage in all but prohibited gambling activity by requiring a tribal-state compact (25 U.S.C. § 2702(1)).

Pursuant to IGRA, simple Class II gaming (like bingo) and commercialized Class III casino gaming activities will be lawful on Indian lands if they are "located in a State that permits such gaming for any purpose by any person, organization or entity . . ." 25 U.S.C. § 2710(d)(1) (B & C).

The State legislation which purported to authorize the subject compact between the State of New York and the Seneca Nation of Indians was passed in the late evening hours – an 81 page bill – without notice to the people or debate. Chapter 383 of the New York State Laws of 2001 provides in pertinent part, that the governor is authorized to negotiate and enter into compacts with Indian tribes to provide for commercialized Class III casino gaming on Indian lands.

On August 18, 2002, pursuant to IGRA and Chapter 383 of the New York State Laws of 2001, the Seneca Nation and the State of New York executed a tribal-state compact (A-109 – A-137).

By letter dated November 12, 2002 former Secretary of the Interior Gale Norton set forth her reasons for not affirmatively denying nor approving the subject compact, but rather to take no action and to allow it by operation of law to be deemed approved to the extent it is consistent with IGRA pursuant to 25 U.S.C. § 2710(d)(8)(C) (A-416 – A-424; Complaint Exhibit "C"). The Secretary

published notice of the approved status of the subject compact in the Federal Register on December 9, 2002.

On November 26, 2002 Defendant Hogen approved the Seneca Nation Gaming Ordinance of 2002 (A-138 – A-158).

On May 3, 2005 in the case of *Dalton v. Pataki*, 5 N.Y.3d 243 the New York Court of Appeals relying on what it believed to be the mandate of the IGRA, upheld the authority of the New York State Legislature to authorize the governor to negotiate and compact with Indians to permit commercialized Class III casino gaming on Indian lands.

The District Court denied Appellant's motion to amend the First Cause of Action as futile on the grounds that Appellant does not have a legally protected interest and no injury-in-fact could be demonstrated.

The District Court denied Appellant's motion to amend the Second and Third Causes of Action as futile due to the State's sovereign immunity under the Eleventh Amendment.

The District Court denied Appellant's motion to amend the Fourth Cause of Action as futile for lack of standing due to no injury-in-fact.

## STANDARD OF REVIEW

In reviewing a facial attack to the court's jurisdiction pursuant FRCP 12(b)(1) or on a motion to dismiss pursuant to FRCP 12(b)(6), this Court draws all

facts—which it assumes to be true unless contradicted by more specific allegations or documentary evidence—from the complaint and from the exhibits attached thereto. See *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419 (2d Cir. June 1, 2011); see also *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) ("A complaint is deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are integral to the complaint." (citations and internal quotation marks omitted)). In doing so, this Court construes all reasonable inferences to be drawn from those factual allegations in Plaintiff's favor. *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009). Moreover, pro se complaints are to be construed more liberally than complaints drafted by trained attorneys. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

In conducting this review Plaintiff bears the burden of establishing standing "in the same way as any other matter on which [Plaintiff] bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).Thus, to survive a motion to dismiss based on standing at the pleading stage, Plaintiff must allege facts that affirmatively and plausibly suggest that Plaintiff has standing to sue. See *Selevan v. N.Y. Thruway Auth.*, 584 F.3d at 88; see also *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007).

Federal Rule of Civil Procedure 15(a) provides that the Court "should freely give leave" to amend a pleading "when justice so requires." FRCP. 15(a). An application to amend a pleading under Rule 15(a) should be denied, however, "if there is an 'apparent or declared reason — such as undue delay, bad faith or dilatory motive ..., repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of an amendment, [or] futility of amendment.'" *Dluhos v. Floating and Abandoned Vessel Known as "New York,"* 162 F.3d 63, 69 (2d Cir. 1998) (quoting Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)); accord, *Richardson Greenshields Sees., Inc. v. Lau*, 825 F.2d 647, 653 n.6 (2d Cir. 1987). A pro se plaintiff "should be afforded every reasonable opportunity to demonstrate that he has a valid claim," *Matima v. Celli*, 228 F.3d 68, 81 (2d Cir. 2000) (quoting Satchell v. Dilworth, 745 F.2d 781, 785 (2d Cir. 1984))

This permissive standard is consistent with this Court's "strong preference for resolving disputes on the merits." *New York v. Green*, 420 F.3d 99, 104 (2d Cir. 2005)

Leave to amend may properly be denied if the amendment would be futile, see, e.g., *Foman v. Davis*, 371 U.S. 178 at 182 (1962), as when the proposed new pleading fails to state a claim on which relief can be granted, see, e.g., *Ricciuti v. N.Y.C. Transit Authority*, 941 F.2d 119, 123 (2d Cir. 1991). The adequacy of a

proposed amended complaint to state a claim is to be judged by the same standards as those governing the adequacy of a filed pleading. See, e.g., id. Hence, a denial of leave to amend on the ground that the proposed new complaint does not state a claim on which relief can be granted is a decision based on a legal ruling and is one that is also reviewed de novo. See, e.g., *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314, 321 (2d Cir. 2010).

## Argument

### The proposed Amended and supplemental complaint states a cause of action

To state a claim for relief under the APA, a plaintiff must allege that his or her injury stems from a final agency action for which there is no other adequate remedy in court. 5 U.S.C. § 704; *Gillis v. U.S. Dep't of Health and Human Servs.*, 759 F.2d 565, 575 (6th Cir. 1985.) An action is final where it: (1) marks the "consummation of the agency's decision-making process;" and (2) determines rights and obligations or occasions legal consequences. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Airbrake Sys., Inc. v. Mineta*, 357 F.3d 632, 639 (6th Cir. 2004).

### Standing

Plaintiff has Article III and prudential standing. An individual has constitutional standing if (1) he has suffered the invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent; (2) the injury is "fairly traceable" to the challenged action of the defendant and not the result of independent action by a third party not before the court; and (3) a favorable decision would "likely" redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations and citations omitted). Prudential standing is established by showing that the interest the Plaintiff seeks to protect arguably falls within the zone of interests to be protected or regulated by the statute at issue. *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)

In a case like this one alleging procedural violations, the requisite showing of injury requires a demonstration that the challenged act performed with improper procedures will cause a distinct risk to Plaintiff's particularized interests. *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc).

This action seeks review of various final agency decisions of the Federal Defendants under the Administrative Procedure Act.

The District Court had subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 . To establish statutory standing under § 702 of the APA, a plaintiff must first identify "final agency action." Id. § 704. Second, a plaintiff

must show that such action subjects plaintiff to a "legal wrong," or "adversely affect[s] or aggrieve[s]" plaintiff "within the meaning of the relevant statute." Id. § 702. The Supreme Court has interpreted § 702 to impose a prudential standing requirement: "For a plaintiff to have prudential standing under the APA, the interest sought to be protected by the complainant must be arguably within the zone of interests to be protected or regulated by the statute in question." *National Credit Union Admin. v. First Nat'l Bank & Trust Co*., 522 U.S. 479, 488 (1998) (emphasis added); see also *Western Shosone Bus. Council v. Babbitt*, 1 F.3d 1052, 1055 (10th Cir. 1993).

This action challenges the determination of the Secretary of the Interior to allow the tribal-state compact permitting Class III gaming between the Seneca Nation of Indians and the State of New York to become approved as set forth in her letter dated November 12, 2002 (A-416 – A-424; Complaint Exhibit “C”). This action also challenges the determination of Defendants Hogen and the National Indian Gaming Commission approving the tribal gaming ordinance of the Seneca Nation of Indians (A-138 – A-158). The making of these determinations are guided by the Indian Gaming Regulatory Act and the regulations of the Federal Defendants and New York State Law as it is incorporated by reference in the Indian Gaming Regulatory Act (18 U.S.C. § 1166; *In re Indian Gaming Related Cases Chemehuevi Indian Tribe*, 331 F.3d 1094 cert. denied 124 S. Ct. 1412 (9th

Cir. 2003)) and the Constitution of the United States. The Federal Defendants do not have complete discretion in this area.

In *Amador County v. Salazar*, 640 F.3d 373, 378 (D.C. Cir. 2011) the Court found that Amador County had Article III standing because it alleged that permitting gambling under tribal-state compact it was challenging would, inter alia, “impact the character of the community”. The Court also found that Amador County had prudential standing citing its decision in *Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011). It specifically held that "Those in the surrounding community who are impacted by gambling fall within IGRA's zone of interest. Accordingly, the County, whose alleged injury flows from its proximity to the gambling operation, is ‘arguably protected’ and is thus a proper party to enforce the limitations IGRA imposes on the Secretary." *Amador County v. Salazar*, 640 F.3d at 379 (D.C. Cir. 2011).

The District Court focused on the geographic proximity of Appellant’s residence and place of work to the casino site and did not address the issue as put forward by the Grinols and Mustard Study that there is an 8% increase in crime in counties that have a casino versus those that do not and that the data from counties that surround a county with a casino indicate that the casinos create crime, not merely move it from one area to another. Therefore all citizens and residents of

Erie County, including Appellant, suffer from a risk of increase in crime due to the existence of the casino.

Additionally, the court did not address the fact as alleged in the complaint and proposed amended complaint that Appellant travels within 1,000 feet of the site of the Buffalo Casino on a regular basis.

Plaintiff is further injured through the commandeering of his state officers to carry out the federal policy set forth in IGRA in violation of the New York State Constitution and depriving him of his power to make the determination of what type of gambling and for what purpose it may be permitted within the state as well as his right to the "dual protection" envisioned by the U.S. Constitution and his power to hold his elected officials responsible for their own actions.

This is cognizable harm caused by the Federal Defendants decisions to permit, allow and condone this casino to be built and operated. (*Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 432-33 (D.C. Cir. 1998) (en banc) (personal, individual injury to aesthetic and recreational interests satisfies standing requirements); *Moreau v. Federal Energy Regulatory Comm'n*, 982 F.2d 556, 565-66 (D.C. Cir. 1993) (adjacent property owners' assertions of aesthetic injury and safety hazards satisfies standing requirements)). The injury-in-fact necessary for standing "need not be large, an identifiable trifle will suffice." *Sierra Club v. Cedar Point Oil Co., Inc*., 73 F.3d 546, 557 (5th Cir. 1996) (internal quotation omitted);

see also *Conservation Council of North Carolina v. Costanzo*, 505 F.2d 498, 501 (4th Cir. 1974) ("The claimed injury need not be great or substantial; an identifiable trifle, if actual and genuine, gives rise to standing.") (internal quotation omitted). The courts of appeals have generally recognized that threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes. See *Friends of the Earth, Inc. v. Gaston Copper Recycling, Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc) (concluding that "[t]hreats or increased risk constitutes cognizable harm" sufficient to meet the injury-in-fact requirement); *Central Delta Water Agency v. United States*, 306 F.3d 938, 947-48 (9th Cir. 2002) (holding that "the possibility of future injury may be sufficient to confer standing on plaintiffs" and concluding that plaintiffs could proceed with their suit where they "raised a material question of fact . . . [as to] whether they will suffer a substantial risk of harm as a result of [the government's] policies"); *Johnson v. Allsteel, Inc.*, 259 F.3d 885, 888 (7th Cir. 2001) (holding that the "increased risk that a plan participant faces" as a result of an ERISA plan administrator's increase in discretionary authority satisfies Article III injury-in-fact requirements); *Walters v. Edgar*, 163 F.3d 430, 434 (7th Cir. 1998) (reasoning that "[a] probabilistic harm, if nontrivial, can support standing"), cert. denied, 526 U.S. 1146 (1999); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234-35 (D.C. Cir. 1996) (recognizing that an incremental increase in the risk of forest fires

caused by the Forest Service's action satisfied Article III standing requirements). The Supreme Court's analysis in both *Helling v. Mckinney*, 509 U.S. 25, 35 (1993) and *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 434-36 (1997) displays a willingness, at least under some circumstances, to conceptualize exposure to enhanced risk as a type of cognizable injury. See *Helling*, 509 U.S. at 33 (reasoning that a prisoner can seek injunctive relief from exposure to an unreasonable risk of future harm, such as exposure to an infectious disease, without alleging "that the likely harm [will] occur immediately and . . . although the possible infection might not affect all of those exposed").

Moreover, there are two critical factors that weigh in favor of concluding that standing exists in this case: (1) the fact that government studies and statements confirm several of Appellant's key allegations, see *Central Delta Water Agency*, 306 F.3d at 950 (concluding that plaintiffs successfully alleged a credible threat of future injury based, in part, on the defendant agency's own estimate that salinity standards would be violated under its proposed operational plan), and (2) that Plaintiff's alleged risk of harm arises from an established government policy. Cf. *31 Foster Children v. Bush*, 329 F.3d 1255, 1265-66 (11th Cir.) (recognizing that "when the threatened acts that will cause injury are authorized or part of an [established government] policy, it is significantly more likely that the injury will occur"), cert. denied sub nom. *Reggie B. v. Bush*, 540 U.S. 984; *DeShawn E. v.*

*Safir*, 156 F.3d 340, 344-45 (2d Cir. 1998) (concluding that there was an increased likelihood of injury where the challenged interrogation methods were authorized by "officially endorsed policies").

These are exactly the types of risks that Congress intended the IGRA to restructure after the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202.

Standing is not to be denied simply because many people suffer the same injury. As the Supreme Court explained in *FEC v. Akins*, 524 U.S. 11, 24 (1998), injury-in-fact may be found although the asserted harm is "widely shared" if the harm is sufficiently concrete and particularized. Here, there is no question that Appellant alleges a discrete, individual risk of personal harm from exposure to increased crime and other risks created by the proposed casino and bases his claim of standing on more than a generalized concern that the government obeys the law. And while Plaintiff could certainly seek redress through the political process, "the fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes." *Akins*, 524 U.S. at 24.

The injuries asserted are traceable to the Appellees' actions because in order to conduct Class III gaming on the Buffalo Site from which would generate the increased risks it must meet the requirements of 25 U.S.C. § 2710 which in turn

depends on the validity of the Indian Gaming Regulatory Act, and if it is applicable whether the legal requirement of a valid tribal-state compact and approved gaming ordinance is in effect and the proper predicate determinations were made. See *Animal Legal Defense Fund*, 154 F.3d at 440. Causation may be established if the plaintiff shows a good probability that, absent the challenged action, the alleged harm would not have occurred, *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262-64 (1977).

Plaintiff seeks a judgment setting aside the determination of the Secretary of the Interior allowing the tribal-state compact to become approved and the determination of Defendants Hogen and the National Indian Gaming Commission approving a gaming ordinance of the Seneca Nation of Indians pursuant to the IGRA. If either determination is set aside gaming may not be conducted at the Buffalo Site and Plaintiff will not suffer the injury as alleged. Therefore the relief requested will likely redress the injury.

**PRUDENTIAL STANDING**

The requirement that the interests of Plaintiff fall within the zone of interests protected or regulated by the statutes at issue is "not meant to be especially demanding" and does not require that a particular plaintiff be the intended beneficiary of the act. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). Zone of interest adequate to sustain judicial review is particularly broad in

lawsuits to compel federal agency compliance with law; broad zone is in keeping with expansive scope of 5 U.S.C. § 702, which grants review to person adversely affected or aggrieved by agency action within meaning of relevant statute. *American Federation of Government Employees v Office of Personnel Management*, 618 F Supp 1254, affd without opinion, 782 F2d 278. With regard to the APA claims Appellant raises all I must show is that my interests arguably fall within the zone of interests to be regulated by the underlying substantive law, i.e., the Indian Gaming Regulatory Act. *Armstrong v. Bush*, 924 F.2d 282, 287 (D.C. Cir. 1991). Although neither the IGRA nor the regulations promulgated pursuant thereto expressly create a cause of action for private parties, IGRA provides for the consideration of effects on surrounding communities. See i.e. 25 U.S.C. §§ 2710, 2719 and 25 CFR Parts 151, 522. Appellant is precisely the type of person who could be expected to police these interests.

In *Amador County v. Salazar*, 640 F.3d at 378 (D.C. Cir. 2011) the Court found that Amador County had prudential standing citing its decision in *Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011). It specifically held that "Those in the surrounding community who are impacted by gambling fall within IGRA's zone of interest. Accordingly, the County, whose alleged injury flows from its proximity to the gambling operation, is 'arguably protected' and is thus a proper party to

enforce the limitations IGRA imposes on the Secretary." *Amador County v. Salazar*, 640 F.3d at 379 (D.C. Cir. 2011).

The Secretary of the Interior may disapprove a compact only if the compact violates an IGRA provision, any other federal law or the United States' trust obligations to a tribe. 25 U.S.C. § 2710(d)(8)(B). The Court in *Amador County v. Salazar*, 640 F.3d at 383 (D.C. Cir. 2011) held "that where, as here, a plaintiff alleges that a compact violates IGRA, thus requiring the Secretary to disapprove the compact, nothing in the APA precludes judicial review of a subsection (d)(8)(C) no-action approval."

The Chairman of the National Indian Gaming Commission “shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.” (25 U.S.C. § 2710(e))

Appellant may challenge agency action under the APA regardless of whether or not a private right of action exists under the relevant statute. *Chrysler Corp. v. Brown*, 441 U.S. 281, 317-18 (1979) (holding that although no private right of action exists under FOIA or under the Trade Secrets Act, a government

contractor could sue under the APA to prevent disclosure of its employment information by the Defense Logistics Agency).

## STANDING TO RAISE TENTH AMENDMENT CHALLENGE WITHIN THE CONTEXT OF AN ACTION CHALLENGING AGENCY ACTION UNDER THE APA

The U.S. Supreme Court held in Bond v. United States, 131 S. Ct. 2355, 2366-2367 (U.S. 2011) "In this case, however, where the litigant is a party to an otherwise justiciable case or controversy, she is not forbidden to object that her injury results from disregard of the federal structure of our Government. Whether the Tenth Amendment is regarded as simply a ‘'truism,'’ New York, supra, at 156, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (quoting United States v. Darby, 312 U.S. 100, 124, 61 S. Ct. 451, 85 L. Ed. 609 (1941)), or whether it has independent force of its own, the result here is the same."

Therefore Appellant’s challenge to the tribal-state compacting requirements of the IGRA under the APA can include a challenge on Tenth Amendment grounds.

Hamilton's reasoning in The Federalist No. 32 that the plan of the Constitutional Convention did not contemplate "an entire consolidation of the States into one complete national sovereignty," but only a partial consolidation in which "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the

United States." The Federalist No. 32, at 198. The text of the Tenth Amendment unambiguously confirms this principle "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In fact this case presents a much more direct injury to plaintiff due to a violation of the Tenth Amendment than that in Bond, supra, in that in that the power to determine when, how and if commercialized gaming is conducted is reserved to the people of the State of New York rather than its legislature pursuant to NY Const. Article I § 9. Therefore, Plaintiff is deprived of a right to vote in order to exercise a power that is reserved to him and all other New York State voters in violation of the Tenth Amendment.

## Appellant has standing to raise the proposed First Cause of Action and it states a cause of action

### *The first cause of action in the proposed amended and supplemental complaint states a cause of action and the District Court erred denying plaintiff's motion to amend it as futile.*

Generally, a legislative Act may be challenged in two ways: (1) by establishing that it is wholly or facially, unconstitutional or (2) by demonstrating that it is unconstitutional as applied in a particular way or as applied to a particular person or group. The District Court erred in dismissing this cause of action based

on the standards for assessing a facial challenge, when in fact, this is an as applied challenge.

The New York Court of Appeals in *Dalton v. Pataki*, 5 N.Y.3d 243 (N.Y.2005), held that the New York Constitution does forbid the Legislature from authorizing Class III gaming. However, the Court went on to hold that despite this state constitutional prohibition the state could authorize Class III gaming because the IGRA pre-empted New York's Constitution (Complaint ¶ 106). The New York Court of Appeals therefore held that Congress through the IGRA pre-empted state law and requires a state to act in a substantial way to accomplish the declared purpose of a federal statute when such action is in defiance of the State's Constitution and Bill of Rights. Therefore, the Court of Appeals held that the state did not have a choice whether or not to allow Class III gaming under the IGRA. This is demonstrated by the majority opinion where it states "However, this authority is limited in that if the state either does not negotiate with a tribe or does not do so in good faith, the tribe may bring suit in Federal District Court (see 25 USC § 2710 [d] [7] [B]). n5 If the court determines the state has not negotiated in good faith, the court will order the parties 'to conclude such a compact within a 60-day period' (25 USC § 2710 [d] [7 ][B] [iii]). If an agreement is not reached within that time, the court will appoint a mediator, who 'shall select from the two proposed compacts [from the tribe and the state] the one which best comports with

the terms of this Act and any other applicable Federal law and with the findings and order of the court' (25 USC § 2710 [d] [7] [B] [iv]). If the state timely agrees, that compact will become the tribal-state compact (see 25 USC § 2710 [d] [7] [B] [vi]). If the state does not agree (or invokes sovereign immunity under the Eleventh Amendment to the United States Constitution), the Secretary of the Interior and the tribe will decide upon procedures for conducting class III gaming (see 25 USC § 2710 [d] [7] [B] [vii]). Thus, if class III gaming is permitted in the state for any purpose, including a strictly charitable purpose, it will be permitted on Indian land with or without the state's involvement. Given the consequence, obviously state involvement and regulation is to be favored." *Dalton v. Pataki*, 5 N.Y.3d at 260-261. Also Judge George B. Smith in his dissent states "Here, the Legislature, by enacting part B of chapter 383, authorized the Governor to execute tribal-state compacts for the establishment of up to six class III, for-profit casino gaming facilities on Indian lands and 'after-acquired' lands pursuant to 25 USC § 2719 (b) (1) (A). There is no dispute, and the majority agrees, that the gaming facilities contemplated under this legislation (and the gaming and games to be engaged in at these facilities) are commercial in nature and fall squarely within the type of commercial gambling activity prohibited under article I, § 9. n24 Moreover, the provisions authorizing the execution of tribal-state compacts for the establishment of the above-mentioned prohibited facilities do not comport with article I, § 9. n25

Thus, in view of the limitation on the Legislature's power set forth in article I, § 9, and the axiom that where a constitutional limitation on the Legislature's power exists, a legislative enactment that seeks to exercise such power in spite of the limitation has no effect, the Legislature did not have the authority to enact part B of chapter 383 of the Laws of 2001." *Dalton v. Pataki*, 5 N.Y.3d at 291-292. Judge Smith goes on to note that "In affirming the lower court's holding regarding part B of chapter 383, and thereby disregarding the article I, § 9 limitation on the Legislature, the majority has essentially concluded that IGRA provides a means for the Legislature to circumvent this State's constitutional limitations and pass legislation that it normally could not. This conclusion suggests, at least with regard to gaming on Indian lands, that IGRA exerts control over how legislation is passed and even supplants this State's Constitution. In view of New York State's status as a sovereign state and the fact that New York State's Constitution is the supreme law of the State, this notion is incorrect." *Dalton v. Pataki*, 5 N.Y.3d at 296. In fact the majority opinion acknowledges that, but for IGRA, the State Constitution would prohibit the legislature from authorizing commercial gambling let alone authorizing the Governor to enter an agreement authorizing commercial gambling (see *Dalton v. Pataki*, 5 N.Y.3d at 261 n.5 (N.Y. 2005) "Certainly, if commercial gambling were to be extended to non-Indian lands, the dissent's proposition would be correct, but here we are dealing with the extension of commercial gambling to

Indian lands, or lands held in trust by the United States Department of the Interior, to which Congress has seen fit to extend this benefit. This was done with the express intent of protecting Indian sovereignty. The Supremacy Clause of the United States Constitution specifically states that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding' (US Const art VI [2]). Federal law thus preempts even our constitutional ban. This is particularly true in the context of Indian matters, where a traditional exemption from state law will be 'lifted only when Congress has made its intention to do so unmistakably clear' (Montana v Blackfeet Tribe, 471 U.S. 759, 765, 85 L. Ed. 2d 753, 105 S. Ct. 2399 [1985] [referring to Indian exemption from state taxes])." While the federal defendants may directly regulate issues surrounding Indian gaming, it may not compel the states to enact and enforce such regulation or enter into compacts not authorized by its constitution and laws. Similarly, the federal government may not force the states to regulate third parties in furtherance of a federal program. See *Reno v. Condon*, 528 U.S. 141, 151 (2000) (upholding federal statutory scheme because it "does not require the States in their sovereign capacity to regulate their own citizens").

The U.S. Supreme Court has stated that it "held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, at 935.

The IGRA exclusively regulates the method and manner of states entering compacts over the regulation of gaming on Indian land. Thus, rather than enacting a law of general applicability that incidentally applies to the States, Congress passed a law that, for all intents and purposes, applies only to the States and Indian nations and tribes. Accordingly, the tribal-state compacting provisions of the IGRA are simply not a valid exercise of Congress's power. Congress' power over Indian matters derives from the Constitution's Indian Commerce Clause, in U.S. Const. art. I, § 8, cl. 3, and its treaty power, U.S. Const. art. II, § 2, cl. 2. (*McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973)). Although Congress possesses a sweeping, plenary power to regulate Indian affairs under the Indian Commerce Clause, that power remains subject to constitutional limitations (See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Eleventh Amendment prevented Congress from authorizing suits by Indian tribes

against States to enforce legislation enacted pursuant to Indian Commerce Clause); *Duro v. Reina*, 495 U.S. 676, 693 (1990) (stating that Supreme Court precedent regarding legislative power over Indian affairs suggests "constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right"); *Hodel v. Irving*, 481 U.S. 704, 712-18 (1987) (holding that congressional statute which escheated tribe members' and others' fractional interests in reservation trust lands to tribe was unconstitutional taking); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84-85 (1977) (holding that plenary power of Congress in matters of Indian affairs is not absolute nor immune from judicial scrutiny).

In a series of rulings over the past two decades, the Supreme Court has consistently reaffirmed dual sovereignty as a fundamental principle inherent in our Nation's "Constitutional blueprint." *New York v. United States*, 505 U.S. 144 (1992); *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997). *Federal Maritime Commission v. So. Carolina State Ports Authority*, 535 U.S. 743, 751 (2002). In those cases, the Supreme Court has protected the states and its citizens against unwarranted usurpations of their prerogatives by an overreaching Congress. Even when upholding the exercise of power by Congress under the Commerce Clause, the Supreme Court has been

scrupulously careful to note the limits of such power, cautioning that while federal law may preempt state laws that interfere with federal policy, it may not impose affirmative obligations on states as a way of implementing such policy. *Reno v. Condon*, 528 U.S. 141, 149 (2000), *citing New York*, *supra* and *Printz*, *supra*.

The Guarantee Clause provides, in relevant part, that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4. The Supreme Court has indicated that this provision is implicated only where legislation poses some "realistic risk of altering the form or method of functioning of [a State's] government." *New York v. United States*, 505 U.S. at 186. In American Constitutional Law Section(s) 5-23, the Guarantee Clause is discussed in the following manner: “The most fundamental threats to state sovereignty--those that genuinely portend reduction of the states into "field offices of the national bureaucracy" or "bureaucratic puppets of the Federal Government"--would seem to arise less from federal laws that impose substantive constraints on state and private actors alike . . . than from federal laws that restructure the basic institutional design of the system a state's people choose for governing themselves. If there is any form of congressional assault that might truly "'nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell,'" it is an assault on those "democratic processes through [which] . . . citizens . . . retain the power to govern . . . their local problems."

There are a number of principles that emerge from the Supreme Court's Tenth Amendment decisions (*Reno v. Condon*, 528 U.S. 141 (2000); *Printz v. United States*, 521 U.S. 898 (1998); *New York v. United States*, 505 U.S. 168 (1992); and *South Carolina v. Baker*, 485 U.S. 505 (1988)):

1) Where Congress has plenary power it may legislate directly to establish gambling on tribal lands;
2) Congress can properly displace state law as part of the doctrine of preemption; and,
3) Congress can offer a "choice" or "option" to States and their people by encouraging them to participate in a federal regulatory program as part of a cooperative effort to achieve the goal of a federal act.

On the other hand:

1) Congress, through IGRA may not enlarge the State legislative or gubernatorial power beyond the limitations contained in the State Constitution and Bill of Rights;
2) Congress may not conscript the State, leaving it no choice or option, but to carry substantial burdens in order to further the purpose of IGRA;
3) Congress may not require State officials to act in disobedience of their State Constitution with respect to gambling, when the people made the ultimate decision to prohibit this activity and placed the ban in their Bill of Rights in order to insure protection against governmental intrusion;
4) Congress may not require the State to enter the compacting process and coerce it, under guise of affording it a supposed "choice," to agree to a compact or else face the Secretary of the Interior ("Secretary"), after consultation only with the tribe, prescribing procedures permitting commercialized Class III gaming consistent with a compact selected by a mediator which will be binding on the State, through threat of federal court action and contempt orders;
5) Congress may not interfere with and disrupt the enforcement scheme between State government and its citizens, which has made criminal the

commercial gambling activity that is the subject of IGRA and all contracts related to that gambling unlawful and unenforceable;

6) Congress may not act in a way that will, of necessity, diminish the confidence of the people of a State that their government will act to protect their fundamental rights; and,

7) Congress may not ignore that State sovereignty is not an end unto itself, but has, as one of its objectives, the protection of fundamental liberties and rights of citizens, affording citizens "double security" (as James Madison wrote in Federalist No. 51). The State is not empowered to consent or waive any of these rights or powers of the people.

To require the State to take action in order to ensure the success of a federal program, in the face of such action being violative of the constitutional duty the State owes its citizens, is to sanction Congress' use of the State as a mere agent serving the interests of the federal government to the detriment of the interests of State citizens. *Alden v. Maine*, 527 U.S. 706 (1999). It is particularly egregious when the federal government in effect "walks away" having no role in advancing the goal it seeks.

Not only does the federal government "walks away" from having no role in advancing its goals it also "walks away" when courts of competent jurisdiction rule that such operations are not lawful and takes no action to halt this unlawful activity (See i.e. *Peterman v. Pataki*, 4 Misc. 3d 1028A affirmed 21 A.D.3d 1388 (2005)).

The means chosen by Congress, i.e. compacting, indelibly blurs the matter of accountability. State citizens, such as Plaintiff, will see their government as the

one entity acting to advance conduct prohibited by their Constitution and Bill of Rights. *New York*, 505 U.S. at 168-169.

There are ample other means to accomplish the goal of IGRA without any coercion of the state and its people. That is, provide for gambling through-out the country on Indian land and provide for federal oversight pursuant to Congress' plenary power. It is no answer to argue that IGRA should be sustained since Congress has bestowed more participation upon the State than the State would ordinarily have were Congress to directly use its plenary power. For now the Court's task is to enforce the constitutional limits on Congressional power presented by this Act.

Congress may not directly shift to the states enforcement and administrative responsibilities allocated to the federal government by the Constitution. Such a reallocation would not only diminish the political accountability of both state and federal officers, see *New York*, 505 U.S. at 168; *Printz*, supra, but it would also "compromise the structural framework of dual sovereignty," *Printz*, supra, and separation of powers, see id. at 2378 and implicate U.S. Const. art. IV, § 4 the Guarantee Clause of the U.S. Constitution.

Assuming that the holding in *Dalton v. Pataki*, supra, is correct then IGRA violates various provisions of the U.S. Constitution and the Federal Defendants acted contrary to constitutional right, power, privilege, or immunity or in excess of

statutory jurisdiction, authority, or limitations, or short of statutory right. If this holding is incorrect then the State Defendants acted ultra vires in entering into the subject tribal-state compact with the Seneca Nation of Indians and the Federal Defendants determinations are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

Under either result the State Defendants acted ultra vires in entering into the subject tribal-state compact and it is not in effect under IGRA and Class III gaming pursuant to this compact is unauthorized under federal law.

This judgment of the District Court dismissing the First Cause of Action for lack of standing should be reversed and this cause of action, as amended, should be remanded to the District Court to consider it merits in the first instance.

**Appellant has standing to raise the proposed Second Cause of Action and it states a cause of action and the District Court erred in deny leave to amend it as futile**

For the same reasons set forth above Appellant has standing to assert the Second Cause of action under the APA challenging the DOI's approval of the tribal-state compact between the State of New York and the Seneca Nation of Indians in that it violates the IGRA because it permits games that are not permitted

for any purpose by any person, organization, or entity as required by 25 U.S.C. § 2710(d)(1)(B) (5 U.S.C. § 706(2)(A, C & D)).

Federal Courts have jurisdiction under the APA to decide whether or not state law that is incorporated by reference in federal statutes were complied with in determining whether final agency action was proper (see *Eskra v. Morton*, 380 F. Supp. 205 ). In the case at bar IGRA incorporates by reference state laws relating to gambling and state laws relating to if, how and when state officers can enter into agreements that bind the State to a tribal-state compact (see 18 U.S.C. § 1166, 25 U.S.C. §§ 2710(b), 2710(d). Contrary to the Defendants assertion before the District Court the Second and Third causes of action are based on federal law, not state law. "To put the matter more bluntly, where a state violates federal law, it is no better off because it also violates its own law." *Louise B. v. Coluatti,* 606 F.2d 392, 399 (3d Cir. 1979).

## ***Appellant has standing to raise the proposed Third Cause of Action and it states a cause of action*** **and the District Court erred in deny leave to amend it as futile**

As set forth above Appellant has standing to assert the Third Cause of action under the APA challenging the tribal-state compact between the State of New York and the Seneca Nation of Indians in that it is not lawfully in effect as required by

25 U.S.C. § 2710(d)(1)(C) because the State Defendants did not have the authority to enter into it (5 U.S.C. § 706(2)(A, C & D));

***Appellant has standing to raise the proposed Fourth Cause of Action and it states a cause of action* and the District Court erred in deny leave to amend it as futile**

As set forth above Appellant has standing to assert the Fourth Cause of action under the APA challenging the NIGC's approval of the gaming ordinances and their amendments because the tribal-state compact between the State of New York and the Seneca Nation of Indians in that it violates IGRA for the reasons asserted in the First through Third Causes of Action.

**THE DISTRICT COURT ERRED IN DETERMINING THAT IT WAS FUTILE TO ADD THE PROPOSED DEFENDANTS ON THE GROUND OF THE PURPORTED SOVEREIGN IMMUNITY OF THE SENECA NATION OF INDIANS**

The proposed new parties named in the proposed amended complaint are the Seneca Gaming Corporation, the President of the SGC and the then president of the Seneca Nation of Indians.

A plaintiff typically is not required to plead, in the complaint, facts that negate an affirmative defense. See *Davis v. Ind. State Police*, 541 F.3d 760, 763

(7th Cir. 2008); see also *Jones v. Bock*, 549 U.S. 199, 216 (2007) . Sovereign immunity is an affirmative defense that the defendant must plead and prove its entitlement to, the burden then shifts to the plaintiff to establish that his action falls within one of the recognized exceptions to sovereign immunity. (*Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 315 F. Supp. 2d 164; *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185 ). The possibility that a proposed defendant may raise and be ultimately successful in asserting an affirmative defense is not a valid reason for denying leave to amend (*Oliver Sch. v. Foley*, 930 F2d 248, 253 (2d Cir. 1991)).

This is particularly applicable to the Seneca Gaming Corporation and its President because "the issue of whether an entity is an arm of the tribe may rest on nuances in the entity's ownership and control structure, corporate purpose, and relationship with the tribal government. Cf. ITSI TV Prods., 3 F.3d at 1292 (observing that "a claim of Eleventh Amendment immunity will occasion serious dispute only where a relatively complex institutional arrangement makes it unclear whether a given entity ought to be treated as an arm of the state"). Knowledge of these facts is much more likely to reside with the party asserting immunity. Accordingly, this Court concludes that defendants have the burden of establishing that they are entitled to sovereign immunity." *City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 U.S. Dist. LEXIS 20953, 13-14 (E.D.N.Y. Mar. 16, 2009).

In its opinion the District Court held that I raised the issue of whether or not the Seneca Nation of Indians could establish that it is entitled to any sovereign immunity for the first time in my reply papers and therefore did not consider that argument. However, I did raise the issue in my opening brief by asserting that sovereign immunity is an affirmative defense that must be proven (Memorandum of Law in Support of Motion to Amend and Supplement the complaint and to add parties, Docket 73 Page 11-12) . In reply to this all that was submitted was a memorandum of law (A-489 – A-452) that asserted that the Seneca Nation of Indians and the proposed defendants enjoyed sovereign immunity in a conclusory fashion that failed to demonstrate the ability of the new proposed defendants to establish that the Seneca Gaming Corporation is an arm of the Seneca Nation of Indians or that the Seneca Nation of Indians is a sovereign entitled to sovereign immunity. In reply it was proper to point out that the proposed new defendants failed in establishing this affirmative defense.

In 1978 the BIA promulgated regulations governing procedures for American Indian tribes to be federally recognized. To be acknowledged as a tribe, a group of Indians must show, inter alia, that (a) they have been identified since 1900 as "American Indian" or "aboriginal" on a substantially continuous basis, (b) a predominant portion of their group comprises a distinct community and has existed as such from historical times to the present, and, (c) they have maintained

tribal political influence or authority over its members as an autonomous entity throughout history until the present. See 25 C.F.R. § 83.7.

While the Seneca Nation of Indians has appeared on a list of federally recognized tribes it has never been formally determined to be a federally recognized tribe under the regulations promulgated by the federal defendants.

Prior to 1978 the Secretary of the Interior did not exercise the rulemaking authority to set forth the various elements of what constitutes an Indian nation or tribe entitled to federal regulation. Instead, the Secretary's determination that the Seneca Nation of Indians is entitled to federal recognition must be gleaned from merely a list of federally recognized Indian nations and tribes. Therefore, the determination that the Seneca Nation of Indians is entitled to federal recognition constitutes an informal adjudication and therefore it does not warrant deference under the familiar rubric of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984), but must be evaluated under the more neutral framework set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In describing the BIA tribal recognition process prior to the passage of these regulations, the First Circuit has stated that the BIA "has not historically spent much effort in deciding whether particular groups of people are Indian tribes. By and large no one has disputed the tribal status of Indians with whom the [BIA] has dealt." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 at 581. It seems

unlikely that the Seneca Nation of Indians volunteered to the BIA any evidence that would have weakened its tribal recognition claim. The courts ought not to accept reflexively BIA recognition as dispositive of federal recognition when it was granted before the Bureau had adopted its comprehensive criteria.

It also should not accept reflexively BIA recognition if that determination has been made in the distant past. The regulations while setting forth standards and procedures for acquiring federal recognition provide no process for subsequent reviews of such recognition. Even once a tribe is federally recognized it may subsequently no longer meet the requirements to be considered a tribe and therefore should not be recognized.

The very purpose of the 25 CFR Part 83 regulations was, among other things, to remedy the piecemeal system of recognition that had existed previously, which included ad hoc recognition of tribes after courts found tribal status to exist for purposes of a particular case. See *Kahawaiolaa v. Norton*, 386 F.3d 1271 at 1273 ("[P]rior to the late 1970's, the federal government recognized American Indian tribes on a case-by-case basis. In 1975, Congress established the American Indian Policy Review Commission to survey the current status of Native Americans. The Commission highlighted a number of inconsistencies in the Department of Interior tribal recognition process and special problems that existed with non-recognized tribes. As a result, in 1978, the Department of Interior

exercised its delegated authority and promulgated [the Part 83 regulations] establishing a uniform procedure for acknowledging American Indian tribes.") (citations and quotation marks omitted).

Native American tribes have been described as "domestic dependent nations" (*Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17 (1831)), and "wards of the Nation" (*U.S. v. Kagama,* 118 U.S. 375, 383 (1886)), giving tribes a "peculiar 'quasi-sovereign' status." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986). Tribes retain "a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations." *White Mountain Apache v. Bracker*, 448 U.S. 136, 142 (1980); see *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character."). Indeed, tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler*, 450 U.S. at 323.

The "unique and limited character" of tribal sovereignty stands in contrast to the plenary sovereignty of the federal government and each of the fifty States under the Constitution. See *Alden v Maine*, 527 U.S. 706, 712-715 (1999) ("our Constitution . . . reserves to [the States] a substantial portion of the Nation's primary sovereignty . . . . The States thus retain a residuary and inviolable

sovereignty"); cf. *Three Affiliated Tribes*, 476 U.S. at 890-891 ("the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy"), citing *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506, 513 (1940).

The Seneca Nation of Indians is not the same political body that was once known as the Seneca Tribe. In 1848 the Seneca Nation of Indians was formed by only a portion of the membership of what was known as the Seneca Tribe through the adoption of their own constitution (http://sni.org/culture/seneca-nation-constitution/ (Last visited 7/17/2012)).

**TRIBAL SOVEREIGN IMMUNITY RELATING TO COMMERCIAL ACTIVITIES SHOULD BE REPUDIATED**

The District Court denied as futile various aspects of the proposed amended complaint due to the purported sovereign immunity of the Seneca Nation of Indians shielding the Proposed New Defendants citing *Kiowa Tribe of Okla. v. Manufacturing Technologies Inc.*, 523 U.S. 751. It should be noted that Kiowa Tribe, supra, is distinguishable from this case in that the claim here is for prospective declaratory and injunctive relief where, on the other hand, the claim in Kiowa Tribe, supra, was for monetary damages. (See *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680-81 (5th Cir. 1999) (distinguishing Kiowa as a suit for money damages and holding that tribal sovereign immunity did not extend to suits

for prospective relief); see also *Comstock Oil & Gas v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567, 571-72 (5th Cir. 2001) (reaffirming that in the Fifth Circuit tribes are not entitled to sovereign immunity from claims seeking prospective relief)).

To the extent that Kiowa Tribe, supra, may be read to support its extension to even actions seeking declaratory or injunctive relief as the District Court apparently did, tribal sovereign immunity should be repudiated to, at least, this extent.

The very doctrine of tribal sovereign immunity from suit was created "almost by accident." *Kiowa Tribe of Okla. v. Manufacturing Technologies Inc.*, 523 U.S. at 756. The case upon which the doctrine relies for its existence, *Turner v. U.S.* , 248 U.S. 354 (1919) has recently been described by the Supreme Court as "but a slender reed for supporting the principle of tribal sovereign immunity." Kiowa Tribe supra, page 757.

Recently two members of a panel of this court stated that: "I wish that we were empowered to revisit those decisions, but, alas, that is not a privilege extended to intermediate appellate courts. If law and logic are to be reunited in this area of the law, it will have to be done by our highest Court, or by Congress." *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149, 164 (2d Cir. 2010). In this case this court affirmed the decision of the trial court based solely

on grounds of tribal sovereign immunity (*Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d at 159). After this decision Madison County sought review by the U.S. Supreme Court which was granted (*Madison County v. Oneida Indian Nation*, 131 S. Ct. 459 (U.S. 2010)) on the questions "whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes" and "whether the ancient Oneida reservation in New York was disestablished or diminished." Pet. for Cert. i. Subsequently, the Supreme Court vacated and remanded this Court's decision after the Oneida Indian Nation waived it's sovereign immunity covering the specific issues in that case (*Madison County v. Oneida Indian Nation*, 131 S. Ct. 704 (U.S. 2011)) .

Allowing the tribes to assert immunity from all suits brought against them would create without justification a kind of super-sovereignty for tribes, giving them the right to resist legal obligations that no foreign nation or state sovereign enjoys. That result cannot be reconciled with the "limited character" of tribal sovereignty and, correspondingly, limited tribal immunity from suit. See *Three Affiliated Tribes*, 476 U.S. at 890-91.

In light of *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2 Cir. 1964), cert. denied, 381 U.S. 934 (1965), an Indian nation or tribe's purely commercial activity should not be protected by any claim of sovereign immunity.

For present purposes, a summary of the general principles emerging from Victory Transport, supra, should suffice; the contemporary rationale for sovereign immunity is the avoidance of possible embarrassment to those responsible for the conduct of the nation's foreign relations; in determining the scope of the immunity which a sovereign enjoys, courts have therefore deferred to the policy pronouncements of the State Department, see, e. g., *National City Bank of New York v. Republic of China*, 348 U.S. 356, 360-361 (1955); the State Department has explicitly indicated that its policy is generally predicated on a "restrictive" theory of sovereign immunity -- "recognizing immunity for a foreign state's public or sovereign acts (jure imperii) but denying immunity to a foreign state's private or commercial acts (jure gestionis)."336 F.2d at 358. See 26 Dept. State Bull. 984 (1952); "the purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts," 336 F.2d at 360.

The United States Supreme Court deferred this questionable policy of an overarching sovereign immunity from suit whether the sovereign's conduct are sovereign acts or commercial acts that developed almost by accident to be resolved

by Congress. The Court stated “There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. See Mescalero v. Jones, 411 U. S. 145 (1973); Potawatomi, supra; Seminole Tribe of Fla. v. Florida, 517 U. S. 44 (1996). In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.” and went on to state “These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.” *Kiowa Tribe* , supra.

There is no reason why this accidental doctrine of tribal sovereign immunity (*Kiowa,* 523 U.S. at 751 ) should be any more expansive than the sovereign

immunity we afford friendly foreign nations and cover purely commercial activity and it should be abrogated, at least, to this extent.

However, as noted by Justices Stevens, Thomas and Ginsburg it is the Courts and not Congress that created this questionable policy, perhaps improvidently (*Kiowa Tribe*, 523 U.S. at 764). Therefore it is up to the Courts to correct this flawed policy it created if it finds it unwise, inequitable or flawed.

**WHATEVER SOVEREIGN IMMUNITY THE SENECA GAMING CORPORATION HAS WAS WAIVED BY THE "SUE AND BE SUED" CLAUSE IN ITS CHARTER**

The Nation in support of its arguments produced a copy of the Fifth Amended Restated Charter of the Seneca Gaming Corporation (A-503 – A-525; that is referred to in the proposed amended complaint (A-335 ¶ 35- A-336 ¶ 39) .

This document demonstrates that the Seneca Gaming Corporation does in fact operate solely as a commercial entity and not as a governmental entity and therefore the Seneca Nation's immunity from suit should not extend to it.

It provides that it is "organized for the purpose of developing, constructing, owning, leasing, operating, managing, maintaining, promoting and financing Nation Gaming Facilities" and other lawful activities. It goes on to provide that "the power of gaming regulation, gaming licensing and enforcement of applicable law, which powers are reserved to the Nation (Page 2 Item 2 to Nation's Exhibit "A" (A-504)). It also provides that "The Company shall have no power to exercise

any regulatory or legislative power; the Nation reserves from the Company all regulatory, legislative and other governmental power, including, but not limited to the power to grant, issue, revoke, suspend or deny licenses, conduct background investigations, and enact legislation regulating Gaming on the territories of the Nation (Page 3 Item 3(c) to Nation's Exhibit "A" (A-505)).

The assets of the Nation are shielded from loss by any action against the Seneca Gaming Corporation. Its Charter specifically provides: "No activity of the Company nor any indebtedness incurred by it shall encumber, implicate or in any way involve assets of the Nation or another Nation Entity not assigned or leased in writing to the Company." (Page 5 Item 5 to Nation's Exhibit "A" (A-507).

The Seventh Circuit has questioned "whether there really is a requirement that a tribe's waiver of sovereign immunity be explicit, especially since the harder it is for a tribe to waive its sovereign immunity the harder it is for it to make advantageous business transactions." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659-60 (CA7 1996) (contrasting the requirement for congressional abrogation of tribal immunity set forth in Santa Clara Pueblo with an express waiver of tribal immunity by the tribe itself); but see *Matter of Ransom v. St. Regis Mohawk Educ. & Community Fund*, 86 N.Y.2d 553 ("At least one Federal Circuit Court of Appeals has ruled that regardless of whether the waiver is externally imposed by Congress or by an act of the tribe itself, there

is no distinction in the requirement of an explicit and unequivocal waiver.") (citing American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1377 (CA8 1975)).

Here in the “sue and be sued” clause in the Charter of the Seneca Gaming Corporation there is an express and unequivocal waiver of whatever tribal sovereign immunity it may have (Page 5 Item 7 to Nation’s Exhibit “A” (A-507). A tribe may clearly express its intent to waive its immunity by stating in a contract, "If the tribe breaches the contract, you may sue us in state district court." The hypothetical tribe would presumably argue that there is no express waiver in that contractual provision because the provision did not contain the necessary terms (In fact, it is questionable whether recitation of the "magic words" would satisfy some tribes' interpretation of the "unequivocally expressed" requirement for waivers of tribal immunity. During oral argument in Kiowa, the tribe claimed an effective waiver not only required the "magic words," but also required the tribe to "select a court that they're going to go into, designate the kind of causes of action that they will be subject to," and identify "what assets can be subjected to the judgment." See Oral Argument of R. Brown Wallace, in Kiowa, 1998 WL 15116, at *5-*6 (Jan. 12, 1998)). But requiring the use of certain words or terms creates an arbitrary and artificial obstacle that is neither inherent in the concept of an "express" waiver, nor justified by paternalistic notions of tribal protection. When a

tribe has unequivocally expressed its willingness to expose itself to suit it has expressly waived its immunity.

Moreover, because the Court has recognized that tribal immunity for commercial enterprises is barely, if at all, defensible, there is no justification for judicially wrapping that immunity in a protective sheath that circumscribes a tribe's ability to waive its immunity from suit. The weak foundation for tribal immunity strongly recommends a relaxed standard for evaluating the validity of a claimed waiver of immunity. Certainly Congress has never acted to restrict Indian tribes' ability to waive their immunity, and the Nation cannot articulate a valid policy rationale for a judicially imposed common-law limitation. Kiowa simply cannot support a doctrine of judicial paternalism that would protect tribes from their own voluntary and express waivers of immunity.

The "sue and be sued" language in the Seneca Gaming Corporation's Corporate Charter results in a waiver of sovereign immunity by the Corporation. See *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 491 F. Supp.2d 1056, 1065 (N.D. Okla. 2007), aff'd sub nom., *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008). See also *Marceau v. Blackfeet Housing Auth.*, 455 F.3d 974, 979-81 (9th Cir. 2006); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 552 (8th Cir. 1989).

**SOVEREIGN IMMUNITY IS NOT A BAR TO JOINDER OF THE PROPOSED NEW DEFENDANTS NOR DOES IT BAR THE CLAIMS AGAINST THE STATE DEFENDANTS**

Even if this Court finds that the Proposed New Defendants enjoy sovereign immunity as asserted by the Federal Defendants and Amicus Seneca Nation of Indians the officers of a sovereign may not act in excess of their lawful authority. For when they do they will not be acting on behalf of the sovereign they allegedly represent, and will thereby be stripped of the immunity conferred to that sovereign. Although tribal sovereign immunity generally extends to tribal officials acting within the scope of their official authority, a tribe's sovereign immunity does not extend to an official when the official is acting outside the scope of the powers that have been delegated to him. *Burrell v. Armijo*, 603 F.3d 825, 832 (10th Cir. 2010) (citing Burrell v. Armijo, 456 F.3d 1159, 1174 (10th Cir. 2006). A tribe's powers are defined by federal statutes. *United States v. Lara*, 541 U.S. 193, 202 (2004), and "an Indian tribe may not unilaterally create sovereign rights in itself that do not otherwise exist." *Kansas v. United States*, 249 F.3d 1213, 1219 (10th Cir. 2001). "If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit. Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess." *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 574 (10th Cir. 1984).

In *Ex parte Young*, 209 U.S. 123, 159-60 (1908), the Supreme Court recognized an exception to Eleventh Amendment immunity for suits against state officials seeking to enjoin alleged ongoing violations of federal law. As the Tenth Circuit has explained:

> The Ex parte Young exception proceeds on the fiction that an action against a state official seeking only prospective injunctive relief is not an action against the state and, as a result, is not subject to the doctrine of sovereign immunity. By adhering to this fiction, the Ex parte Young doctrine enables federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States.

*Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011) (quotations and citations omitted).

In *Crowe & Dunlevy*, the Tenth Circuit acknowledged it had previously applied Ex parte Young—although implicitly—in the tribal context. Id. (citing Burrell v. Armijo, 603 F.3d 825, 1174 (10th Cir. 2006) and Tenneco Oil Co. v. Sac & Fox Tribe of Indians, 725 F.2d 572, 574 (10th Cir. 1984) (per curiam)). The court stated, "Today we join our sister circuits in expressly recognizing Ex parte Young as an exception not just to state sovereign immunity but also to tribal sovereign immunity." Id. Further, "[t]he Supreme Court has explained that, in determining whether the doctrine of Ex parte Young applies, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing

violation of federal law and seeks relief properly characterized as prospective." Id. at 1155 (citing Verizon Md., Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 645 (2002)).

In this case, the Plaintiff, alleging defendants' official-capacity actions violate IGRA and the Gaming Compact, seeks prospective declaratory and injunctive relief. Pursuant to *Ex parte Young* and *Crowe & Dunlevy*, and accepting as true the well pled allegations of the Complaint, the court should reject the sovereign immunity claims of the State Defendants and the proposed new defendants, and conclude that they are proper party defendants.

Furthermore, the declarations and prohibitive injunction sought here does not rise to the level of interference that triggers sovereign immunity.

Wherefore, plaintiff respectfully requests that the court enter an order adding the proposed parties as defendants in this action.

## CONCLUSION

For the reasons set forth above the Judgment of the District Court should be vacated, the Federal and State Defendants respective motions to dismiss should be denied and Plaintiff's motion to amend, supplement and add parties should be granted and this action remanded to the District Court for further proceedings.

DATED: July 26, 2012
Buffalo, New York

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