UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

NANTICOKE LENNI-LENAPE TRIBAL NATION,

Plaintiff,

v.

ROBERT LOUGY, ACTING ATTORNEY GENERAL OF NEW JERSEY, IN HIS INDIVIDUAL AND IN OFFICIAL CAPACITIES,

Defendant.

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Civil Action No:
1:15-cv-05645 (RMB/JS)

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Oral Argument Requested

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) and 12(b)(6)

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PRELIMINARY STATEMENT

Plaintiff, Nanticoke Lenni-Lenape Tribal Nation, seeks an order compelling the State of New Jersey from denying or repudiating claimed prior official recognition of the Plaintiff as an American Indian tribe of the State. As demonstrated in this brief, the factual and legal predicates for this suit are misguided. In any event, this case cannot proceed in federal court for at least two reasons. First, the suit is barred by the Eleventh Amendment. The State is the real, substantial party in interest; the sole named defendant, the Acting Attorney General of New Jersey, is only a nominal defendant. The Amended Complaint seeks relief against the State itself, requiring the State to maintain its purported recognition of Plaintiff as an American Indian tribe. Further, the pleading impermissibly seeks retrospective relief in the form of restoration of the status quo (allegedly recognition of the Plaintiff) that supposedly existed before the Defendant issued his challenged communications. Therefore, the Ex Parte Young, exception does not apply. Second, this case presents a nonjusticiable political question. The issue of recognition is a clear political question within the sole power of the Legislature

to determine. Indeed, the Legislature has considered several times over the last several years, but failed to adopt, legislation recognizing Plaintiff in a limited form. Thus, the case should be dismissed under Fed. R. Civ. P. 12(b)(1).

In addition, the Court should dismiss the federal claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The federal substantive due process claim cannot proceed because Plaintiff cannot identify a protected liberty or property interest in "continued" State recognition of an American Indian tribe and has not plausibly alleged government conduct that "shocks the conscience." Similarly, the procedural due process claim fails as a matter of law because there is no protected liberty or property interest and Plaintiff necessarily has failed to allege what process might be due, given that New Jersey has no statutory or administrative standards or procedures for recognition of American Indian tribes. Finally, the Equal Protection Claim should be dismissed because Plaintiff does not allege that it has been treated differently than other similarly situated putative American Indian tribes.

STATEMENT OF THE CASE

A. Procedural Background of the Federal Litigation

Plaintiff Nanticoke Lenni-Lenape Tribal Nation ("Tribe") has now filed a third version of a complaint for injunctive and declaratory relief against a single defendant, Acting Attorney General Robert Lougy, in his official and individual capacities.[1] It is clear from the first paragraph of Plaintiff's Second Amended Complaint ("Amended Complaint") that this case is focused on the State's claimed official recognition of the Tribe in 1982. That paragraph generally describes this matter as a civil rights action in which the "Acting Attorney General of New Jersey has wrongfully repudiated state recognition of the Tribe as an American Indian tribe…."

The Amended Complaint then turns to an historical overview of the Tribe. After asserting that the Tribe was mistreated by the State since the 19th Century (Amend. Compl. ¶16), the pleading then alleges that "[i]n the late 1970s and early 1980's, New Jersey began to reverse [the] its nearly three centuries' course of maltreatment of American Indians by implementing a process of state recognition." (Amend. Compl. ¶ 21). In particular, the State

[1] This third iteration of the complaint substantially reorganizes the earlier pleadings and contains new substantive allegations. Accordingly, the Defendant believes that it is necessary to file a completely new brief in support of his motion to dismiss rather than incorporating by reference the previously filed brief seeking to dismiss the First Amended Complaint.

Legislature passed a concurrent resolution in 1982 that allegedly officially recognized the Tribe.[2] (Amend. Compl. ¶ 28). The Amended Complaint then avers that "[f]or decades thereafter, New Jersey routinely reaffirmed recognition of the three tribes [The Tribe, the Ramapough Mountain Indians and the Powhatan-Renape Nation]…." (Amend. Compl. ¶ 30). In support of this assertion, the Amended Complaint cites actions and statements by various state government officials from both the Executive and Legislative branches. Ibid. Plaintiff further asserts that "[s]ince 1982, the Tribe has reasonably relied on New Jersey's recognition to claim eligibility for, and entitlement to, certain federal benefits, and to obtain them." (Amend. Compl. ¶ 31).

The Amended Complaint later alleges that despite these three decades of state recognition, "the Acting Attorney General now wrongfully attempts to deny and repudiate such recognition…." (Amend. Compl. ¶ 43). Although the Amended Complaint attempts to characterize the State's purported repudiation of its recognition

[2] As noted later in this brief, the resolution in fact did not formally "recognize" the Nation, but merely "designated" the Nation as an alliance of tribes in the area. See Certification of Stuart M. Feinblatt ("Feinblatt Cert."), Exhibit A. In deciding a motion to dismiss, the court may look beyond the pleadings to documents that are "referred to in the plaintiff's complaint and are central to the claim[,]" Pryor v. NCAA, 288 F.2d 548, 560 (3d. Cir. 2002), and the court may also consider matters of public record. Lum v. Bank of Am., 361 F.3d 217, 221 n.3 (3d Cir. 2004); see also Ieradi v. Mylan Labs, Inc., 230 F.3d 594, 598 n.2 (3d Cir. 2000) (court took judicial notice of certain publications and publicly filed documents not cited in the complaint).

of the Tribe as a current development, the pleading belatedly acknowledges that in fact, as early as 2001, the Division of Gaming Enforcement stated that New Jersey has no state-recognized tribes. (Amend. Compl. ¶ 49). (See Feinblatt Cert., Exh. B). The Amended Complaint also alleges that some five years ago, in 2011, a staff member of the New Jersey Commission on American Indian Affairs (a cultural heritage committee within the Department of State) informed the United States General Accounting Office ("GAO") that New Jersey has no state-recognized tribes. (Amend. Compl. ¶ 38).

The Amended Complaint contains three counts, all directed at the purported repudiation of the State's official recognition of the Tribe. Count I asserts deprivation of procedural due process under the Federal Constitution. Counts II and III assert, respectively, substantive due process and equal protection violations under the Federal Constitution.

Plaintiff seeks a declaration that "the Tribe has been officially recognized as an American Indian tribe by the State of New Jersey," and that the State be enjoined from "denying, repudiating, or otherwise impairing the Tribe's status as an American Indian tribe officially recognized by the State of New Jersey." (Amend. Compl. p. 25). The Plaintiff also seeks a determination that "the Defendant is estopped from denying or repudiating the Tribe's status as an American Indian tribe officially recognized by the State of New Jersey." Ibid.

B. Dismissal of the State Court Complaint.

On or about October 9, 2015, Plaintiff filed a parallel Complaint in state court seeking similar injunctive and declaratory relief, as well as damages, against the Acting Attorney General. The state court complaint asserted claims of violations of procedural and substantive due process and equal protection under the New Jersey Constitution, as well equitable estoppel under state law and another state law claim labelled "arbitrary and capricious action." The factual allegations in the state court case were essentially the same as those asserted here. (See Feinblatt Cert., Exh. C).

On March 6, 2016, Superior Court Judge William Anklowitz dismissed the state court complaint in its entirety. In his oral opinion, a copy of which is attached to the Feinblatt Cert. as Exh. D, the court properly noted that the keystone of the Plaintiff's complaint was the 1982 Concurrent Resolution. Op. at 17. The state court carefully evaluated the legal effect of a legislative concurrent resolution and correctly found that a concurrent resolution is not an act of legislation but rather "an expression of sentiment or an opinion without legislative quality or any coercive or operative effect." Op. at 6. The state court further noted that in 2002, N.J.S.A. 52:16A-56 was passed, mandating that formal state recognition of American Indian tribes be effectuated through specific statutory authorization. Op. at 12. Despite the introduction of several bills in later years attempting to

recognize the Tribe, none of the bills passed. Op. at 13-15.[3] Given that all of Plaintiff's claims depended on the 1982 Concurrent Resolution, and that resolution does not have the force of law, the state court dismissed all counts of the Complaint. That ruling is currently on appeal.

C. Recognition of American Indian Tribes

Although this case is focused on state recognition of American Indian tribes, the United State Constitution has indisputably assigned Congress the sole authority to regulate relations and commerce with American Indians, including the power to recognize tribes. U.S. Const. Art. 1, ¶8, cl. 3. See Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes.").

The term "recognition" or "recognize" has been used in two senses in the context of federal government relations with American Indians. First, it has been used in the "cognitive" sense that federal representatives "knew" or "realized" that a purported Indian tribe existed. Second, the term has been used in a more formal jurisdictional sense to refer to when the federal government "formally acknowledges a tribe's existence as a 'domestic dependent nation' with tribal sovereignty and deals with it in a special

[3] Copies of the proposed legislation identified by the state court judge seeking to recognize the Tribe are attached as Exhibit E to the Feinblatt Cert.

relationship on a government-to-government basis." William V. Quinn, Jr., Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept, 34 Am. J. of Legal Hist., 331, 333 (Oct. 1990).

The federal Department of Interior has established an elaborate administrative process for American Indian tribes to obtain formal federal recognition of their existence.[4] This process is administered by the Bureau of Indian Affairs (BIA). See 25 C.F.R. § 83.7. A tribe must meet certain anthropological, historical, and genealogical criteria. See 25 C.F.R. § 83.11.

A federally recognized tribe is "recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations and obligations attached to that designation, and is eligible for funding and services from the Bureau of Indian Affairs." Bureau of Indian Affairs Frequently Asked Questions, http://www.indianaffairs.gov/FAQs/index.htm (last visited May 19, 2016). Plaintiff is not currently a federally recognized tribe. (See Amend. Compl. ¶ 17).

The Defendant acknowledges, as noted in Plaintiff's Amended Complaint, ¶ 34, that certain states also have adopted various procedures to "recognize" American Indian tribes in some form. New

[4] American Indian tribes can also be formally recognized through an Act of Congress and by a decision of a United States court. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No.103-454, § 103, 108 Stat. 4791, 4792 (1994).

Jersey does not have established criteria for recognizing tribes. N.J.S.A. 52:16A-56 does provide that the sole authorized method of "recognition shall require specific statutory authorization."

As referenced in the Amended Complaint, in 1982, the Senate passed Concurrent Resolution No. 73. (Amend. Compl. ¶ 28; Feinblatt Cert., Exhibit A). This Resolution "designated" the Confederation of Nanticoke-Lenni Lenape Tribes of southern New Jersey "as an alliance of independent surviving tribes of the area" and "memorialized" the U.S. Congress "to acknowledge the Confederation of Nanticoke-Lenni Lenape tribes as such." The resolution specifically noted that the designation was made in order to assist the Tribe in qualifying for appropriate federal funding for American Indians. Although the Amended Complaint asserts that this Resolution "recognized" the Tribe as an American Indian tribe (see Amend. Compl. ¶¶ 28, 31), it is clear from the use of the terminology "designate," that the recognition was only in the limited cognitive sense of marking, signifying or identifying the Tribe. See Oxford University Press, Oxford Dictionaries (U.S. English) (2015), http://www.oxforddictionaries.com/us/definition/american_english/designate (defining "designate" as to "signify; indicate"). The Resolution cannot be plausibly read as a formal

acknowledgement that the Tribe is an authentic sovereign government as might be found by the BIA.[5]

Moreover, as properly found by Judge Anklowitz (op. at 6), in this context, the Concurrent Resolution is not an act of legislation and does not have any binding legal effect outside of the legislature. See General Assembly of New Jersey v. Byrne, 90 N.J. 376, 388-89 (1982) (relying on In re N.Y. Susquehanna & Western R.R. Co., 25 N.J. 343, 348 (1957) (a concurrent resolution is "without legislative quality of any coercive or operative effect")). These very points were clearly made by the Director of the Division of Gaming Enforcement in his December 14, 2001 letter. (See Feinblatt Cert., Exhibit B).

As noted in the Amended Complaint, ¶ 30, the Legislature has passed at least two other statutes that refer to the Tribe by name.[6] These and other actions identified in the Amended Complaint again reflect a designation that the Tribe and certain other purported American Indian tribes exist in New Jersey. They appear motivated at least in part to assist the Tribe and certain other

[5] In dismissing the state court complaint, Judge Anklowitz similarly noted that the Resolution "doesn't recognize the plaintiff as a tribal entity for any purpose other than for Congress to determine the worthiness of their legal recognition." Op. at 18.

[6] Judge Anklowitz's opinion explicitly referenced one of those statutes, N.J.S.A. 26:8-49, addressing corrections to birth and fetal death certificates. As the court correctly found, that statute "recognized" the Tribe as an ethnic group for vital statistics purposes but not as an authentic tribal entity. Op. at 11, 15.

tribes in obtaining whatever funds, services and other benefits they might be entitled to under federal programs. These actions, however, cannot be viewed as a formal recognition of these tribes as independent and sovereign political communities.

The Legislature has attempted on several occasions to officially recognize the Tribe. (See Feinblatt Cert., Exh. E). If passed, these statutes would have recognized the Tribe for the primary purpose of establishing eligibility for federal benefits and services. All of those efforts have failed. Finally, to the extent the State might have designated the Tribe in some form in the past, there are no laws precluding the State from reconsidering or rescinding that designation at a later date.

STANDARD OF REVIEW

A motion to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction requires that the court accept as true the plaintiff's well-pleaded factual allegations. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). However, the Court may ignore legal conclusions and factually unsupported accusations. Id. "[T]he person asserting jurisdiction bears the burden of showing that the case is properly before the Court at all stages of the litigation." Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3d Cir. 1993). Even if the pleading itself adequately alleges the existence of federal subject-matter jurisdiction; the complaint can still be dismissed if the facts averred actually belie the assertion of

federal jurisdiction. Gibbs v. Buck, 307 U.S. 66 (1939). Point I of this brief presents a facial challenge to jurisdiction based on sovereign immunity provided under the Eleventh Amendment while Point II asserts a justiciability challenge under the political question doctrine.

In Points III and IV, the State moves under Fed. R. Civ. P. 12(b)(6). Such a motion challenges the legal sufficiency of the Amended Complaint on the ground that it fails to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, supra, 556 U.S. at 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In deciding a motion to dismiss, although the plaintiff's factual allegations will be accepted as true, the plaintiff's conclusory allegations and legal conclusions do not enjoy the same assumption of truth. Ashcroft v.Iqbal, supra, 556 U.S. at 678; see also Anspach v. City of Philadelphia, 503 F.3d 256, 260 (3d Cir. 2007) (recognizing that conclusory allegations or legal conclusions masquerading as factual allegations will not prevent dismissal). The factual allegations must be more than speculative and "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." Twombly, supra,

550 U.S. at 555 (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)). Thus, a court must dismiss where, as a matter of law, "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Neitzke v. Williams, 490 U.S. 319, 327 (1989).

LEGAL ARGUMENT

POINT I

THIS ACTION IS BARRED IN ITS ENTIRETY BY THE ELEVENTH AMENDMENT.

A. Introduction.

The Eleventh Amendment renders unconsenting states, state agencies, and state officers sued in their official capacities immune from suits brought in federal courts by private parties. Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); Frew v. Hawkins, 540 U.S. 431, 437 (2004); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996); Haybarger v. Lawrence County Adult Prob. & Parole, 551 F. 3d 193, 197 (3d Cir. 2008). "The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." Federal Maritime Comm'n v. South Carolina Ports Authority, 535 U.S. 743, 760 (2002). Therefore, any time a State is haled into federal court against its will, "the dignity and respect afforded [that] State, which [sovereign] immunity is designed to protect, are

placed in jeopardy." Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 268 (1997).

Given the key role played by state sovereign immunity in our federal system, the United States Supreme Court has recognized only three exceptions to that immunity. Only one of those exceptions, first enunciated in Ex parte Young, 209 U.S. 123 (1908), potentially applies here. Under Ex parte Young, "individual state officers can be sued in their individual capacities for prospective injunctive and declaratory relief to end continuing or ongoing violations of federal law." MCI Telecomm. Corp. v. Bell Atl.-Pa., 271 F.3d 491, 506 (3d Cir. 2001). The doctrine rests on the "obvious fiction," Couer d'Alene Tribe, 521 U.S. at 270, that such a suit is not in reality against the State but rather against an individual state official who has been "stripped of his official or representative character" due to his unlawful conduct. Ex parte Young, 209 U.S. at 159-160.

Although Ex parte Young has been invoked to promote the vindication of federal rights in federal court, "the theory of Young has not been provided an expansive interpretation." Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 102 (1984). As was observed by Chief Justice Roberts in his dissent in Virginia Office for Protection & Advocacy v. Stewart, 563 U.S. 247, 268 (2011):

> Indeed, the history of our Ex parte Young jurisprudence has largely been focused on ensuring that this narrow exception is "narrowly construed," [Pennhurst, supra, 465

> U.S. at 114, n. 25]. We have, for example, held that the fiction of Ex parte Young does not extend to suits where the plaintiff seeks retroactive relief, [Edelman v. Jordan, supra, 415 U.S. at 678]; where the claimed violations are based on state law, [Pennhurst, supra, 465 U.S. at 106]; where the federal law violation is no longer "ongoing," [Green v. Mansour, 474 U.S. 64, 71 (1985)]; "where Congress has prescribed a detailed remedial scheme for the enforcement against a State" of the claimed federal right, [Seminole Tribe, supra, 517 U.S. at 74.]; and where "special sovereignty interests" are implicated, [Couer d' Alene Tribe, supra, 521 U.S. at 281.].

B. Ex parte Young is Inapplicable Here because Plaintiff's Suit is in Fact Against the State and Seeks Retroactive Relief.

It is well-established that to determine "whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, 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.'" Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635, 645 (2002) (quoting Idaho v. Coeur d' Alene Tribe of Idaho, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in the judgment)).

Even so, "not every plaintiff who complies with [the Ex parte Young pleading] prerequisites will be able to bring suit under Ex parte Young." Virginia Office for Protection & Advocacy v. Stewart, 563 U.S. 247, 268 (2011)(Roberts, J., dissenting). For example, plaintiff "cannot wiggle into this exception through

creative pleading." Seminole Tribe of Florida v. Florida Dep't of Revenue, 750 F.3d 1238, 1243 (11th Cir. 2014). A reviewing court "must look to the substance of Plaintiffs' requested relief, not to how creatively their claims are pleaded." New Jersey Educ. Ass'n v. New Jersey, 2012 U.S. Dist. LEXIS 28683, No. 11-5024, at *31 (D.N.J. Mar. 5, 2012); see Papasan v. Allain, 478 U.S. 265, 279 (1986)("In discerning on which side of the line a particular case falls, we look to the substance rather than to the form of the relief sought . . . ."). Indeed, the Supreme Court has cautioned against employing a mechanistic approach to evaluating Young's applicability:

> To interpret Young to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the Young exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction. [Coeur d' Alene, supra, 521 U.S. at 270 (emphasis added)].

Simply put, there are "'certain types of cases that formally meet the Young requirements of a state official acting inconsistently with federal law but that stretch that case too far and would upset the balance of federal and state interests that it embodies.'" Virginia Office for Protection & Advocacy, supra, 563

U.S. at 269 (2011)(quoting Papasan, supra, 478 U.S. at 277). Accordingly, "Young does not apply if, although the action is nominally against individual officers, the state is the real, substantial party in interest and the suit is in fact against the state." MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491 (3d Cir. 2001)(citing Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 101 (1984).

The "general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought." Virginia Office for Protection & Advocacy v. Stewart, supra, 563 U.S. at 248 (2011) (emphasis in the original) (quoting Pennhurst, supra, 465 U.S. at 107). Thus, for example, "a suit is against the sovereign . . . if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" Dugan v. Rank, 372 U.S. 609, 620 (1963) (quoting Larson v. Domestic & Foreign Corp., 337 U.S. 682, 704 (1949)). Therefore, "Ex parte Young cannot be used . . . [for] an order for specific performance of a state's contract." Virginia Office for Protection & Advocacy, supra, 563 U.S. at 256-57; see also In re Ayers,123 U.S. 443, 502-504 (1887)(11th Amendment bars specific performance suits of state contracts); MSA Realty Corp. v. Illinois, 990 F.2d 288, 294 (7th Cir. 1993) ("Even after Ex parte Young was decided in 1908, the Supreme Court has never approved a lower court order requiring officials of a state to take actions that constitute performance by

a state of obligations that are the state's in its political capacity.").

A salient example of a court's refusal to apply Ex parte Young when the state is the real party in interest (despite satisfaction of the technical pleading requirements) is New Jersey Education Association, supra, No. 11-5024, 2012 U.S. Dist. LEXIS 28683, at *22-23. The plaintiffs in that case sought a declaration from the court that portions of a state statutory enactment making changes to the New Jersey retirement system for public employees violated the United States Constitution. The plaintiffs also requested a permanent injunction barring the defendant officials from "administering, enforcing or otherwise implementing" portions of the state law. Id. at *5.

The court, however, concluded that "enjoining the enforcement of [the state law] is nothing more than an indirect way of forcing the State to abide by its obligations as they existed prior to the enactment," and the 11th Amendment bars such a request for specific performance. New Jersey Education Association, supra, No. 11-5024, 2012 U.S. Dist. LEXIS 28683, at *16; see also Petit-Clair v. New Jersey, 2016 U.S. Dist. LEXIS 51738, at *5 (D.N.J. Apr. 18, 2016). Even when the state is not a named party, "if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a

suit against the State." New Jersey Education Association, supra, No. 11-5024, 2012 U.S. Dist. LEXIS 28683, at *22 (quoting In re Ayers, 123 U.S. 443, 503 (1887)).

The court further observed that the relief requested also violated a different but related limitation on Ex parte Young, namely relief that is retroactive in nature. New Jersey Education Association, supra, No. 11-5024, 2012 U.S. Dist. LEXIS 28683, at *32; see Edelman v. Jordan, 415 U.S. 651,667-68 (1974). Ultimately, the court rejected the requested injunctive relief under the Eleventh Amendment because it "will have only one effect: the resumption of the status quo existing prior to the enactment of [the challenged] legislation. This would result, for all practical purposes, in either the specific performance of the contract allegedly existing between Plaintiffs and the State of New Jersey or an order compelling the State to abide by what it has agreed to do in the its capacity as an 'organized political community.'" Id. at *36-37.

Although contractual obligations are not directly in play here, this case is closely analogous to New Jersey Education Association, supra, No. 11-5024, 2012 U.S. Dist. LEXIS 28683. Plaintiff's claims are, in essence, against the State and seek retrospective relief. Significantly, Plaintiff seeks to compel specific performance of an obligation of the State in its political capacity -- the State's claimed previous commitments (first

allegedly enunciated in 1982) to recognize Plaintiff as an American Indian tribe. The Plaintiff also seeks the restoration of the status quo by restoring the State's recognition of the Tribe that supposedly existed before the Defendant's challenged communications.

Looking to its substance, the suit seeks to bar all agencies and State government representatives from rescinding the Tribe's alleged prior "recognition." Specifically, paragraph (a) of the *ad damnum* clause seeks a declaration "that the Tribe has been officially recognized as an American Indian tribe by the State of New Jersey" (emphasis added), paragraph (b) seeks an order "[e]njoining Defendant from denying, repudiating or otherwise impairing the Tribe's status as an American Indian tribe officially recognized by the State of New Jersey," and paragraph (g) seeks a judgment that "Defendant is estopped from denying or repudiating the Tribe's status as an American Indian tribe officially recognized by the State of New Jersey."[7]

Unquestionably, the recognition of a putative American Indian tribe, and whether to deny or rescind the claimed recognition,

[7] Although the language of some of the requests for relief are literally only directed at the single defendant in the case, the Acting Attorney General, it is clear from the totality of the Amended Complaint that plaintiff seeks to enjoin all representatives of New Jersey's state government from repudiating the claimed earlier official recognition.

falls within the role of the State in its political capacity.[8] This case cannot satisfy the Ex Parte Young exception for the fundamental reason that when read as a whole, the suit is in reality against the State itself and seeks relief compelling the State to "continue" to recognize Plaintiff as an official American Indian tribe of New Jersey and not deny, repudiate or otherwise impair that status. Further, it improperly seeks restoration of the status quo that supposedly existed before the Defendant's challenged statements. The relief the Tribe seeks is therefore prohibited under the Eleventh Amendment.[9]

C. This Case is Readily Distinguishable from the Hypothetical Scenario the Court Posed During Oral Argument of the Motion to Dismiss the First Amended Complaint.

This Court presented the following hypothetical during oral argument of the State's Motion to Dismiss the First Amended Complaint held on April 12, 2016: The New Jersey Legislature enacted a statute formally recognizing the Tribe but the Attorney General then sought to take impending action (for an unstated

[8] For this reason, Ex parte Young also does not apply where, as here, "the suit against the state officer affects a unique or essential attribute of state sovereignty, such that the action must be understood as one against the state." MCI Telecomm. Corp., supra, 271 F.3d at 508. See Coeur d' Alene, supra, 521 U.S. at 287; 296–97 (O'Connor, J., concurring in part and concurring in the judgment).

[9] It is well-settled that a party cannot seek declaratory relief under the Eleventh Amendment unless it is ancillary to a valid injunction. Green v. Mansour, 474 U.S. 64, 71–72 (1985). Given that an injunction is precluded here, Plaintiff is also precluded from seeking declaratory relief.

reason) defying that legislation. The Court asked whether the scenario fell within the Ex parte Young paradigm and why the case filed by the Tribe also does not fall within Ex parte Young.

Although we do not concede that the hypothetical presents a violation of federal law, we acknowledge that the hypothetical's fact pattern is analogous to the typical fact pattern presented in Ex parte Young cases. See, e.g., Georgia R. & B. Co. v. Redwine, 342 U.S. 299, 304-305 (1952)(applying Ex parte Young to suit to enjoin State Revenue Commissioner "from a threatened and allegedly unconstitutional invasion of its property"); Sterling v. Constantin, 287 U.S. 378, 387 (applying Ex parte Young where governor declared martial law and issued orders to limit oil production). But that hypothetical scenario is readily distinguishable from the facts alleged in this case for two main reasons. First, with respect to the hypothetical, the obvious and only target of the needed injunction would be the Acting Attorney General. By contrast, as addressed in subsection B immediately above, the relief sought here is against the State itself as the Amended Complaint effectively seeks an injunction restraining all representatives of State government from acting in a certain way and restoring the status quo -- all State officials should "continue" to recognize the Tribe as an official American Indian tribe and not deny, repudiate or otherwise impair that status.

Second, unlike in the hypothetical, this case does not present a clear case of prospective conduct involving ongoing or threatened future violations of federal law. The Amended Complaint largely focuses on advice allegedly rendered by prior Attorneys General years ago, as opposed to any pending or threatened action. Specifically, paragraph 38 of the Amended Complaint asserts that an employee of the State Commission on Indian Affairs advised the GAO in 2012 that New Jersey has no state-recognized tribes. That paragraph also alleges "upon information and belief" that the employee "relied on counsel from the Acting Attorney General" in rendering advice to the GAO. Furthermore, paragraph 49 contends that "the first instance in which a state official attempted to undermine the tribes' state-recognized status" occurred in 2001 when "the Division of Gaming Enforcement - part of the Attorney General's Office" informed the federal Indian Arts and Crafts Board that it was not in New Jersey's purview to determine the issue of recognition.

In sum, the latest pleading focuses on advice purportedly rendered by prior Attorneys General on two occasions -- approximately four and fifteen years ago. Moreover, as discussed above, the Plaintiff effectively seeks to restore the status quo that allegedly existed years before Defendant's challenged communications. Therefore, the circumstances presented are readily

distinguishable from both the Court's hypothetical and the types of cases falling within the Ex parte Young exception.

POINT II

PLAINTIFF'S SECOND AMENDED COMPLAINT SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(b)(1) BECAUSE THE ISSUES PRESENTED ARE NONJUSTICIABLE POLITICAL QUESTIONS.

Whether there is a justiciable controversy is properly presented on a motion under Fed. R. Civ. P. 12(b)(1). See Harris v. Kellogg Brown & Root Servs., 724 F.3d 458, 463 (3d Cir. 2013). Questions of justiciability are distinct from questions of jurisdiction, and a court with jurisdiction over a claim should nonetheless decline to adjudicate it if it is not justiciable. Gross v. German Found. Indus. Initiative, 456 F.3d 363, 376, (3d Cir. 2006) (citing Baker v. Carr, 369 U.S. 186, 198 (1962)).

In order for there to be a claim or actual controversy in the constitutional sense under Article III, the controversy must be one that is appropriate for judicial determination. See U.S. Const. art. III, § 2. Under this framework, claims that present a political question are nonjusticiable. See generally Baker, supra, 369 U.S. 186.

Here, the issue of recognition raised by Plaintiff is a political question best left to the legislature to decide. "The nonjusticiability of a political question is primarily a function of the separation of powers . . . ." Baker, supra, 369 U.S. at 210.

The doctrine "'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.'" Gross, supra, 456 F.3d at 377 (quoting Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)).[10]

In determining whether a political question exists, the court must determine whether any of the following six factors are present: 1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or 2) a lack of judicially discoverable and manageable standards for resolving it; or 3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or 4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or 5) an unusual need for unquestioning adherence to a political decision already made; or 6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Baker, supra, 369 U.S. at 217. The

[10] As a corollary, the doctrine also applies to judicial review of controversies committed to the coordinate branches of state government. See generally Gilligan v. Morgan, 413 U.S. 1 (1973) (applying the political question doctrine to hold as nonjusticiable petitioner's request for injunctive relief because such relief would require the Court to evaluate and pass judgment upon the training programs, weapons, use of force, and orders of the Ohio National Guard, a determination better left to Ohio's Legislative and Executive branches).

presence of a political question exists where any *one* of the six factors is found. See INS v. Chadha, 462 U.S. 919, 941 (1983). If that factor is "inextricable from the case at bar," then the issue is non-justiciable and must be dismissed. Baker, supra, 369 U.S. at 217.

Plaintiff seeks an order from this Court compelling the State to "continue" to recognize Plaintiff as an American Indian tribe. In New Jersey, as noted previously, official recognition of an American Indian Tribe can only be achieved through statutory enactment by the Legislature. See N.J.S.A. 52:16A-56(g). Therefore, as detailed below, whether a tribe should be recognized as an official tribe by the State is a clear political question that is within the sole power of the Legislature to determine. Shinnecock Indian Nation v. Kempthorne, No. 06-5013, 2008 U.S. Dist. LEXIS 75826, at *4 (E.D.N.Y. Sept. 30, 2008) ("The issue of federal recognition of an Indian tribe is a quintessential political question that, in the first instance, must be left to the political branches of government and not the courts").

Although Plaintiff's Complaint relies on a 1982 legislative concurrent resolution for the proposition that the State has already "recognized" the Tribe as an official American Indian tribe, as noted above, that resolution is not an act of legislation and does not have binding legal effect. In re N.Y. Susquehanna & Western R.R. Co., supra, 25 N.J. at 348. Indeed, if that Resolution

had binding legal effect, there would be no need for the Legislature to consider passing legislation recognizing the Tribe in some form. Yet, as referenced in the Amended Complaint (¶ 37), several bills have been proposed since 2002 providing for official state recognition of the Tribe. (See Feinblatt Cert., Exh. E). Despite these efforts, the Legislature has never passed a formal statute officially recognizing the Tribe.

Given this state of affairs, this case meets at least four of the independent grounds for finding a political question. First, there is a lack of judicially discoverable and manageable standards for resolving the issue. Plaintiff cannot cite to any statutory or regulatory standards allowing for recognition of American Indian tribes by New Jersey because they simply do not exist. Indeed, Plaintiff cannot establish that New Jersey has a legal duty to create such standards. Second, in the absence of prescribed criteria, there may be an infinite number of good reasons for the Legislature not to pass legislation recognizing Plaintiff as an "official" tribe of the State. These reasons may include consideration of important policy implications and are exclusively within the province of the Legislative Branch. Indeed, it bears repeating that the Legislature in fact has on several occasions considered but never passed a statute officially recognizing Plaintiff. Thus, the third factor identified in Baker, namely the

impossibility of deciding the issue without an initial policy determination reserved for nonjudicial discretion, is also met.

In addition, there is the impossibility of a court's undertaking independent resolution of this issue without expressing a lack of respect for the coordinate branches of government. "The test of respect for another branch of government, . . . , lies in judicial restraint not when a court agrees with that branch, but when it disagrees." DeVesa v. Dorsey, 134 N.J. 420, 442 (1993) (Pollack, J., concurring). "A court must stay its hand if the public and its elected representative are to assume their responsibilities." Id. at 443. Because the remedy Plaintiff seeks can only be achieved by enacting a statute, and the Legislature has attempted but failed on several occasions to pass the mandated statute, the Court cannot resolve this matter without treading on the province of the Legislature. Thus, the fourth Baker factor applies here. For the same reason, if the Court were to act here, when the Legislature has failed to pass legislation addressing the very subject of this lawsuit, there would clearly be the potential for "embarrassment from multifarious pronouncements by various departments on one question." Thus, the sixth Baker factor is also satisfied.

The same violation of the separation of powers would occur even if Plaintiff could somehow successfully argue that it has already been granted binding official recognition by this State—

despite the Legislature's repeated failed efforts to pass legislation officially recognizing the Tribe for the first time. Plaintiff asserts in its Amended Complaint that later pronouncements and actions by the State (at least as early as 2001), "denied" or "repudiated" the claimed earlier official recognition. There is, however, no statute or regulation that precludes the State from reevaluating or rescinding "recognition" of an American Indian tribe or that sets forth the criteria for such actions. Indeed, as noted above, there are no available criteria addressing state recognition at all. Thus, the Court would be confronted with the same Baker factors noted above if it were to wade into the question of whether the State validly "rescinded" its earlier claimed official recognition of the Tribe. In sum, because Plaintiff seeks relief that it can obtain only from the Legislature, this matter must be dismissed for lack of justiciability.

POINT III

COUNTS I AND II OF THE SECOND AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO STATE A DUE PROCESS CLAIM UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Counts I and II of Plaintiff's Second Amended Complaint raise substantive and procedural due process claims against the State under the Fourteenth Amendment.[11] As demonstrated below, these counts fail as a matter of law.

A. Substantive Due Process

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. To state a valid claim for a violation of substantive due process, Plaintiff must show that the State exercised power "without any reasonable justification in the service of a legitimate governmental objective." Cty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). In other words, substantive due process "protects

[11] Because vicarious liability is inapplicable to § 1983 claims, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." Iqbal, 556 U.S. at 676. As there is no supervisor liability in a § 1983 suit, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. Id. at 677. Here, the Amended Complaint does not allege any individual actions by Acting Attorney General Lougy causing violations of constitutional rights. (See Subsection E of the factual section of the pleading). Accordingly, any personal capacity claims against the Acting Attorney General must be dismissed.

individuals from the 'arbitrary exercise of the powers of government' and 'government power […] being used for the [the] purposes of oppression'" Daniels v. Williams, 474 U.S. 327, 331 (1986).

The threshold inquiry in these claims is whether a plaintiff has a protected property or liberty interest that gives rise to due process protection. Nicholas v. Pennsylvania State Univ., 227 F.3d 133, 139-40 (2000). "'[O]nly fundamental rights and liberties which are deeply rooted in this Tribe's history and tradition and implicit in the concept of ordered liberty'" are afforded substantive due process protection. River Nile Invalid Coach & Ambulance, Inc. v. Velez, 601 F. Supp. 2d 609, 621 (D.N.J. 2009) (quoting Chavez v. Martinez, 538 U.S. 760, 775 (2003)). Examples of fundamental rights and liberties include the right to marry, to have children, to direct the upbringing of one's children, to use contraception, to bodily integrity and to abortion. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

Furthermore, the United States Supreme has "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." Id. at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)). In other words, Plaintiff's complaint must allege specific conduct by the defendant that violates a *clearly* established right. Atkinson v. Taylor, 316 F.3d 257, 261(3d Cir. 2003); see also Anderson v. Creighton, 483 U.S.

635, 640 (1987) (holding that to be clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right").

Once a "fundamental" right is identified, a plaintiff must allege a deprivation by government conduct that "shocks the conscience." Chainey v. Street, 523 F.3d 200, 219 (3d Cir. 2008). Whether an incident "shocks the conscience" is a matter of law for the courts to decide. Benn v. Universal Health Sys., 371 F.3d 165, 174 (3d Cir. 2004). Substantive due process protects individuals from government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense. Disability Rights N.J., Inc. v. Velez, 974 F. Supp. 2d 705, 724 (D.N.J. 2013), aff'd, 2015 U.S. App. LEXIS 13553 (3d Cir. Aug. 4, 2015) (citing Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994)). Substantive due process "does not protect 'against government action that is incorrect or ill-advised' but against those circumstances in which 'government action might be so arbitrary that it violates substantive due process regardless of the fairness of the procedures used.'" Ibid. (internal references omitted). In other words, "[w]ith the exception of certain intrusions on an individual's privacy and bodily integrity, the collective conscience of the United States Supreme Court is not easily shocked." Rivkin v. Dover Twp. Rent

Leveling Bd., 143 N.J. 352, 366 (1966) (citing Irvine v. California, 347 U.S. 128, 133 (1954)).

Plaintiff's Amended Complaint fails as to both elements. First, the Amended Complaint does not allege violation of a fundamental right or liberty, such as those catalogued in Glucksberg. Rather, the Amended Complaint vaguely asserts that the Tribe has fundamental property and liberty interests "in its identity and status as an American Indian tribe." (Amend. Compl. ¶ 62). The Defendant is not aware of any cases identifying this vague right as a recognized fundamental right or liberty. To the contrary, the right of an American Indian tribe to be recognized by the State, or for the State to be prevented from changing or repudiating an earlier recognition, simply does not fall within the limited list of fundamental rights and liberties that are deeply rooted in this country's history.

Furthermore, Plaintiff's Amended Complaint woefully fails to provide a careful description of the fundamental liberty or property interest at stake. Nor can the Amended Complaint provide the required precision by tying this asserted fundamental right to the purported actions of the State. The Amended Complaint asserts that the State's purported repudiation of the Tribe's tribal status infringed on its fundamental rights. (Amend. Compl. ¶ 64). But, as addressed earlier in this brief, the State does not have any procedures, standards or requirements for the "recognition" or

continued recognition of American Indian tribes (other than that the Legislature must pass a formal statute recognizing a tribe). Thus, it follows that the right to be free from any purported repudiation of state recognition does not fall within the narrow list of this country's deeply-rooted fundamental rights and liberties.

Even if Plaintiff were able to identify a protected liberty or property interest, it has not plausibly alleged government conduct that "shocks the conscience." A State's decision not to formally recognize an American Indian tribe in some form, or to modify or disavow an earlier recognition, could only plausibly fall into the realm of possible "incorrect or ill-advised" government action. In particular, Plaintiff alleges here that the Defendant, supposedly acting in part through the Division of Gaming Enforcement, inappropriately opined that the State in fact had not officially recognized the Tribe as an American Indian tribe. (See, e.g., Amend. Compl., ¶¶ 43, 49). We submit, as ruled by Judge Anklowitz and is self-evident from the repeated but failed efforts by the Legislature over the last several years to pass legislation providing the Tribe with limited recognition, that the Defendant's challenged position is demonstrably correct. In any event, an opinion on the legal status of a purported American Indian tribe (even if it were incorrect) simply does not fall into the narrow category of egregious and arbitrary actions that could shock the

conscience. The substantive due process claim should therefore be dismissed.

B. Procedural Due Process

As noted in Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 680 (3d Cir. 1991), there are two basic elements to a procedural due process claim: "a plaintiff [must prove] that a person acting under color of state law deprived [him] of a protected interest [and] that the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process." Plaintiff's Amended Complaint does not satisfy the threshold requirement of a protected property interest.

"'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" Ibid. (quoting Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972)). That entitlement is created by an "independent source," such as state law, which secures the benefit for the plaintiff. Baraka v. McGreevey, 481 F.3d 187, 205 (3d Cir. 2007).

Plaintiff articulates that it has a "property interest, protected under state law, in protecting and preserving its tribal identity and in its recognition by New Jersey as an official American Indian tribe . . . ." (Amend. Compl. ¶ 57). This entitlement is supposedly based on the 1982 Concurrent Resolution

(as well as certain later state conduct). (See Amend. Compl. ¶¶ 28-29).

As Judge Anklowitz already correctly found, the 1982 Concurrent Resolution, however, does not have the force and effect of law and cannot confer any due process rights on Plaintiff. A Concurrent Resolution is not an act of legislation and does not have any binding legal effect outside of the legislature. General Assembly of New Jersey v. Byrne, 90 N.J. 376, 388-89 (1982) (relying on In re N.Y. Susquehanna & Western R.R. Co., 25 N.J. 343, 348 (1957)). It is well-settled that "a concurrent resolution is ordinarily an expression of sentiment or opinion, without legislative quality of any coercive or operative effect." Application of New York, S. & W. R. Co., 25 N.J. 343, 348-349 (1957). See also state court opinion at pp. 5-6. Thus, because the Concurrent Resolution is not state law and lacks the force and effect of a law, it cannot serve as Plaintiff's independent source of entitlement under Baraka and does not entitle Plaintiff to any property interest or due process.

Moreover, even if the 1982 resolution were a valid source of state law, it cannot be construed to confer official state recognition on the tribe. As noted earlier in this brief and as previously determined by Judge Anklowitz (Op. at 18), a fair reading of the express language of the Concurrent Resolution says nothing about recognizing the tribe as an official tribe of New

Jersey. Rather, the Concurrent Resolution merely acknowledges the tribe by the name it wishes to be called, and provides such acknowledgment to allow the tribe to qualify "for appropriate federal funding for Indians." (See Feinblatt Cert., Exhibit A). Thus, the independent source upon which Plaintiff relies to assert its due process rights fails as a matter of law.

Furthermore, even if a protected interest were present, Plaintiff necessarily fails to allege what process might be due. See N.J. Sand Hill Band of Lenape & Cherokee Indians v. Corzine, No. 09-683, 2010 U.S. Dist. LEXIS 66605, at *69 (D.N.J. June 30, 2010). The Amended Complaint alleges that the Defendant disavowed or repudiated the State's earlier official recognition "without proper notice to the Tribe or an opportunity for the Tribe to be heard, or without any of the process required by law before the state can interfere with the Tribe's protected interest." (Amend. Compl. ¶ 58). Given that there are no statutory or administrative standards or procedures in New Jersey for recognition of American Indian tribes, the threadbare allegations that the State, in part, through the Acting Attorney General, did not provide "proper" notice or other process "required by law" constitute mere legal conclusions and labels. Consequently, the procedural due process claim should be dismissed.

POINT IV

COUNT III OF THE SECOND AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO STATE AN EQUAL PROTECTION CLAIM UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In Count III of the Second Amended Complaint, Plaintiff asserts an Equal Protection claim based on the theory that the State discriminated against Plaintiff, as an American Indian tribe, when it allegedly repudiated official recognition of the tribe. (Amend. Compl. ¶¶ 67-71). Plaintiff alleges that such action constitutes discrimination based on race in violation of the Equal Protection Clause of the U.S. Constitution and that the tribe has been irreparably injured as a result. (Amend. Compl. ¶ 72).

Like Plaintiff's Due Process claims, Plaintiff has made unadorned allegations of discriminatory conduct against the State. N.J. Sand Hill Band, supra, No. 09-683, 2010 U.S. Dist. LEXIS 66605, at *65 (citing Iqbal, supra, 556 U.S. at 678). Plaintiff's Equal Protection claim should be dismissed because Plaintiff has not alleged that the tribe was treated differently than members of a similarly situated class. The Fourteenth Amendment prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To sustain a cause of action on Equal Protection grounds, Plaintiff must allege that it is a member of a protected class that was

treated differently from members of a similarly situated class. Bradley v. U.S., 299 F.3d 197, 206 (3d Cir. 2002). Persons are similarly situated when they are alike "in all relevant aspects." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

Plaintiff alleges that as an American Indian tribe, it is a suspect class (race) and that the State's failure to recognize Plaintiff as an official tribe of the State constituted discrimination based on race. (Amend. Compl. ¶¶ 67-68). The Amended Complaint, however, fails to address *how* the State selectively discriminated against Plaintiff. N.J. Sand Hill Band, supra, No. 09-683, 2010 U.S. Dist. LEXIS 66605, at *65. In order to state such a claim, Plaintiff must show that the State's action classified or distinguished between two or more relevant persons or groups. Johnson v. Rodriguez, 110 F.2d 299, 306 (5th Cir. 1997). If the State action does not so distinguish, the action does not deny equal protection. Ibid.

Here, Plaintiff does not plausibly allege that the State's "recognition" of American Indian tribes can be compared to the State's treatment of other racial groups.[12] When properly limited to

[12] Paragraph 70 of the Amended Complaint asserts that the "Defendant does not require that similarly situated non-American-Indian New Jersey residents with questions of state policy pending before his office disclaim interests in casino gaming before he evaluates their concerns." The pleading does not plausibly allege, however, that all persons with state policy issues before the Defendant are similarly situated with Plaintiff (particularly when the issue involves recognition of American Indian tribes).

the realm of American Indian tribes, Plaintiff fails to allege a single fact that suggests that the State singled out the Tribe, or treated this tribe any differently from similarly situated tribes in the State. To the contrary, at various points in the Amended Complaint, Plaintiff asserts that the State has wrongfully repudiated its claimed recognition of the Tribe, as well as that of two other tribes, the Ramapough Mountain Indians and the Powhatan Renape Nation. (See, e.g., Amend. Compl. ¶¶ 39, 43). Thus, Plaintiff fails to state a claim that the State violated its equal protection rights and this claim should be dismissed.

CONCLUSION

For the foregoing reasons, the Second Amended Complaint should be dismissed in its entirety for lack of subject matter jurisdiction and failure to state a claim.

Respectfully submitted,

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