

16-2158-cv

MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy, et al.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35

In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM, 2016

ARGUED: NOVEMBER 28, 2016

DECIDED: JUNE 21, 2017

AMENDED: AUGUST 2, 2017

No. 16-2158-cv

MGM RESORTS INTERNATIONAL GLOBAL
GAMING DEVELOPMENT, LLC,
Plaintiff-Appellant,

v.

DANNEL P. MALLOY, in his official capacity as Governor of
Connecticut; DENISE MERRILL, in her official capacity as Connecticut
Secretary of the State; JONATHAN A. HARRIS, in his official capacity
as Commissioner of the Connecticut Department of Consumer
Protection,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Connecticut.
No. 3:15 Civ. 1182 – Alvin W. Thompson, *Judge.*

Before: WALKER, SACK, and CHIN, *Circuit Judges.*

1 Plaintiff-appellant MGM Resorts International Global Gaming
2 Development, LLC (“MGM”), a developer of casinos and other
3 commercial gaming enterprises, appeals a judgment of the United
4 States District Court for the District of Connecticut (Thompson, J.)
5 dismissing its complaint against the State of Connecticut for lack of
6 Article III standing. MGM claims that Special Act 15-7 (the “Act”) of
7 the Connecticut General Assembly, which creates a special
8 registration pathway for the state’s two federally recognized Indian
9 tribes to apply to build commercial casinos on non-Indian land,
10 places it at a competitive disadvantage in the state’s gaming
11 industry. Because MGM has failed to allege any specific plans to
12 develop a casino in Connecticut, we conclude that any competitive
13 harms imposed by the Act are too speculative to support Article III
14 standing. We therefore AFFIRM the judgment of the district court.

15

16

17 KEVIN KING (Thomas Brugato, Covington &
18 Burling LLP, Washington, DC; Neil K. Roman,
19 Cléa Liquard, Covington & Burling LLP, New
20 York, NY, *on the brief*), Covington & Burling LLP,
21 Washington, DC, *for Plaintiffs-Appellants*.

22 ROBERT J. DEICHERT, Assistant Attorney General,
23 *for George Jepsen, Attorney General, Hartford,*
24 *CT, for Defendants-Appellees.*

25

1 JOHN M. WALKER, JR., *Circuit Judge*:

2 Plaintiff-appellant MGM Resorts International Global Gaming
3 Development, LLC (“MGM”), a developer of casinos and other
4 commercial gaming enterprises, appeals a judgment of the United
5 States District Court for the District of Connecticut (Thompson, J.)
6 dismissing its complaint against the State of Connecticut for lack of
7 Article III standing. MGM claims that Special Act 15-7 (the “Act”) of
8 the Connecticut General Assembly, which creates a special
9 registration pathway for the state’s two federally recognized Indian
10 tribes to apply to build commercial casinos on non-Indian land,
11 places it at a competitive disadvantage in the state’s gaming
12 industry. Because MGM has failed to allege any specific plans to
13 develop a casino in Connecticut, we conclude that any competitive
14 harms imposed by the Act are too speculative to support Article III
15 standing. We therefore AFFIRM the judgment of the district court.

16 **BACKGROUND**

17 In 2015, the Connecticut General Assembly enacted Special
18 Act 15-7, which establishes a framework through which
19 Connecticut’s two federally-recognized Indian tribes, the
20 Mashantucket Pequot and the Mohegans (the “Tribes”), may seek to
21 negotiate with municipalities to establish commercial casinos on
22 non-reservation land. Under the Indian Gaming Regulatory Act
23 (“IGRA”), 25 U.S.C. § 2701 *et seq.*, federally recognized Indian tribes

1 may establish casinos on tribal land by entering into compacts with
2 the surrounding state, subject to the approval of the Secretary of the
3 Interior. By contrast, gaming on non-tribal land (“commercial
4 gaming”) is regulated by the law of the relevant state. The Tribes
5 already operate two casinos—Foxwoods and Mohegan Sun—on
6 tribal land in Connecticut, which were established pursuant to
7 IGRA.

8 Special Act 15-7 establishes a process by which the Tribes may
9 jointly apply to establish commercial casinos elsewhere in
10 Connecticut. It mandates that if the Tribes wish to pursue
11 commercial gaming opportunities on non-tribal land, they must
12 form a “tribal business entity” (TBE) for that purpose. A TBE is a
13 business entity registered with the Connecticut Secretary of the
14 State, and jointly owned by both of the Tribes. § 1(a)(1). It is the only
15 entity permitted to negotiate with municipalities on behalf of the
16 Tribes. Though the Act allows a TBE to negotiate for the
17 establishment of new commercial casinos, it mandates that the
18 Connecticut General Assembly amend state law to expressly
19 “provide for the operation of and participation in” a new gaming
20 facility by the Tribes before any new casino can be built. § 1(c)-(d).
21 The Act also requires that any requests for proposals (“RFPs”)
22 issued by a TBE regarding the establishment of a casino on non-

1 tribal land be submitted to the state Department of Consumer
2 Protection (“DCP”), and published on that agency’s website. § 1(b).

3 While the Act requires the Tribes to establish a TBE in order to
4 pursue commercial casino development, it makes no mention of any
5 other potential market actors. The parties dispute the meaning of
6 this omission. MGM interprets the statutory language to mean that
7 only the Tribes are authorized to establish commercial casinos in
8 Connecticut at all, because the Act is the only statute that provides
9 any entity with an express right to enter into such negotiations with
10 municipalities. The state argues that nothing in the Act prevents
11 other developers from soliciting municipalities for contracts, and
12 that it imposes a unique burden on the Tribes by requiring them to
13 partner with each other through a TBE in order to compete for
14 contracts. No Connecticut state court decision has interpreted the
15 Act or suggested any path toward resolving this dispute.

16 Proceeding on its interpretation of the Act that a non-tribal
17 land casino requires the establishment of a TBE, on July 23, 2015,
18 MGM attempted to register a TBE with the Connecticut Secretary of
19 the State as a preliminary step to issuing RFPs to municipalities for
20 potential casino developments. The Secretary rejected the
21 application on the ground that it “[did] not comply with Connecticut
22 law” because MGM has “no affiliation with either of [the] Tribes.”
23 [Amended Complaint ¶ 53, App’x 23-24]. MGM claims that it

1 remains interested in establishing a commercial casino in
2 Connecticut.¹ According to MGM's brief, "[a]s part of its
3 development and expansion efforts," it has "conducted a study
4 analyzing the viability of a casino in Connecticut and concluded that
5 such a development would be both feasible and desirable."
6 [Appellant's Br. At 13]. However, MGM does not appear to be
7 currently engaged in negotiations with any municipalities on
8 specific projects.

9 The Tribes registered a TBE with the Secretary of the State on
10 August 24, 2015. Shortly thereafter, they published an RFP on the
11 website of the state Department of Consumer Protection. While the
12 Tribes' negotiations to build a casino remain "ongoing," no
13 development agreement has been executed.

14 On August 4, 2015, MGM filed a complaint in the District of
15 Connecticut seeking a declaratory judgment and other relief on the
16 basis that Special Act 15-7 violates the Equal Protection Clause of the
17 Fourteenth Amendment and the dormant Commerce Clause. On
18 June 23, 2016, the district court dismissed the complaint under

¹ MGM is currently opening two new casinos in Maryland and Springfield, Massachusetts. The Springfield development agreement prevents it from building another casino within fifty miles of that development site. That provision would preclude MGM from contracting with most municipalities in Connecticut, but not those in the southwestern portion of the state, which is of course the portion closest to the largest population centers of New Jersey and New York (including New York City).

1 Federal Rule of Civil Procedure 12(b)(1), after determining that
2 MGM had not suffered a concrete harm and therefore did not have
3 Article III standing. MGM now appeals.

4 DISCUSSION

5 We review *de novo* a district court's grant of a motion to
6 dismiss. *Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003). At the
7 pleading stage, a reviewing court must accept as true any facts
8 plausibly alleged in a complaint, and must draw all inferences in
9 favor of the plaintiff. *Id.*

10 I. Article III standing

11 In order to demonstrate Article III standing to pursue a claim
12 in federal court, a plaintiff must demonstrate: (1) an "injury in fact,"
13 which is "an invasion of a legally protected interest that is
14 (a) concrete and particularized, and (b) actual or imminent, not
15 conjectural or hypothetical"; (2) "a causal relationship between the
16 injury and the challenged conduct," establishing "that the injury
17 fairly can be traced to the challenged action of the defendant, and
18 has not resulted from the independent action of some third party not
19 before the court"; and (3) a "likelihood that the injury will be
20 redressed by a favorable decision," such that "the prospect of
21 obtaining relief from the injury as a result of a favorable ruling is not
22 too speculative." *Ne. Fla. Chapter of Associated Gen. Contractors of Am.*
23 *v. City of Jacksonville, Fla.*, 508 U.S. 656, 663–64 (1993) (internal

1 quotation marks and citations omitted); *see also Lujan v. Defs. of*
2 *Wildlife*, 504 U.S. 555, 560 (1992).

3 MGM alleges that Special Act 15-7 imposes two distinct harms
4 on it, each of which would be sufficient to confer standing. First,
5 MGM claims that the Act authorizes only the Tribes to pursue
6 commercial casino development in Connecticut, and that it therefore
7 excludes it and all other potential competitors from the Connecticut
8 commercial gaming market completely. Second, MGM argues that
9 even if the Act is read not to exclude non-Tribe competitors from the
10 market, it still confers a competitive advantage on the Tribes by
11 granting them the exclusive right to publicize their bids on the
12 DCP's website, and by "signaling" the state's preference for Tribe-
13 sponsored casinos over other proposed projects.

14 MGM alleges that these preferences violate (1) the Equal
15 Protection Clause of the Fourteenth Amendment, U.S. CONST.,
16 amend. XIV, § 1, because they discriminate in favor of the Tribes on
17 the basis of race, and (2) the dormant Commerce Clause, U.S.
18 CONST., Art. I, § 8, cl. 3, because they discriminate on the basis of
19 state citizenship. Both parties agree that the standing inquiry for
20 dormant Commerce Clause and equal protection claims is the same.
21 An injured plaintiff has standing to raise an equal protection claim
22 when the state imposes "unequal treatment" on the basis of a
23 protected characteristic, such as race. *Heckler v. Mathews*, 465 U.S.

1 728, 738 (1984). A plaintiff has standing to raise a dormant
2 Commerce Clause claim when it has sustained “an injury resulting
3 from a burden on interstate commerce.” *Loyal Tire & Auto Ctr., Inc. v.*
4 *Town of Woodbury*, 445 F.3d 136, 151 (2d Cir. 2006); *see also Gen.*
5 *Motors Corp. v. Tracy*, 519 U.S. 278, 286 (1997) (noting that
6 “unconstitutional discrimination against interstate commerce”
7 constitutes a “cognizable injury” for Article III standing purposes).
8 MGM’s dormant Commerce Clause claims must therefore be
9 resolved in the same manner as its equal protection claims

10 We address both of MGM’s alleged injuries in turn. Because
11 we find that neither of the harms alleged by MGM constitutes an
12 “injury in fact,” we confine our analysis to the first element of the
13 standing inquiry.

14 **A. Injury in Fact**

15 Whether a party has demonstrated an injury in fact is resolved
16 by a two-step analysis. A court must determine (1) whether the
17 asserted injury is “concrete,” and (2) whether it is “actual or
18 imminent.” *City of Jacksonville*, 508 U.S. at 663. The first prong
19 requires that the alleged injury is “particularized” to the plaintiff,
20 rather than “conjectural or hypothetical.” *Adarand Constructors, Inc.*
21 *v. Pena*, 515 U.S. 200, 211 (1995) (quoting *Lujan*, 504 U.S. at 560). The
22 second prong requires that the alleged injury is, if not actual, at least

1 “certainly impending” and “not too speculative.” *Id.* (quoting *Lujan*,
2 504 U.S. at 565 n.2 (emphasis in original)).

3 **1. Special Act 15-7 does not exclude MGM from the**
4 **Connecticut casino market**

5 With respect to MGM’s first argument, we agree with the
6 district court that Special Act 15-7 does not prevent bidders other
7 than the Tribes from entering the Connecticut casino market. MGM
8 asserts that the Act establishes the exclusive pathway by which a
9 developer can negotiate with a municipality for the establishment of
10 a commercial casino. It reasons that because the Act only specifies
11 the procedures by which the Tribes may enter into those
12 negotiations, only the Tribes have been granted express
13 authorization to pursue casino contracts under Connecticut law.

14 But Connecticut has provided municipalities with a general
15 authority to enter into contracts under a separate statute, Conn. Gen.
16 Stat. § 7-194. Nothing in Special Act 15-7, or any other authority,
17 prohibits non-tribal developers from negotiating with municipalities
18 to develop commercial gaming enterprises. MGM argues that a
19 municipal contract to develop a casino would be void for illegality
20 under Connecticut state law, which generally prohibits gambling.
21 *See* Conn. Gen. Stat. § 53-278b (prohibiting gambling); Conn. Gen.
22 Stat. § 52-533 (declaring contracts for gambling activities void as
23 against public policy); *see also* *Sokaitis v. Bakaysa*, 293 Conn. 17, 27

1 (2009) (noting that contracts for gambling activities are void, unless
2 those activities are “expressly authorized by law” (emphasis
3 omitted)). But even assuming that this is true, MGM cites no
4 authority to suggest that Conn. Gen. Stat. § 7-194 prohibits
5 developers like MGM from entering into development agreements
6 with municipalities that are subject to future state approval, which is
7 all that Special Act 15-7 allows the Tribes to do. *See* Special Act 15-7
8 § 1(c)-(d) (conditioning the Tribes’ right to develop commercial
9 casinos on express authorization by the Connecticut General
10 Assembly).

11 Under Connecticut’s statutory interpretation rules, which are
12 binding here, Connecticut statutes must be interpreted primarily
13 according to the plain meaning of their text. *See Martin v. Hearst*
14 *Corp.*, 777 F.3d 546, 550 (2d Cir. 2015) (noting that the Second Circuit
15 is “bound to interpret Connecticut law according to Connecticut’s
16 own interpretive rules”); *see also* Conn. Gen. Stat. § 1-2z (providing
17 that in Connecticut, “[t]he meaning of a statute shall, in the first
18 instance, be ascertained from the text of the statute itself and its
19 relationship to other statutes”). The most straightforward reading of
20 these provisions is that MGM and any other developers are
21 permitted to negotiate with municipalities for contingent future
22 gaming contracts under Conn. Gen. Stat. § 7-194, and that Special
23 Act 15-7 in no way restricts that right. Because MGM’s claim that it

1 is excluded from the Connecticut casino market is unsupported by
2 the text of the Act, exclusion from the market cannot form the basis
3 of MGM's Article III standing.

4 **2. The competitive harms MGM alleges are not**
5 **sufficiently imminent to confer Article III standing**

6 MGM next argues that, even if Special Act 15-7 does not
7 exclude non-tribal businesses from the Connecticut casino market, it
8 nonetheless confers special competitive benefits on the Tribes that
9 give them an unfair advantage in the bidding process. Specifically,
10 the Act both gives the Tribes the exclusive "right" to publicize their
11 RFPs on the Department of Consumer Protection's website, and
12 gives the appearance of state preference for Tribe-sponsored
13 projects.

14 We agree with MGM that its Complaint alleges a sufficiently
15 concrete harm, and therefore satisfies the first prong of the "injury-
16 in-fact" analysis. Where, as here, a plaintiff alleges that it has been
17 denied equal protection in its attempt to secure a state contract, it
18 does not need to prove that it would have ultimately been awarded
19 the contract absent the alleged discrimination. *City of Jacksonville*, 508
20 U.S. at 666. It need only show that it was denied the ability "to
21 compete on an equal footing in the bidding process." *Id.* While
22 Connecticut contends that the Act does not give the Tribes a
23 competitive advantage, at the pleading stage all of MGM's factual

1 allegations must be accepted as true and all inferences must be
2 drawn in its favor. *See WC Capital Mgmt., LLC v. UBS Secs., LLC*, 711
3 F.3d 322, 328-29 (2d Cir. 2013). MGM's complaint plausibly alleges
4 that the RFP requirement reallocates state resources—specifically,
5 space on the website of a state agency—in a discriminatory manner,
6 and that the Act generally encourages municipalities to favor the
7 Tribes' projects over others. If MGM's assertions are correct, this
8 places it at a disadvantage in attracting negotiating partners for
9 future development sufficient to trigger protection under the Equal
10 Protection Clause and the dormant Commerce Clause.

11 MGM's alleged harms fail, however, to satisfy the second
12 requirement of the "injury-in-fact" analysis, because MGM has not
13 shown that those harms are "imminent" or "*certainly* impending."
14 *Adarand*, 515 U.S. at 211. In previous cases, courts have required that
15 a plaintiff who challenges a barrier to bidding on public contracts
16 actually make a bid on the contracts at issue, or at least establish
17 standing by proving that it very likely would have bid on the
18 contract but for the alleged discrimination. In *Warth v. Seldin*, 422
19 U.S. 490 (1975), for example, the Supreme Court held that the
20 plaintiffs—an association of construction firms—did not have
21 standing to challenge a local zoning ordinance because they had
22 produced "no averment that any member has applied . . . for a
23 building permit or variance with respect to any current project," nor

1 any evidence “that respondents have delayed or thwarted any
2 project” by the association’s members, *id.* at 516.

3 By contrast, in *City of Jacksonville*, the Supreme Court held that
4 the plaintiffs—businesses challenging a local ordinance requiring
5 that a certain percentage of the city’s contracts be awarded to
6 minority-owned companies—did have standing, because they
7 “regularly bid on contracts in Jacksonville and would bid on those
8 that the city’s ordinance makes unavailable to them.” 508 U.S. at 668.
9 The Court distinguished *Warth* on the basis that the plaintiffs in
10 *Warth* were not actively seeking building permits at the time they
11 filed their complaint, and that they had therefore not alleged “an
12 injury of sufficient immediacy to warrant judicial intervention.” *Id.*
13 (alterations and internal quotation marks omitted). Likewise, in
14 *Adarand*, the Court held that the plaintiff—a contractor—had
15 standing to challenge the federal government’s practice of giving
16 financial incentives to hire subcontractors controlled by “socially
17 and economically disadvantaged individuals,” because the plaintiff
18 made an “adequate showing that sometime in the relatively near
19 future it will bid on another Government contract” affected by the
20 incentives. 515 U.S. at 211; *see also In re U.S. Catholic Conference*
21 (*USCC*), 885 F.2d 1020, 1028–29 (2d Cir. 1989) (holding that plaintiffs
22 lacked standing to challenge tax determinations by the IRS that
23 allegedly favored the political advocacy of anti-abortion Catholic

1 groups, because “by their own admission” the plaintiffs “choose not
2 to match the Church's alleged electioneering with their own” and
3 were “[t]herefore . . . not competitors”).

4 Here, MGM has pleaded only that it is “interested” in
5 exploring development opportunities in Connecticut, and that it has
6 made initial studies of the viability of a casino in the state. It has not
7 alleged any concrete plans to enter into a development agreement
8 with a Connecticut municipality, or demonstrated any serious
9 attempts at negotiation.² MGM cites to an out-of-circuit case—*Lac*
10 *Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan*
11 *Gaming Control Board*, 172 F.3d 397 (6th Cir. 1999)—to argue that it
12 only needs to show that it is “able and ready” to bid on a contract,
13 not that is actively engaged in an ongoing negotiation. *Id.* at 404

² In a Rule 28(j) Letter, MGM contended that it has Article III standing under the United States Supreme Court’s recent opinion in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 580 U.S. ___, (2017). We disagree. *Czyzewski* is far removed from this case. There, employee judgment creditors of their employer company, which was in bankruptcy, challenged a structured “dismissal” that placed their claims at a lower priority than those of other creditors. 137 S. Ct. at 978. The Supreme Court rejected the trustee’s argument that, because there would be insufficient assets to pay the employees’ claims regardless of the outcome of their suit, the employees lacked standing to challenge the bankruptcy court’s ruling. *Id.* at 982-83. Standing existed because the ruling impaired the employees’ position in ongoing negotiations that could lead to a recovery. *Id.* Here, by contrast, MGM is not actively engaged in any negotiations to develop a casino in Connecticut, and has not alleged any concrete plans to do so in the foreseeable future. Any “disadvantage” MGM might suffer in future contract negotiations is purely speculative.

1 (emphasis omitted) (quoting *City of Jacksonville*, 508 U.S. at 666).
2 However, *Lac Vieux* is consistent with the *Warth* and *City of*
3 *Jacksonville* line of precedent. In *Lac Vieux*, Michigan and the City of
4 Detroit each passed laws that established an express “preference”
5 for one of the plaintiff tribe’s competitors in a bidding process to
6 build a casino in downtown Detroit. *Id.* at 401. The competitor
7 submitted an RFP for the casino project, while the plaintiff tribe did
8 not. *Id.* at 402. The tribe challenged the city and state laws as
9 unconstitutional, and the Sixth Circuit held that it had standing to
10 pursue the case, on the ground that it had demonstrated it was “able
11 and ready” to bid on the contract. *Id.* at 404-05.

12 But in *Lac Vieux*, the challenged set-aside applied to a specific
13 casino development for which bidding was ongoing. *Id.* at 402.
14 Moreover, the plaintiff tribe had submitted to the district court
15 substantial evidence that it had: (1) participated in past casino
16 development in Michigan; (2) had secured financing to pursue to the
17 present development; and (3) would have submitted an RFP in the
18 ongoing bidding process, but for the express preference granted to
19 its competitors. *Id.* at 405. The court found these facts dispositive of
20 the standing analysis under *City of Jacksonville*, holding that “[t]he
21 evidence shows that Lac Vieux was ready and able to submit a
22 proposal and that it was willing and able to pay the associated fees.”
23 *Id.* at 406. Here, by contrast, MGM has not alleged that there is any

1 specific project that it is prevented from bidding on by the Act. Nor
2 has it asserted that it has made any serious effort at locating a
3 municipal partner or securing financing to bid on a project. It has
4 simply expressed a general interest in the market, and made
5 preliminary studies of the viability of a casino project. These alleged
6 steps do not indicate that MGM is ready to participate in a specific
7 bidding process, and that it is only prevented in doing so by the
8 alleged benefits provided to the Tribes. Any competitive harm to
9 MGM is therefore too remote and conjectural to support Article III
10 standing.

11 MGM also cites to a First Circuit case, *KG Urban Enterprises,*
12 *LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012), in which a non-tribal casino
13 development company was found to have standing to challenge a
14 Massachusetts gaming law on equal protection grounds, despite the
15 fact that no bidding process had begun. *Id.* at 16-17. *KG Urban* is
16 distinguishable, however. That case involved a facial challenge to a
17 state statute as to which Massachusetts had conceded that the effect
18 of the statute was to “preclude a competitive license from being
19 awarded to non-tribal applicants” in certain areas of the state
20 entirely. *Id.* at 17. Connecticut makes no such concession here. *KG*
21 *Urban* might have been relevant for MGM’s claim that it has
22 standing to challenge Special Act 15-7’s supposed total ban on non-
23 tribal bids in Connecticut, but we have already rejected that claim

1 based on the plain meaning of the statutory text. The case is not
2 relevant to MGM's claim that the RFP publication requirement and
3 the Act's "signaling" effect interfere in the competitive process, and
4 does not bear on the imminence aspect of that inquiry.

5 **B. MGM does not have standing under the Supreme**
6 **Court's decision in *Heckler v. Mathews***

7 Lastly, MGM argues that even if the competitive harms it
8 alleges are not imminent it still has standing to challenge the
9 constitutionality of Special Act 15-7 because the law is
10 discriminatory on its face. In support of this position, it cites the
11 United States Supreme Court's opinion in *Heckler v. Mathews*, 465
12 U.S. 728 (1984), which MGM claims eliminated the "imminence"
13 requirement when a plaintiff is challenging a facially discriminatory
14 statute.

15 MGM misreads *Mathews*. That case concerned a
16 discriminatory amendment to the Social Security Act. The
17 amendment required married men applying for spousal Social
18 Security benefits to prove that they were economically dependent on
19 their wives, but created an "exception" for women that did not
20 require them to make a similar showing. 465 U.S. at 728. The statute
21 also contained a severability clause, which stated that if any portion
22 of the law was held unconstitutional, the "exception" clause could
23 not be expanded to include previously uncovered parties (*i.e.*, men).

1 Instead, the only permissible remedy was for a court to declare the
2 entire provision void, such that it could not be applied to any Social
3 Security applicant of either gender. *Id.*

4 Theoretically, this eliminated the standing of men to challenge
5 the clause, because any challenge would be un-redressable: Men
6 could never gain the benefits that were denied to them by suing;
7 they could only cause women to lose those benefits. Despite
8 Congress's "adroit attempt to discourage the bringing of an action
9 by destroying standing," *id.* at 737, the Supreme Court held that the
10 plaintiff, Mathews, could challenge the statute even though he
11 personally would not obtain a monetary benefit from a favorable
12 ruling. *Id.* The court concluded that Mathews had a legally
13 cognizable right not to be subject to a regime that denied him certain
14 benefits solely on the basis of gender. *Id.*

15 But critically for our purposes, *Mathews* did not change the
16 requirement that a plaintiff demonstrate an injury in fact in order to
17 establish Article III standing. A plaintiff still must show that he was
18 denied an actual, rather than a conjectural, benefit (or that he
19 sustained some other actual harm) in order to challenge a
20 government action in a federal court. In *Mathews*, the denial of a
21 tangible benefit was never in dispute. The plaintiff would have been
22 eligible to receive extra Social Security payments (an extra \$153.30 in
23 the mail every month, to be precise) had the amendment applied the

1 same eligibility criteria to men and women. *Id.* at 738 (“[A]ppellee
2 claims a type of personal injury we have long recognized as
3 judicially cognizable. He alleges that the pension offset exception
4 subjects him to unequal treatment in the provision of his Social
5 Security benefits solely because of his gender; specifically, as a
6 nondependent man, he receives fewer benefits than he would if he
7 were a similarly situated woman.” (footnote omitted)). Later
8 Supreme Court cases have reaffirmed that a plaintiff must prove
9 that he has personally suffered a concrete and particularized injury.
10 *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (noting that a
11 “bare procedural violation, divorced from any concrete harm” does
12 not satisfy the injury-in-fact requirement); *Allen v. Wright*, 468 U.S.
13 737, 757 (1984), *abrogated on other grounds by Lexmark Int’l, Inc. v.*
14 *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014).

15 The plaintiff in *Mathews* was a long-tenured civil servant who
16 had taken affirmative steps to establish his eligibility for the extra
17 Social Security benefits he sought, and indisputably would have
18 been entitled to receive them were it not for the discriminatory
19 amendment being challenged. By contrast, MGM has not made any
20 serious attempt to obtain the benefit it claims that it was denied (*i.e.*,
21 the right to compete on equal footing for development rights). MGM
22 cannot identify any “*certainly* impending” competitive harm that it

1 will suffer, *Adarand*, 515 U.S. at 211, because it is not presently
2 competing for anything.

3 MGM incorrectly suggests that *Mathews* eliminated the
4 “injury-in-fact” requirement in discrimination cases, by holding that
5 *any* race- or gender-based classification is *itself* a judicially
6 cognizable harm. To be sure, *Mathews* did state that an injury
7 resulting from discrimination could be emotional or psychic, rather
8 than monetary. As the Court explained:

9 [L]ike the right to procedural due process, the right to
10 equal treatment guaranteed by the Constitution is not
11 co-extensive with any substantive rights to the benefits
12 denied the party discriminated against. Rather, as we
13 have repeatedly emphasized, discrimination itself, by
14 perpetuating ‘archaic and stereotypic notions’ or by
15 stigmatizing members of the disfavored group as
16 ‘innately inferior’ and therefore as less worthy
17 participants in the political community, can cause
18 serious non-economic injuries to those persons who are
19 personally denied equal treatment solely because of
20 their membership in a disfavored group.

21
22 465 U.S. at 739–40 (citations omitted). But this holding did not
23 eliminate the need to show an “injury in fact” (incorporating the
24 dual requirement of concreteness and imminence); it simply
25 expanded the definition of what constitutes such an injury to include
26 emotional as well as tangible harms. As the Supreme Court has since
27 emphasized, in order to adequately plead a harm (whether psychic
28 or monetary) based on discriminatory treatment under a statute, a

1 plaintiff still must prove he personally would have been subject to
2 the discriminatory terms of the law. *See Allen*, 468 U.S. at 755 (“Our
3 cases make clear, however, that such injury accords a basis for
4 standing only to ‘those persons who are personally denied equal
5 treatment’ by the challenged discriminatory conduct.” (quoting
6 *Mathews*, 465 U.S. at 739-40)); *see also O’Shea v. Littleton*, 414 U.S. 488,
7 496-97 (1974).

8 MGM, a corporation, has not alleged psychic or emotional
9 harm stemming from the passage of Special Act 15-7, and it is
10 doubtful that it could. Moreover, because MGM has no concrete
11 plans to negotiate for casino development rights in Connecticut, it is
12 not “personally denied equal treatment” by the allegedly
13 discriminatory terms of Special Act 15-7, and therefore does not
14 have standing to challenge it. *Allen*, 468 U.S. at 755.

15 MGM claims that other federal circuit courts of appeal have
16 interpreted *Mathews* to eliminate the imminence requirement where
17 a plaintiff challenges a discriminatory classification. In particular, it
18 cites to the Fifth Circuit’s opinions in *Texas Cable &*
19 *Telecommunications Ass’n v. Hudson*, 265 F. App’x 210 (5th Cir. 2008)
20 (*Hudson I*) and *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630 (5th
21 Cir. 2012) (*Hudson II*). These cases cited *Mathews* for the proposition
22 that “[d]iscriminatory treatment at the hands of the government is
23 an injury long recognized as judicially cognizable,” and that “such

1 injury is recognizable for standing irrespective of whether the
2 plaintiff will sustain an actual or more palpable injury as a result of
3 the unequal treatment under law or regulation.” *Hudson II*, 667 F.3d
4 at 636 (citation omitted).

5 But this holding only reiterates the rule articulated in *Mathews*
6 that once a plaintiff is subject to a discriminatory classification, he
7 has standing to bring suit. In *Hudson*, the plaintiffs indisputably
8 were subject to the terms of the challenged statute. In that case, cable
9 companies in Texas that did not have existing contracts with
10 municipalities were allowed to apply for more advantageous state
11 operating licenses, while companies with existing municipal
12 contracts were explicitly barred from applying for those licenses. 667
13 F.3d at 633-34. The Fifth Circuit held this disparate treatment of
14 otherwise similarly situated economic competitors was sufficiently
15 discriminatory to constitute an injury in fact for standing purposes.
16 *Id.* at 636. But in *Hudson* the plaintiff telecommunications companies
17 were already participating in the Texas telecom market, and were
18 therefore immediately subject to the allegedly discriminatory terms
19 of the act which placed them at a competitive disadvantage.

20 MGM’s participation in the Connecticut casino market, unlike
21 the *Hudson* plaintiffs’ participation in the Texas telecom market, is
22 still entirely conjectural. Even if Special Act 15-7 excludes MGM
23 from accessing the “benefits” of the RFP publication requirement

1 and the signaling effects of the state's supposed public support, this
2 argument fails for the same reason set forth above. These "harms"
3 can only be conceived of as competitive harms that create an
4 "uneven playing field." But for a competitive harm to confer
5 standing, there must be some actual competition underway that the
6 "uneven playing field" distorts. A purely abstract competition,
7 based only on MGM's expression of "interest" and some
8 preliminary studies, without any concrete steps toward a bid for a
9 Connecticut casino, is insufficient.³

10 CONCLUSION

11 We have considered MGM's remaining arguments, and we
12 find them unavailing. We therefore AFFIRM the judgment of the
13 district court.

³ Our conclusion does not rule out the possibility that MGM's alleged harm may at some future point become sufficiently imminent. That possibility, though, is at this time only hypothetical and we therefore need not address it.