No. 16-1137

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS; AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.; TOWN OF AQUINNAH, MA,
Plaintiffs-Appellees

v.

THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH); THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC.; THE AQUINNAH WAMPANOAG GAMING CORPORATION,
Defendants-Appellants

v.

CHARLES D. BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts; MAURA T. HEALY, in her capacity as Attorney General of the Commonwealth of Massachusetts; STEPHEN P. CROSBY, in his official capacity as Chairman of the Massachusetts Gaming Commission,
Third-Party Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(HON. F. DENNIS SAYLOR, IV)

UNITED STATES' BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS AND IN SUPPORT OF REVERSAL

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The United States respectfully submits this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a).

INTEREST OF THE UNITED STATES

The Wampanoag Tribe of Gay Head (Aquinnah) ("the Tribe" or "Aquinnah") appeals a district-court judgment prohibiting the Tribe from building or operating a gaming facility on tribal trust lands located within the Town of Aquinnah ("the settlement lands") without complying with the laws and regulations of Massachusetts and the Town. Whether the Tribe's gaming is subject to state and local law, however, turns on which of two federal statutes regulates the Tribe's gaming plans: the Massachusetts Indian Land Claims Settlement Act of 1987 ("Massachusetts Settlement Act"), 25 U.S.C. §§ 1771–1771i; or the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §§ 2701–2721.

The Massachusetts Settlement Act was enacted during a "gap" period, just after the United States Supreme Court had held that California (and consequently many other states) lacked civil regulatory authority over on-reservation tribal gaming activities, and before Congress had filled that gap by enacting comprehensive tribal gaming procedures. Consequently, the Settlement Act expressly provided that gaming on the settlement lands must comply with Massachusetts and town law. A year later, Congress filled the regulatory gap by enacting IGRA, which established a comprehensive scheme for regulating tribal gaming on Indian lands.

The United States has a substantial interest in the administration of these two federal statutes and how they inter-relate. The United States has a trust responsibility to the Tribe and an interest in ensuring that its Settlement Act is fairly administered. It also has an interest in the proper implementation of IGRA, by which Congress "struck a careful balance among federal, state, and tribal interests" in adopting a "comprehensive approach" to tribal gaming. *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1247 (11th Cir. 1999). The National Indian Gaming Commission ("NIGC") has significant responsibilities under IGRA. The NIGC Chair approves tribal gaming ordinances and may exercise enforcement authority. 25 U.S.C. §§ 2705, 2706, 2710. The Department of the Interior ("Interior") also has duties under IGRA, including the approval of tribal/state gaming compacts and the issuance of procedures. *See id.* § 2710(d)(8); 25 C.F.R. pt. 293. Additionally, Interior administers aspects of the Massachusetts Settlement Act related to the settlement lands. 25 U.S.C. §§ 1771a, 1771d. Both NIGC and Interior have opined that IGRA applies to the settlement lands.

ISSUES PRESENTED

This amicus brief addresses the following issues:

(1) Whether the Tribe exercises sufficient governmental power over the settlement lands to meet the standard for "Indian lands" under IGRA.

(2) Whether IGRA impliedly repealed the Massachusetts Settlement Act's provision that authorized state and local jurisdiction over gaming activities on the settlement lands.[1]

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

In 1983, the Wampanoag Tribal Council of Gay Head, the Commonwealth of Massachusetts, the Town of Gay Head, Massachusetts (now the Town of Aquinnah), and a local association of taxpayers (now the Aquinnah/Gay Head Community Association) entered into a Joint Memorandum of Understanding (the "Settlement Agreement") intended to resolve litigation over whether the Tribal Council held

[1] The Tribe also asserts that the state's complaint should have been dismissed because the United States is a required party under Rule 19(a)(1)(B)(ii), Fed.R.Civ.P. The district court concluded to the contrary. On appeal, the Tribe argues that it could be subject to inconsistent obligations, citing the possibility of an NIGC enforcement action. *See* Appellants' Op. Br. at 50–51, 55. But the Tribe does not cite any concrete *obligations* under IGRA that would subject it to NIGC enforcement if the Tribe also complies with state or town laws. *See* 7 Wright & Miller, Fed. Prac. & Proc. Civ. § 1604 (3d. ed.) ("The key is whether the possibility of being subject to multiple obligations is real; an unsubstantiated or speculative risk will not satisfy the Rule 19(a) criteria."); *United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275, 298 (W.D. Mich. 1988) (the possibility of additional state law obligations or enforcement did not make Michigan a required party to United States enforcement action), *appeal dismissed on other grounds*, 867 F.2d 611 (6th Cir. 1989). The recent NIGC and Interior opinions cited by the Tribe (Op. Br. at 51 n.10) that regard the applicability of IGRA to Texas tribes with a different settlement act and litigation history do not transform the risk of enforcement against this Tribe from speculative to substantial. The United States is not a required party to this suit under Rule 19(a)(1)(B)(ii).

aboriginal title to certain lands within the town. Add. 37.[2] The Settlement Agreement created a tribal land corporation that would hold in trust certain "settlement lands," and extinguished the Tribal Council's land claims. Add. 37–38. The Settlement Agreement provided that the settlement lands would be "subject to all Federal, State, and local laws, including Town zoning laws," except for hunting regulations, and the lands would be exempt from state property taxes. Add. 38. The Massachusetts Legislature enacted implementing legislation in 1985. For the Settlement Agreement to take effect, it required Congressional approval. *Id.*

In 1985, Congress considered, but did not enact, implementing legislation. The proposed legislation provided that state and local laws would apply on the settlement lands and that no tribe would exercise jurisdiction over those lands, except for certain hunting activities. S. 1452, §§ 5(a)(1)(C), 7, 99th Cong. (1985) (Ex. 1); H.R. 2868, §§ 5(a)(1)(C), 7, 99th Cong. (1985) (Ex. 2).

Before the settlement legislation was reintroduced in the next Congress, the Supreme Court decided a high-profile case addressing state authority to regulate gaming on Indian lands, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In *Cabazon*, the State of California sought to bar high-stakes bingo games operated by a tribe, citing a state law that permitted bingo only for charity and

[2] Citations to "Add." are to the Defendants-Appellants' Opening Brief Addendum; Citations to "App. Vol. I" or "App. Vol. II" are to the Appendices to the Opening Brief.

pursuant to certain requirements. *Id.* at 205–06. The Court first noted that state laws may be applied to tribal Indians on their reservations only "if Congress has expressly so provided." *Id.* at 207. It then concluded that, in enacting Public Law 83-280, Congress granted six states, including California, complete criminal jurisdiction over portions of Indian country, but that it had not authorized California to exercise general civil regulatory authority over tribes. *Id.* at 207–08. The Court consequently held that federally recognized Indian tribes in a Public Law 83-280 state have a right to conduct gaming on Indian lands without state regulation if located in a state that permits the gaming. *Id.* at 209–10. Because California did not criminally prohibit the type of gaming engaged in by the tribe, it could not civilly regulate it. *Id.* at 211–12.

That same month, the United States, through Interior's acknowledgment process, formally recognized the Wampanoag Tribe of Gay Head (Aquinnah). 52 Fed. Reg. 4193 (Feb. 10, 1987).

In Congress, the Massachusetts settlement legislation was introduced again. H.R. 2855, 100th Cong. (1987) (Ex. 3). In August 1987, Congress enacted the legislation. Pub. L. 100-95, 101 Stat. 704, *codified at* 25 U.S.C. §§ 1771–1771i. The statute's language generally resembles the prior bills, but contains important differences. The statute does not include the expansive prohibition on tribal jurisdiction contained in the earlier bills, but rather allows for tribal jurisdiction with specified limitations. *See* 25 U.S.C. § 1771e(a) (Tribe cannot exercise jurisdiction over non-members or in contravention of federal, state, or local laws); *see also* H. Rep. No.

100-238, at 6 (1987) (The Tribe may exercise concurrent jurisdiction "as long as such jurisdiction is consistent with the civil and criminal laws of the State and the Town"). With respect to the applicability of state and town laws on the settlement lands, the statute provides that:

> the settlement lands . . . shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).

25 U.S.C. § 1771g. Following the enactment of the settlement legislation, Interior took the settlement lands into trust for the Tribe. Add. 38.

In October 1988, a year after the Settlement Act, the same Congress enacted IGRA, 25 U.S.C. §§ 2701–2721, which establishes a comprehensive scheme governing gaming on Indian lands in light of the Supreme Court's decision in *Cabazon*. *See, e.g.*, *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2034 (2014) ("Congress adopted IGRA in response to [*Cabazon*], which held that States lacked any regulatory authority over gaming on Indian lands."); *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1080 (7th Cir. 2015) ("*Cabazon* led to a flood of activity, and states and tribes clamored for Congress to bring some order to tribal gaming.").

IGRA provides "for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and "for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences." 25 U.S.C. § 2702.

Congress found that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." *Id.* § 2701(5). Notably, the Senate Report issued in 1988 explains that IGRA is "intended to expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 100-446, at 6 (1988), *reprinted in* 1998 U.S.C.C.A.N. 3071, 3076.

IGRA divides gaming into three classes. Class I consists of social games with prizes of minimal value and traditional Indian games. 25 U.S.C. § 2703(6). Tribes exclusively regulate these activities. *Id.* § 2710(a)(1).

Class II—which is directly at issue in this case—includes "the game of chance commonly known as bingo." *Id.* § 2703(7)(A)(i). IGRA provides that a tribe "may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction," if—

> (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and
>
> (B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the [NIGC] Chairman.

Id. § 2710(b)(1). Congress defined the term "Indian lands" to include "any lands . . . held in trust by the United States for the benefit of any Indian tribe . . . and over

which an Indian tribe exercises governmental power." *Id.* § 2703(4). Class II gaming is subject to federal oversight by the NIGC. *See id.* §§ 2705.

Class III gaming is any form of gaming other than Class I or II. *Id.* § 2703(8). Slot machines, lotteries, and casino games are Class III games. 25 C.F.R. § 502.4. IGRA authorizes a tribe to engage in Class III gaming on Indian lands within its jurisdiction, but only if (1) the tribe has an NIGC-approved ordinance; (2) the state "permits such gaming for any purpose by any person, organization, or entity"; and (3) the tribe and the state enter into a compact, approved by the Secretary of the Interior, to govern the gaming. 25 U.S.C. § 2710(d).

II. STATEMENT OF FACTS AND PROCEEDINGS BELOW

This case involves a dispute over whether the Settlement Act or IGRA governs the Tribe's proposed Class II gaming on its settlement lands. In 2013, the Tribe submitted a Class II gaming ordinance to NIGC for parcels located on the settlement lands, which was approved by operation of law. Add. 44. The Tribe requested an opinion from NIGC regarding whether settlement lands on which the Tribe desired to operate a bingo facility were eligible for gaming under IGRA. *Id.*

As the applicability of IGRA required interpretation of the Settlement Act, the NIGC's Office of General Counsel sought the Department of the Interior's opinion, which concluded that the Tribe had jurisdiction over the settlement lands pursuant to the Settlement Act and that IGRA impliedly repealed those portions of the Settlement Act providing for state and local regulation of gaming. App. Vol. I 214, 220–231

(Interior Aug. 23, 2013 Letter); App. Vol. I 233, 236 (NIGC Oct. 25, 2013 Letter). NIGC considered whether the settlement lands, held in trust by the United States, qualified as "Indian lands." It concluded that the Tribe exercised governmental power because the tribal government "is responsible for providing a full range of services to its members, including education, health and recreation, public safety and law enforcement, public utilities, natural resource management, economic development and community assistance." *Id.* at 236. NIGC concluded that the Tribe's settlement lands constituted "Indian lands" and were eligible for gaming under IGRA. *Id.* at 237.

Following NIGC's approval of the gaming ordinance, Massachusetts filed an action in state court against the Tribe and its gaming subsidiary, seeking a declaratory judgment that the Tribe would breach the 1983 Settlement Agreement if it operated a gaming facility without complying with state law, and an injunction to prohibit the Tribe from gaming on the settlement lands. Add. 45. The Tribe removed the case to federal district court, and the Town of Aquinnah and the Aquinnah/Gay Head Community Association ("Community Association") intervened as plaintiffs. Add. 46. The Tribe filed counterclaims against Massachusetts and government officials concerning Massachusetts's assertion of jurisdiction over gaming on the Tribe's settlement lands. *Id.*

The district court dismissed the counterclaims against Massachusetts, and the parties addressed the remaining claims through summary-judgment motions. *Id.* The

district court granted summary judgment to the state, the town, and the Community Association. The district court relied on the analytical framework of *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994), in which this Court considered whether IGRA applied to tribal lands acquired pursuant to the Rhode Island Settlement Act of 1978, 25 U.S.C. §§ 1701–1716. In that case, this Court stated that IGRA applies only to an "Indian tribe having jurisdiction over Indian lands," and that IGRA defines "Indian lands" in part as land over which "an Indian tribe exercise[s] governmental power." 19 F.3d at 701 (quoting 25 U.S.C. §§ 2710(d)(3)(A), 2703(4)). This Court also considered the interaction between IGRA and the Rhode Island Settlement Act, concluding that IGRA impliedly repealed the portion of the Rhode Island Settlement Act providing for state jurisdiction over gaming on the settlement lands. *Id.* at 704–05.

Applying *Narragansett*'s framework, the district court held that the Tribe made the necessary showing under IGRA that it had jurisdiction over the settlement lands, Add. 53; but that the Tribe failed to demonstrate sufficient exercise of governmental power over its lands to meet the standard established in IGRA. Add. 60–61. It cited the Tribe's lack of a full-fledged police department and the inability of the Tribe's two rangers to enforce state or town laws without being cross-deputized by a non-tribal authority. The district court found that the Tribe also did not provide sufficient examples of actually providing governmental services, noting the Tribe's underfunded

health clinic and public housing, lack of public schools, a taxation system, and a criminal code, and its part-time judiciary. Add. 25–27.

As an alternative holding, the district court concluded that IGRA had not impliedly repealed the Settlement Act's state-law gaming requirements. The district court found that IGRA and the Settlement Act could be read harmoniously. Add. 30–33. The court relied on two IGRA provisions, explaining that tribes have the right to engage in gaming only if the gaming is not "specifically prohibited … by Federal law." 25 U.S.C. §§ 2701(5), 2710(b)(1)(A). The court reasoned that the Settlement Act's application of state and town gaming laws to the Tribe constituted a "prohibition" on gaming and there was thus no "irreconcilable conflict" between the Settlement Act and IGRA. Add. 32–33. The district court also relied on the strong presumption against implied repeals, see *Passamaquoddy Indian Tribe v. Maine*, 75 F.3d 784, 790 (1st Cir. 1996). Add. 35.

Based on its conclusions that the Tribe did not meet its burden to demonstrate sufficient "governmental power" and that IGRA had not impliedly repealed the Settlement Act, the district court held that the Tribe could not operate a gaming facility on the settlement lands without complying with state and local gaming laws. Add. 72–73.

SUMMARY OF ARGUMENT

The district court applied too demanding a standard—requiring far more than this Court did in *Narragansett*—in concluding that the Tribe did not exercise sufficient governmental power over its lands to be deemed "Indian lands" under IGRA. In *Narragansett*, this Court determined that "strides" the tribe had taken "in the direction of self-government" were more than adequate. 19 F.3d at 703. The record contains evidence of similar strides by Aquinnah: the Tribe's codes, ordinances, and intergovernmental agreements; its administration of federal funds and programs for housing, environmental pollution, and health care; and the exercise of law-enforcement authority by tribal rangers. NIGC and Interior have found similar evidence relevant in determining whether lands meet the standard to qualify as Indian lands under IGRA. Under *Narragansett*, the evidence here demonstrates "more than enough" governmental power over the settlement lands. *See id.* at 703. The district court's onerous standard would significantly undermine IGRA's purpose of promoting tribal economic development, self-sufficiency, and strong tribal governments. *See* 25 U.S.C. § 2702(1).

The district court further erred in holding that IGRA did not impliedly repeal those portions of the Massachusetts Settlement Act that subject the settlement lands to state and town gaming laws. The Massachusetts Settlement Act subjected the Tribe to two kinds of state and local laws: those that prohibit gaming and those that regulate gaming. The district court improperly conflated those into one in order to

force it into IGRA's exception for games that are otherwise "specifically prohibited... by Federal law." 25 U.S.C. § 2710(b)(1). That reading undermines the heart of IGRA's Class II gaming provision which prohibits tribal operation of such games only if they are absolutely prohibited under state law. If they are not absolutely prohibited under state law, tribes as a matter of federal law (IGRA) may conduct such gaming even though a state regulates that activity on non-Indian lands. In IGRA, Congress specifically intended to allow tribes to operate Class II games that were regulated, but not absolutely prohibited, under state law. IGRA impliedly repealed the Settlement Act to the extent of the conflict. In *Narragansett*, this Court found that IGRA repealed portions of Rhode Island's 1978 Indian Claims Settlement Act, which provided for state jurisdiction over tribal settlement lands. The district court distinguished *Narragansett* because the Rhode Island Settlement Act did not expressly reference gaming in its grant of jurisdiction. But the Massachusetts Settlement Act was enacted nearly ten years after the Rhode Island Settlement Act and after the 1987 Supreme Court's decision in *Cabazon*. Through IGRA, Congress intended to resolve the uncertainty generated by *Cabazon* and establish a comprehensive Indian gaming scheme. Reading the Settlement Act and IGRA together to limit state and local jurisdiction over gaming honors IGRA and leaves "the heart of the Settlement Act untouched." 19 F.3d at 704.

ARGUMENT

1. The district court erred in concluding that the Tribe exercised insufficient governmental power over the settlement lands to meet the standard of "Indian lands" under IGRA.

While the district court correctly concluded that the Tribe had sufficient "jurisdiction" over its lands to meet IGRA's requirement,[3] it erred in concluding that the Tribe does not exercise sufficient governmental power over those same lands to be deemed "Indian lands" under IGRA. The pertinent provision of IGRA defines "Indian lands" in part to include trust lands outside the limits of a reservation where the tribe "exercises governmental power" over those lands. 25 U.S.C. § 2703(4). IGRA does not further specify the degree to which or how a tribe must exercise that power. The NIGC has not formulated a uniform definition of "exercise of governmental power" but rather engages in a case-specific evaluation as the circumstances of individual tribes vary widely.[4] However, NIGC has considered the

[3] The parties here stipulated that the Tribe has exercised jurisdiction over the Settlement Lands pursuant to the Massachusetts Settlement Act. Add. 53. While the Settlement Act places some limits on the Tribe's exercise of jurisdiction, *see* 25 U.S.C. § 1771e, it does not "unequivocally articulate an intent to deprive" the Tribe of jurisdiction. *Narragansett*, 19 F.3d at 702. Because the Act's grant of jurisdiction to Massachusetts is non-exclusive and the Tribe exercises at least some level of jurisdiction, the Tribe met its burden under this factor. *See id.*

[4] *National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12,382, 12,388 (1992).

following examples relevant: governmental agreements pertaining to the land;[5] supervision of the land;[6] governmental services;[7] and adoption of tribal ordinances.[8]

In *Narragansett*, this Court found that the tribe had "taken many strides in the direction of self-government," citing the following factors:

> It has established a housing authority, recognized as eligible to participate in the Indian programs of the federal Department of Housing and Urban Development.... It has obtained status as the functional equivalent of a state for purposes of the Clean Water Act.... The Tribe administers health care programs under an [Indian Self-Determination and Education Assistance Act (ISDA)] pact with the Indian Health Service, and, under ISDA contracts . . . administers programs encompassing job training, education, community services, social services, real estate protection, conservation, public safety, and the like.

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[5] Letter from NIGC Office of General Counsel to Stephen Ward re: Quapaw Indian Tribe, Nov. 21, 2014, at 7 (agreements with local law enforcement to provide support for tribal police), *available at* http://www.nigc.gov/images/uploads/indianlands/Quapaw2194%2034.pdf.

[6] Letter from NIGC Acting General Counsel to Chairperson Walker-Grant, Jan. 10, 2014, at 4 (tribal police patrol lands to protect cultural sites and water-storage facility.), *available at* http://www.nigc.gov/images/uploads/indianlands/2014.01.10%20Letter%20to%20Tribe%20fr%20OGC%20re%20Indian%20lands%20opinion%20-%2060%20acre%20parcel.pdf.

[7] Mem. to NIGC Chairman from NIGC Office of General Counsel re: Big Sandy Rancheria, Sept. 6, 2006, at 5–6 (provision of housing services, food delivery, home repair, and refuse removal), *available at* http://www.nigc.gov/images/uploads/indianlands/bigsandyrancheriaflo.pdf.

[8] Mem. to NIGC Chairman from NIGC Office of General Counsel re: Bear River Band of Rohnerville Rancheria, Aug. 5, 2002, at 7, *available at* http://www.nigc.gov/images/uploads/indianlands/2002.08.05%20Bear%20River%20Band%20ILO.pdf.

19 F.3d at 703. Without examining the degree of progress in each cited area, the Court concluded that the tribe had "exercised more than enough" governmental power for its lands to qualify as "Indian lands" under IGRA. *Id.*

Although the district court faulted the Aquinnah Tribe for not demonstrating "concrete manifestations" of its exercise of governmental powers, the Tribe, just as in *Narragansett,* has "taken many strides in the direction of self-government." First, as explained in a deposition of Tribal Chairman Tobias Vanderhoop that was attached to the Community Association's summary-judgment papers (Dkt. 134, filed July 23, 2013), the Tribe has established a tribal housing entity that regularly develops and submits Indian housing maintenance plans to the federal Department of Housing and Urban Development (HUD) and obtains HUD subsidies. Deposition of Tobias Vanderhoop, July 1, 2015 ("Vanderhoop Dep.") at 123 (Ex. 4 at 5). Under its tribal housing ordinance, the Tribe also developed 30 housing units on settlement lands with HUD financing. *Id.* at 126–127 (Ex. 4 at 6). The district court noted that the Tribe does not provide "any public housing beyond that which is funded by HUD." Add. 60. But there is no evidence that the Narragansett Tribe's housing referred to in this Court's decision was funded *other* than by HUD. Requiring tribes to independently fund housing or other programs as a threshold for eligibility for IGRA undermines the tribal economic-development and self-sufficiency purposes of the Act. *See* 25 U.S.C. § 2702(1).

Second, the Environmental Protection Agency ("EPA") has designated Aquinnah to be treated like a state for grant purposes under five statutes administered by the EPA, including the Clean Water Act, 33 U.S.C. §§ 1251–1388, and the Clean Air Act, 42 U.S.C. §§ 7401–7671q. Vanderhoop Dep. at 48, 253–54 (Ex. 4 at 4, 9–10). As part of the Tribe's Clean Air Act program, it takes on some of EPA's data-collection responsibilities. *Id.* Despite this Court's recognition that being the functional equivalent to a state is an indicia of a tribe's governmental power, 19 F.3d at 703, the district court failed to give this appropriate weight when evaluating Aquinnah.

Third, Aquinnah has self-governance compacts with both the Indian Health Service (IHS) and the Bureau of Indian Affairs, Vanderhoop Dep. at 246–49 (Ex. 4 at 7), another example of governmental power relied on by this Court. Tribes participating in the IHS self-governance program take on full funding, control, and accountability for those programs, services, functions, and activities that the Tribe chooses to assume.[9] Of the 567 federally recognized tribes, fewer than a quarter, including Aquinnah, currently participate in the IHS self-governance program.[10] As the Tribal Council President stated, Aquinnah's self-governance compacts indicate a

[9] About Us, What is the Self-Governance Program?, Indian Health Service, *available at* https://www.ihs.gov/selfgovernance/aboutus.

[10] Self-Governance Tribes, Indian Health Service, *available at* https://www.ihs.gov/selfgovernance/tribes/.

"mature tribal government program." *Id.* at 247 (Ex. 4 at 7). Under its compacts, the Tribe provides direct services through a health clinic, contracts with other health-service providers to pay for services for its members, provides education scholarships and youth programs, and has natural-resource programs to maintain tribal lands. *Id.* at 247–48 (Ex. 4 at 7).

In addition to the examples of governmental power referenced in *Narragansett*, the Tribe also provided evidence of tribal ordinances it has enacted and implemented, including laws concerning building codes, historic preservation, natural resources and wildlife, housing, elections, the judiciary, background checks, and reporting of child abuse and neglect. Add. 56. There is also evidence of its exercise of law-enforcement authority through two tribal conservation rangers. *Id.*[11]

IGRA requires only that a tribe has exercised such power; it does not require that any particular degree of governmental power be demonstrated. The evidence put forward by the Tribe demonstrates that it has exercised governmental power at least at the level found sufficient by this Court in *Narragansett.* Indeed, the NIGC opined

[11] Relying on the only other case besides *Narragansett* to address IGRA's reference to "governmental powers," *Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523 (D.S.D. 1993), the district court implied that because the town, and not the Tribe, provides the essential law-enforcement services, governmental power is lacking. Add. 25. But the court in *Cheyenne River Sioux* set forth five different factors, only one of which touched on law enforcement, and did not elaborate on whether the listed factors were weighted or whether the presence or absence of any one factor was dispositive. 830 F. Supp. at 528.

that the Tribe exercised sufficient governmental power in its August 2013 letter to the Tribe, relying on Aquinnah's provision of a range of services to its members, including education, health, and law enforcement. App. Vol. I 236.

The district court's high standard for assessing governmental powers would undermine IGRA's applicability and frustrate Congress's intent to use gaming as a mechanism to promote tribal economic development. For example, while it is true that Aquinnah's rangers cannot arrest non-tribal members without cross-deputization agreements, nearly *all* tribes enter into such agreements with other governmental agencies.[12] And although the district court cited the Tribe's lack of a "full-fledged" police department, many tribal police departments are small.[13] The district court also cited the lack of a full-time judge, but statistics from 2002 indicate that the majority of tribal-court systems employed only one full-time judge while many others, like Aquinnah, rely on part-time judges.[14]

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[12] *See* Bureau of Justice Statistics, Census of Tribal Justice Agencies in Indian Country iii (2002), *available at* www.bjs.gov/content/pub/pdf/ctjaic02.pdf (reporting that 99% of tribes had cross-deputization agreements).

[13] *See* Stewart Wakeling, et al., Policing on American Indian Reservations: A Report to the Department of Justice 23 (2001), *available at* https://www.ncjrs.gov/pdffiles1/nij/188095.pdf (reporting that in 2001, 150 tribal police departments employed fewer than nine officers).

[14] Indian Law Resource Center, Restoring Safety to Native Women and Girls and Strengthening Native Nations: A Report on Tribal Capacity for Enhanced Sentencing and Restored Criminal Jurisdiction 78 (Fall 2013), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwiYkayfnYrNAhVDcj4KHd6HAawQFggjMAE&url=http%

The district court also found it "important[]" that "the Tribe has no tax system in place on the lands to fund any future governmental services." Add. 60. However, tribes rarely levy property taxes or impose income taxes on tribal members.[15] The Tribe stated that its governmental programs are being provided "to the greatest extent possible by the Tribe and would be provided to a much greater extent if the Tribe had governmental revenue generated by a gaming facility." Defs. Reply Mot. Summ. J., *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, No. 13-cv-13286, 2015 WL 8028884 (D. Mass. filed Aug. 18, 2015). Courts have recognized that Indian tribes conduct gaming under IGRA to raise revenues for essential governmental functions. *See, e.g., Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Att'y for W. Dist. of Mich.*, 369 F.3d 960, 962 (6th Cir. 2004) (IGRA gaming operations "fund[] hundreds of tribal government positions responsible for administering programs such

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3A%2F%2Findianlaw.org%2Fsites%2Fdefault%2Ffiles%2FTribalCapacityReport_Final_1.pdf&usg=AFQjCNGm1lK5xUj7SAILcJxMO9mOGsLd4Q&sig2=jgFZOb_RUGl3s0K8cE7UHA (81 tribal legal systems lacked full-time tribal judges, and 51 had one full-time judge).

[15] *See, e.g.*, Matthew L.M. Fletcher, In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue, 80 N.D. L. Rev. 759, 771–72 (2004) ("Tribal governments . . . have virtually no tax base" and "[p]roperty tax revenue is generally unavailable to tribal governments, mostly because taxing tribal members would be pointless and counterproductive."); Robert A. Williams, Jr., Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982, 22 Harv. J. on Legis. 335, 385 (1985) ("Other than the relatively small number of Indian Nations aggressively developing their mineral and energy reserves, few Indian communities enjoy the thriving economic environment necessary to sustain a stable tax base.").

as health care, elder care, child care, youth services, education, housing, economic development and law enforcement.").

In sum, the district court applied an overly stringent standard in assessing the degree of the Tribe's exercise of governmental powers—beyond what is required by IGRA, by this Court's decision in *Narragansett*, and by the NIGC. It also did not give sufficient weight to the many manifestations of governmental power presented by the Tribe. It thus erred in its conclusion that the settlement lands do not qualify as Indian lands under IGRA.

2. IGRA impliedly repealed those portions of the Massachusetts Settlement Act that provide for state and local regulation over the Tribe's proposed gaming activities.

Implied repeals are rare, but may occur where provisions in two statutes are in irreconcilable conflict. *Narragansett*, 19 F.3d at 704 (citing *Watt v. Alaska*, 451 U.S. 259, 266 (1981)). The Settlement Act requires that the lands at issue be subject to state and local law "including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance." 25 U.S.C. § 1771g. This is in direct conflict with IGRA, which allows tribes to operate any Class II game unless the state in which the tribe is located has an absolute ban on the conduct of that game. Thus, where a form of game is permissible under state law, IGRA allows tribes to conduct such games. *See* 25 U.S.C. §§ 2701(5), 2710(b)(1)(A). In enacting IGRA, Congress intended to create a comprehensive Indian gaming regime to fill the regulatory gap created by *Cabazon*. As the later-enacted statute, it therefore impliedly

repealed the Settlement Act's gaming provision, which was enacted during a period of uncertainty over state power to regulate gaming on Indian lands.

The district court erred in its attempt to reconcile these two statutes. Citing a provision in IGRA that tribes may not conduct Class II gaming that is "otherwise specifically prohibited" by federal law (25 U.S.C. § 2710(b)(1)(A)),[16] the district court concluded that the Massachusetts Settlement Act is such a prohibition. But this overstates the import of the Settlement Act, which itself drew a distinction between "prohibit[ion]" and "regulat[ion]." This is an important distinction, given the Supreme Court's decision in *Cabazon*. Congress enacted IGRA in direct response to *Cabazon*. Thus, where the Supreme Court in *Cabazon* drew a sharp distinction between criminal prohibitions and civil regulatory programs, Congress must be considered to have been acting similarly when it used the term "prohibited." *Cf. Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) (presuming that Congress meant to refer to the common law interpretation of terms). When, in IGRA, Congress referred to gaming "otherwise specifically prohibited" by federal law, it meant only those

[16] As a preliminary matter, IGRA's legislative history shows that Congress clearly intended the "otherwise specifically prohibited" language to refer to "gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175 [the Johnson Act]." S. Rep. 100-446, at 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082. The Johnson Act prohibits the use of certain gambling devices in Indian country and certain other geographic areas. These devices are not at issue in this case. If this phrase is deemed to extend beyond the Johnson Act, it must still be construed against the backdrop of *Cabazon*'s prohibitory/regulatory distinction.

games that were absolutely prohibited, not merely those subject to civil regulatory regimes. In Massachusetts, bingo falls into the latter category.

For decades Massachusetts has provided for bingo by charitable organizations that obtain state licenses. Mass. Gen. Law. Ann. ch. 10, § 38 (added in 1973). Indeed, the 1988 IGRA Senate Report acknowledged that Massachusetts and 44 other states permitted "some forms of bingo," rather than criminally prohibiting bingo, and that "tribes with Indian lands in those States are free to operate bingo on Indian lands, subject to the regulatory scheme set forth in the bill." S. Rep. No. 100-446, at 11–12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3081–82.

In the context of deciding whether a state "permits" gaming for purposes of IGRA, courts have incorporated the regulatory/prohibitory distinction set forth in *Cabazon*. *See, e.g.*, *Ho-Chunk Nation*, 784 F.3d at 1082 ("*Cabazon's* regulatory/prohibitory distinction applies when determining whether state law permits (or does not prohibit) gambling for the purposes of IGRA."); *Mashantucket Pequot Tribe v. Conn.*, 913 F.2d 1024, 1029 (2d Cir. 1990) (explaining that the IGRA "Senate Report specifically adopted the *Cabazon* rationale as interpretive of the requirement in section 2710(b)(1)(A)" that Class II gaming be located within a state that permits such gaming). Thus, one must look not to whether the state or local government prohibits *unlicensed* gaming, but whether it entirely prohibits the activity.[17]

[17] This interpretation is also consistent with the text of the Massachusetts Settlement Act, which references laws that either "prohibit *or* regulate" the conduct of gaming.

Just as in *Narragansett,* this Court also should hold that IGRA impliedly repeals the pertinent provision of the Settlement Act. First, if two acts are repugnant, the later act operates, to the extent of the repugnancy, as a repeal of the first. 19 F.3d at 703, 704. Second, courts should read conflicting statutes to "minimize the aggregate disruption of congressional intent." *Id.* at 704–05.

The Rhode Island Settlement Act stated that, with two exceptions not relevant here, "the [Narragansett] settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708. The Court concluded that IGRA, as the later-passed statute, trumped the Rhode Island Act to the extent of their "irreconcilable conflict." 19 F.3d at 704. This result, the court found, minimized the "disruption of congressional intent":

> [R]eading the two statutes to restrict state jurisdiction over gaming honors [IGRA and] leaves the heart of the Settlement Act untouched. Taking the opposite tack—reading the two statutes in such a way as to defeat tribal jurisdiction over gaming on the settlement lands—would honor the Settlement Act, but would do great violence to the essential structure and purpose of [IGRA].

Id. at 704–05.[18]

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25 U.S.C. § 1771g (emphasis added). If one considered a state or local law prohibiting unlicensed gaming and permitting licensed gaming to be a specific "prohibition" within the meaning of IGRA, then the words "or regulate" in section 1771g of the Settlement Act would be surplussage. Thus, the Settlement Act cannot be read as a law that "specifically prohibit[s]" Class II gaming.

[18] This Court rejected the state's argument that the Rhode Island Act should prevail because it is the more specific statute. *Id.* at 704 n.21. The Court explained that it was unclear which statute was more specific: While the Rhode Island Act addresses a

The fact that the Massachusetts Act contains an express reference to gaming, which the Rhode Island Act did not, should not change the outcome of the implied repeal analysis. Concluding that IGRA impliedly repealed the Massachusetts Act would still leave the heart of that Act intact, whereas concluding that the Massachusetts Act should prevail would do violence to the essential structure and purpose of IGRA. *See id.*

Further, the Massachusetts Act must be understood in its historical context. The Rhode Island Act was enacted in 1978, long before the Supreme Court's 1987 decision in *Cabazon* generated uncertainty regarding jurisdiction over Indian gaming. By contrast, the Massachusetts Act was reintroduced just months after the *Cabazon* decision with new language expressly addressing the gap created by *Cabazon*. *Compare* S. 1452, § 10, 99th Cong. (Ex. 1) *with* H.R. 2855, § 9, 100th Cong. (Ex. 3). This suggests that Congress intended for the Massachusetts Settlement Act's provisions on gaming to address the uncertainty in gaming regulation created by *Cabazon*. At the time of the Settlement Act's reintroduction, a version of IGRA was also being considered, S. 555, 100th Cong. (1987), but the final IGRA bill did not pass until October 17, 1988, over a year after the Massachusetts Settlement Act was enacted.

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range of state and tribal jurisdiction over particular lands, IGRA addresses a narrow subset of that jurisdiction (gaming) over a broader category of lands (Indian lands). *Id.* Significantly, this Court further noted that the canon that favors specific statutes over general ones has no application where Congress is "demonstrably" aware of the earlier and more-specific enactment when enacting the more general legislation. *Id.*

To support its conclusion that there was no implied repeal, the district court referenced statements by the then-President of the Wampanoag Tribal Council at an April 1986 Congressional hearing. The President agreed that the bill would not allow the Tribe to "exercise the necessary civil regulatory control on those trust lands which the courts have deemed necessary" and that "no gaming on our lands is now or will in the future be possible." Add. 70–71. But the version of the bill addressed by the President differed in key respects from the version ultimately enacted. The bill addressed by the President included a broad prohibition on the Tribe's exercise of jurisdiction. *See* S. 1452, § 7(a) (99th Cong.) (Ex. 1). In contrast, the bill ultimately enacted allows for concurrent tribal jurisdiction with specified limitations. *See* 25 U.S.C. § 1771e.

The district court also reasoned that the 1996 legislative override of this Court's decision in *Narragansett* "is further evidence that Congress did not intend IGRA to supersede state-specific Indian land settlements." Add. 72. But if that were Congress's intent in 1996, it could have enacted an amendment to IGRA to broadly address these settlements. Instead, Congress enacted a Narragansett-specific fix by amending the Rhode Island Settlement Act to address the applicability of IGRA to the Narragansett tribe's settlement lands. *See* Pub. L. No. 104-208, § 330, 100 Stat. 3009-227 (1996).

Finally, *Passamaquoddy*, 75 F.3d 784, relied upon by the district court, is distinguishable in a very key respect. *Passamaquoddy* involved the interface between

the Maine Settlement Act, enacted in 1980, and IGRA. The Maine Settlement Act, which made state law applicable to the Maine tribe's settlement lands, contained a key provision not present here: that subsequent federal law enacted for the benefit of tribes would not affect the application of state law "unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine." 25 U.S.C. § 1735(b). Because Congress did not make IGRA specifically and expressly applicable within the State of Maine (and thus render Maine law *specifically* inapplicable), the Maine Settlement Act controlled. But the Massachusetts Settlement Act did not include such a provision limiting the application of federal statutes.

In sum, the Massachusetts Settlement Act itself is not a complete "prohibition" on IGRA Class II gaming and therefore cannot be harmonized with IGRA. The two statutes cannot be reconciled because the Settlement Act permits state and local regulation of gaming, but IGRA allows Class II gaming, free from state and local regulation, unless the state has imposed a total ban on all forms of a game, such as all forms of gaming akin to bingo. IGRA, through which Congress intended to create a comprehensive scheme for Indian gaming, impliedly repealed the Settlement Act's provision for state and local jurisdiction over gaming. To conclude otherwise "would honor the Settlement Act, but would do great violence to the essential structure and purpose of [IGRA]." *Narragansett*, 19 F.3d at 705.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed and the case remanded with instructions to direct judgment in favor of the Tribe because (1) the Tribe exercises sufficient governmental power over its settlement lands to qualify under IGRA and (2) IGRA impliedly repealed the Massachusetts Settlement Act provision authorizing state and local regulation over gaming on those lands.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in size 14-point Garamond font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2016 I electronically filed the foregoing documents with the United States Court of Appeals for the First Circuit by using the CM/ECF System, which will serve the brief on the other participants in this case.

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