Nos. 17-215 & 17-216

IN THE

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, *Petitioner*,
v.
THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH);
THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC.;
and THE AQUINNAH WAMPANOAG GAMING
CORPORATION, *Respondents*.

TOWN OF AQUINNAH, MASSACHUSETTS; AQUINNAH/GAY
HEAD COMMUNITY ASSOCIATION, INC., *Petitioners*,
v.
THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH);
THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC.;
and THE AQUINNAH WAMPANOAG GAMING
CORPORATION, *Respondents*.

On Petitions for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, permits tribes to engage in gaming on their own lands, provided they satisfy certain prerequisites not at issue here. The question presented is:

Whether IGRA displaces a provision in the previously enacted Massachusetts Indian Land Claims Settlement Act that allows state or local law to preclude gaming on Wampanoag Aquinnah tribal lands.

RULE 29.6 STATEMENT

The Wampanoag Tribe of Gay Head (Aquinnah), the Wampanoag Tribal Council of Gay Head, Inc., and the Aquinnah Wampanoag Gaming Corporation certify that none has any parent corporation and certifies that it has no stock and therefore no publicly held corporation owns 10% or more of any of their stock.

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STATEMENT OF THE CASE

A. Factual and legal background

1. For at least 10,000 years, members of the Wampanoag Tribe of Gay Head (Aquinnah) have lived on the western peninsula of Martha's Vineyard. The Tribe's first contact with European colonists occurred nearly 400 years ago when they aided the Pilgrims who arrived on the Mayflower.

European colonists soon began settling in the area, bringing new diseases and warfare with them. *See History & Culture*, Wampanoag Tribe of Gay Head (Aquinnah), http://www.wampanoagtribe.net/Pages/Wampanoag_WebDocs/history_culture. When the United States was formed, however, the new country pledged to protect the Tribe's land ownership against local interference. In signing the Nonintercourse Act of 1790, President Washington forbade acquisition of tribal land without federal government consent. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138.

Nevertheless, in the late 1800s, the Commonwealth of Massachusetts began violating the Nonintercourse Act and allowing non-Indians to purchase tribal lands. As part of these practices, the Commonwealth incorporated the Town of Gay Head (now called the Town of Aquinnah), transferring to the Town title to lands previously held by the Tribe. Commonwealth Pet. 5. During the next 100 years, economic development and rising property values on the island forced many tribal members to sell their land and relocate. *See* Pet. App. 107a. Even so, the Tribe maintained a continuous presence on Martha's Vineyard.

In the early 1970s, the Wampanoag Tribal Council of Gay Head, Inc. was formed to initiate efforts to obtain federal recognition, to regain lost tribal lands, and to promote the Tribe's economic self-sufficiency and self-government. The Tribal Council sued the Town, alleging violations of the Nonintercourse Act and claiming aboriginal title to the Tribe's ancestral lands. That litigation culminated in a 1983 memorandum of understanding (hereinafter MOU) with the Commonwealth, the Town, and the Town's Taxpayer Association (now the Aquinnah/Gay Head Community Association, Inc.). The agreement provided for the Tribal Council to acquire about 485 acres of land on Martha's Vineyard in return for relinquishing all claims to other property elsewhere in the Commonwealth. Pet. App. 25a, 77a-86a.

2. In light of Congress's plenary authority over Indian affairs, the MOU required congressional approval to take effect. In 1987, while Congress was drafting legislation to codify the MOU, two things occurred.

First, the Department of the Interior acknowledged the Aquinnah as a federally recognized tribe. Final Determination for Federal Acknowledgement of the Wampanoag Tribal Council of Gay Head, Inc., 52 Fed. Reg. 4193 (Feb. 10, 1987). In so doing, the Department confirmed that the Tribe had maintained a continuous presence on Martha's Vineyard and satisfied the other prerequisites for federal recognition. *See id.*

Second, this Court decided *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In that case, the Court held that states could not enforce their own civil gaming regulations on tribal lands. *Id.* at

221-22. The decision created uncertainty about the extent to which states could limit gaming on tribal lands, leading to both "states and tribes clamor[ing] for Congress to bring some order." Pet. App. 17a (quoting *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1080 (7th Cir. 2015)).

To avoid any complications, such as rising property values, in the land transfer to the Tribe, Congress pressed ahead with codification of the Aquinnah settlement. *See* 133 Cong. Rec. S11,449 (1987). And because of the uncertainty caused by *Cabazon*, lawmakers decided to address gaming rights on a temporary basis in the Aquinnah-specific legislation. *See* U.S. CA1 Br. 1, 2016 WL 3475452.

In August 1987, Congress enacted the Massachusetts Indian Land Claims Settlement Act. First and foremost, the Settlement Act resolved the Tribe's property claims, establishing parcels of tribal land on Martha's Vineyard and clearing land titles on the island. 25 U.S.C. §§ 1771a-1771d. At the tail end of the Act, one subsection addressed state and local jurisdiction, providing (save exceptions not relevant here) that 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)." *Id.* § 1771g.

At the time the Settlement Act became law, Massachusetts permitted limited gaming, including bingo and a state-run lottery. But the Commonwealth's regulations permitted only a few types of organizations, such as religious organizations, veterans' organizations, and non-profit ambulance

services, to host bingo. *See* Mass. Gen. Laws ch. 10, § 38 (1987). The Settlement Act's jurisdictional provision therefore effectively precluded the Tribe from conducting bingo.

3. Fourteen months after the Settlement Act became law, Congress resolved the uncertainty stemming from *Cabazon* by passing the Indian Gaming Regulatory Act (IGRA). IGRA is a carefully crafted compromise between tribal and state interests. Specifically, it protects tribes' interest in "economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1), while also recognizing states' interest in regulating high-stakes gaming, *id.* § 2710(d).

IGRA applies to all qualifying tribes' "Indian lands," defined in part as land over which a tribe "exercises governmental power." 25 U.S.C. § 2703(4)(b); *cf. id.* § 5123(g) (providing that the federal government must treat all federally recognized tribes equally). The statute separates gaming into three classes. Class I gaming covers "social games solely for prizes of minimal value or traditional forms of Indian gaming." *Id.* § 2703(6). Tribes have "exclusive jurisdiction" over such gaming. *Id.* § 2710(a)(1). Class II gaming—the class at issue here—covers "bingo" and some "card games." *Id.* § 2703(7). Under IGRA, tribes share "jurisdiction" over Class II gaming with the federal government to the exclusion of the state—so long as the state does not completely prohibit that type of gaming and the tribe obtains approval of a gaming ordinance or resolution from the National Indian Gaming Commission (NIGC). *Id.* § 2710(a)-(b). Class III gaming encompasses all other forms of gaming, including casino gaming. *Id.* § 2703(8). IGRA provides

that tribes may engage in such gaming through a tribal-state compact. *Id.* § 2710(d).

4. In 1993, the Tribe began trying to open a gaming facility in Massachusetts. As IGRA contemplates, the Tribe's goal was to raise revenue needed to discharge its governmental responsibilities, including providing members with health care, education, elder and day care, and affordable tribal housing. *See Gaming Update and Overview,* Aquinnah Gaming, http://bit.ly/2zdA6Sx. In relatively short order, the Tribe signed a compact with Governor Weld to open the first casino in the Commonwealth. David Stipp, *Indian Tribe in Massachusetts Signs Accord to Open State's First Casino*, Wall Street J., Aug. 24, 1994, at B6. But the state legislature voted down the compact.

Over the next two decades, the Commonwealth and its localities resisted several additional gaming proposals. Most notably, the Tribe developed a plan to procure land outside Martha's Vineyard to construct a Class II gaming facility. The Settlement Act provides for state jurisdiction over newly acquired lands just as it does for settlement lands. 25 U.S.C. § 1771d(g). The Tribe therefore sought and ultimately secured a determination from the Department of the Interior in 1997 that IGRA applies to the Tribe and would "control" over the Settlement Act "[w]ith respect to Class II gaming" on newly acquired lands. Letter of Michael J. Anderson, Acting Asst. Sec'y of Indian Affairs, Dep't of Interior, to Patricia A. Marks, Morisset, Schlosser, Ayer & Jozwiak (Sept. 15, 1997); Exhibit G, ECF No. 107. But the city where the Tribe wished to build the new facility, Fall River, ultimately prevented the Tribe from obtaining the land. Tina

Cassidy, *Bingo Vote Fails in Fall River*, Bos. Globe, May 27, 1998, at C1.

In 2011, the gaming landscape in the Commonwealth changed dramatically. New legislation authorized large-scale casino gaming and established processes for private entities and tribes to obtain such gaming licenses. *See* Mass. Gen. Laws ch. 23K, §§ 2, 9, 25. Soon thereafter, the Tribe asked to begin compact negotiations with the Commonwealth for a Class III gaming facility. But Governor Patrick quickly rejected the Tribe's request. *See* Letter from Jerome L. Levine, Holland & Knight LLP, to Scott Crowell, Crowell Law Office-Tribal Advocacy Grp. (Apr. 20, 2012).

Following this refusal to negotiate and given the persistent pushback from the Commonwealth over the years, the Tribe began efforts to open a smaller facility on tribal settlement lands that would offer IGRA Class II gaming (the "bingo facility"). The modest proposed facility would include at most 300 electronic bingo machines and live bingo. *Gaming Update and Overview,* Aquinnah Gaming, http://bit.ly/2zdA6Sx. Toward this end, the Tribe enacted a site-specific Class II gaming ordinance.

In 2013, the NIGC, in consultation with the Department of the Interior, approved the ordinance.[1] As is relevant here, the Department reasoned that

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[1] Letter from Eric Shepard, Acting Gen. Counsel, Nat'l Indian Gaming Comm'n, to Hon. Cheryl Andrews-Maltais, Chairwoman, Wampanoag Tribe of Gay Head (Aquinnah) (Oct. 25, 2013) [hereinafter Aquinnah NIGC Letter], http://bit.ly/2xRW7Db.

"IGRA and the Settlement Act cannot be read in harmony" because the statutes directly conflict on the question whether the Tribe must "act in conformance with the State's laws when gaming."[2] The Department then determined—as it had in 1997—that IGRA "prevails to the extent of the impasse." Aquinnah DOI Letter at 16. In the Department's view, allowing IGRA to govern the Tribe's gaming would best "respect[] congressional intent." *Id.* at 18.

B. Procedural history

1. Seeking to stop the Tribe from acting on its NIGC approval, the Commonwealth filed suit in Massachusetts state court against the Tribe. The Commonwealth alleged breach of contract (for violating the MOU) and sought a declaratory judgment stating that the Commonwealth may ban gaming on settlement lands. Pet. App. 34a. The Tribe removed the case to federal court, and the Town and Community Association intervened. *Id.*

The district court granted motions for summary judgment against the Tribe on two grounds. Pet. App. 68a. First, the court held that the Tribe does not exercise sufficient governmental power over its lands on Martha's Vineyard for them to be considered "Indian lands" within the meaning of IGRA. *See id.* 53a-54a. Second, the district court concluded that even if the Tribe's lands fall within IGRA, the Settlement Act provision granting state and local jurisdiction over gaming remains in effect. *See id.* 67a. In so concluding,

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[2] Letter from Michael J. Berrigan, Assoc. Solicitor, Div. of Indian Affairs, Dep't of Interior, to Jo-Ann Shyloski, Assoc. Gen. Counsel, Nat'l Indian Gaming Comm'n (Aug. 23, 2013) [hereinafter Aquinnah DOI Letter], http://bit.ly/2z5MEt4, at 16.

the court distinguished the First Circuit's decision in *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir.), *cert. denied*, 513 U.S. 919 (1994) (*Narragansett I*). In *Narragansett I*, the First Circuit held that IGRA impliedly repealed the grant of state and local jurisdiction over gaming in a very similar statute (the Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701-1716). *See Narragansett I*, 19 F.3d at 704-05. The district court found *Narragansett I* distinguishable because "the Rhode Island Settlement Act at issue in *Narragansett I* did not contain any specific language about gaming," Pet. App. 60a, whereas the parenthetical in the Massachusetts Settlement Act that follows the general grant of jurisdiction refers specifically to "gaming on the Settlement Lands," *id.* 58a.

2. The Tribe appealed, and the United States filed an amicus brief arguing that both of the district court's holdings were incorrect. *See* U.S. CA1 Br. 12-13. The First Circuit unanimously reversed. Pet. App. 2a.

The court of appeals first held that "the Tribe has exercised more than sufficient governmental power to satisfy the requirements of IGRA." Pet. App. 2a. Then, the First Circuit turned to the issue of implied repeal. Looking to *Narragansett I*, the First Circuit determined that the Massachusetts Settlement Act conflicted with IGRA just like the Rhode Island Settlement Act had: Both settlement acts gave states control over tribal gaming, whereas IGRA precluded such control. *Id.* 14a-15a. Following the longstanding rule that the later of two conflicting federal statutes "operates to the extent of the repugnancy as a repeal of the first," *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1870), the court of appeals concluded that "the [Settlement] Act has been impliedly repealed by IGRA

in relevant part." Pet. App. 13a, 2a (citation omitted); *see also* U.S. CA1 Br. 27.

The court of appeals also explained that this outcome comports with congressional intent. In *Narragansett I*, the First Circuit had observed that "reading the two statutes to restrict state jurisdiction over gaming honors [IGRA] and, at the same time, leaves the heart of the [Rhode Island] Settlement Act untouched." Pet. App. 15a (alterations in original) (quoting *Narragansett I*, 19 F.3d at 704). Here, as in *Narragansett I*, an implied repeal "minimize[s] the aggregate disruption of congressional intent." *Id.* Referencing an express savings clause in the Maine Indian Claims Settlement Act, *see* 25 U.S.C. § 1735(b), the First Circuit also pointed out that "Congress knew how" to make IGRA inapplicable to a particular tribe, but did not do so here. Pet. App. 18a.

3. The Town (together with the Community Association) and the Commonwealth now seek certiorari. Petitioners do not challenge the First Circuit's holding that the Tribe exercises sufficient government power for IGRA to apply, but they maintain that the First Circuit erred in holding that IGRA takes precedence over the conflicting provision of the Settlement Act.

REASONS FOR DENYING THE WRIT

This Court has already considered numerous petitions asking it to address whether IGRA prevails over tribe-specific acts insofar as they purport to give states jurisdiction over gaming on Indian lands. The Court has denied them all.[3]

It should do so again here. A single tribe in Massachusetts opening a single bingo facility on its own land in accordance with federal law does not raise issues of genuine importance. The First Circuit's decision does not conflict with the controlling law in any other circuit. And the First Circuit correctly applied this Court's jurisprudence, properly effectuating Congress's intent in enacting IGRA. Finally, even if intervention were needed (and it is not), with its long history of legislating to resolve these types of disputes, Congress is well-positioned to address the issue.

I. The question presented is not important enough to warrant this Court's attention.

This case raises no issue worthy of this Court's review. Contrary to petitioners' assertions, the Tribe's

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[3] *See* Petition for Writ of Certiorari, *Alabama-Coushatta Tribe of Tex. v. Texas*, 540 U.S. 882 (2003) (No. 03-270), *denying review of* 66 Fed. Appx. 525 (5th Cir. 2003) (Texas Restoration Act); Petition for Writ of Certiorari, *Ysleta del Sur Pueblo v. Texas*, 537 U.S. 815 (2002) (No. 01-1671), *denying review of* 31 Fed. Appx. 835 (5th Cir. 2002) (same); Petition for Writ of Certiorari, *Ysleta del Sur Pueblo v. Texas*, 514 U.S. 1016 (1995) (No. 94-1161), *denying review of* 36 F.3d 1325 (5th Cir. 1994) (same); Petition for Writ of Certiorari, *Rhode Island v. Narragansett Indian Tribe*, 513 U.S. 919 (1994) (No. 94-68), *denying review of* 19 F.3d 685 (1st Cir. 1994) (Rhode Island Settlement Act).

proposed bingo facility would have few, if any, negative consequences for the Commonwealth or the Town while having many positive impacts for the Tribe. Petitioners also fail in their attempts to expand the relevance of this case to other tribe-specific acts or to federal Indian law principles in general.

1. Petitioners assert that the Tribe's planned facility would "seriously burden the administration of state and local governments." Town Pet. 33 (citation omitted); *cf.* Commonwealth Pet. 22. Such is hardly the case. To begin, nothing about this case implicates whether the Tribe is subject to almost all state and local laws. The dispute is limited only to gaming. Even within that sphere, the Commonwealth could always decide to forbid Class II gaming throughout the state. (Utah, for example, had made this choice, *see* Utah Code Ann. § 76-10-1102, and IGRA allows it, *see* 25 U.S.C § 2710(b)(1)(A).) All the Tribe seeks here is the right to engage in a type of gaming that Massachusetts already allows others in the state to conduct.

Contrary to the Commonwealth's suggestion, granting the Tribe this opportunity would not significantly affect the state's gaming market, which includes several far larger gaming operations already open or under development. The Commonwealth tries to downplay its recent foray into gaming. *See* Commonwealth Pet. 22. But in 2011, the Commonwealth legalized casino gaming to attract massive gaming facilities that are projected to generate well over $300 million in annual tax revenue for state government and billions for their private operators. *See Budget*, Massachusetts Gaming Commission, http://massgaming.com/the-commission/budget.

The Wynn Boston Harbor will be "reminiscent" of a "resort on the Las Vegas Strip." Mark Arsenault, *A Showman Shows Latest Casino Plans; Wynn Tweaks Design, Name in Everett*, Bos. Globe, Mar. 16, 2016, at A1. The MGM Springfield casino complex will be "the largest private development in Western Massachusetts history." Sean P. Murphy, *MGM Invests $150m More: Springfield Casino Plan Is Solid, It Says*, Bos. Globe, Nov. 19, 2015, at B1. The Mashpee Wampanoag Tribe has plans to open the $1 billion First Light Resort & Casino, Sean P. Murphy, *Mashpee Tribe Says It Will Open Taunton Casino in Mid-2017*, Bos. Globe, Mar. 15, 2016, at A1. And the Plainridge Park Casino, a horse racing and gaming facility, has already netted the Commonwealth nearly $150 million in taxes since it opened in 2015. *Slot Machine Revenue, Plainridge Park Casino*, Massachusetts Gaming Commission, http://bit.ly/2zeMTnN; *see also Plainridge Park Casino*, Massachusetts Gaming Commission, http://bit.ly/2iqFmZ5.

The bingo facility proposed by the Tribe pales in comparison. Under the Tribe's 2015 proposal, the facility would contain no casino-level attractions and at most a few hundred electronic bingo machines. *See Gaming Update and Overview*, Aquinnah Gaming, http://bit.ly/2zdA6Sx. The Tribe's bingo facility also will be under "proper supervision," *see* Commonwealth Pet. 22, pursuant to rules the NIGC promulgated to implement IGRA. *See* 25 C.F.R. §§ 522.4, 543 (setting standards for Class II gaming); *see also* Wampanoag Tribe of Gay Head (Aquinnah), Ordinance 2011-01 (Dec. 21, 2011), http://bit.ly/2hvYzcc (providing for promulgation of regulations that "meet or exceed" NIGC standards).

As for its stake in this case, the Town fails to specify how the Tribe's modest bingo facility will "adversely affect" the local community or how it will "burden" local government. *See* Town Pet. 33 (citation omitted). A bingo facility on the Tribe's settlement lands would be tucked away in the remote western corner of the island far from the populous towns on the island's east side. The facility, under the Tribe's 2015 proposal, would match the architecture that already exists on the island. *See Gaming Update and Overview*, Aquinnah Gaming, http://bit.ly/2zdA6Sx. And the Tribe can provide the requisite government services for a bingo facility. *Cf.* Pet. App. 11a-13a (listing services provided by the Tribe); *see also* Tribal Ordinance 2011-01 (gaming revenue can fund "operations of local government agencies").

2. Unable to make a compelling case for certiorari on Massachusetts-specific grounds, petitioners try to frame a more generalized question presented to sweep in additional laws concerning a handful of states: Maine, Rhode Island, Florida, Connecticut, and Texas. *See* Commonwealth Pet. 19-20; Town Pet. 33-34. But this attempt likewise fails. Each congressional statute governing a specific tribe must be considered in light of its own text, historical context, and local conditions. None would be controlled by this case.

To begin with, this case can have no bearing on how the Maine Settlement Act or the Rhode Island Settlement Act interacts with IGRA. Unlike the Massachusetts Settlement Act, the Maine Settlement Act includes a clause providing that any later-enacted federal Indian legislation does not preempt state law. *See* 25 U.S.C. § 1735(b). And the First Circuit held that because of that clause, IGRA is inapplicable in Maine. *See Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794

(1st Cir. 1996). Similarly, there is nothing left to resolve in Rhode Island. In 1996, Congress amended the Rhode Island Settlement Act to specify that IGRA does not apply to the Narragansett Tribe's lands. *See* 25 U.S.C. § 1708(b).

Nor does this case have any practical relevance in Florida or Connecticut. In Florida, both the Seminole and Miccosukee tribes are already conducting gaming under IGRA on their non-settlement lands. *See Tourism/Enterprises*, Seminole Tribe of Fla., http://bit.ly/2hD21lt; *Gaming*, Miccosukee Tribe of Indians of Fla., http://bit.ly/2zaJbMx. There is no reason to believe these tribes have any interest in conducting gaming on their settlement lands, which largely consist of swampland in the Everglades. In Connecticut, the Mashantucket Pequot Tribe likewise operates a large casino through secretarial procedures promulgated under IGRA. *Cf. Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1032 (2d Cir. 1990) (holding tribe was entitled to negotiate Class III gaming compact). There is no reason to think the Mashantucket Pequot Tribe's gaming rights could be affected by this case.

That leaves only the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, 25 U.S.C. §§ 731-737, 1300g-1300g-7. The Fifth Circuit held in *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995), that IGRA does not displace the gaming provisions in that statute. The NIGC and the Department of the Interior have since concluded otherwise. *See infra* Part II. But this case cannot resolve any uncertainty on that subject; the Texas Restoration Act is different from the Massachusetts Settlement Act. *See id.*

3. Finally, this case has no broader implications for the development of federal Indian law. The Town contends that the First Circuit's decision upsets the principle that tribes can consent to state jurisdiction and undercuts Congress's plenary power over Indian affairs. Town Pet. 31-32. But these arguments presuppose that the First Circuit decision is incorrect and, accordingly, do nothing more than repackage the Town's merits arguments. If the First Circuit *correctly* held that IGRA displaced the Settlement Act's grant of state and local jurisdiction over the Tribe's gaming, its decision is nothing more than a mundane recognition of Congress's plenary power to modify the allocation of jurisdiction over tribal lands.

II. The First Circuit's decision does not conflict with the decision of any other court of appeals.

Petitioners assert that the First Circuit's decision conflicts with the Fifth Circuit's decision in *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995). The Town also tacks on a contention that the decision here conflicts with the D.C. Circuit's decision in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998) (*Narragansett II*). Neither argument withstands scrutiny.

1. The Fifth Circuit held in *Ysleta* that the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, 25 U.S.C. §§ 731-737, 1300g-1300g-7 (the Texas Restoration Act), continued after IGRA to prohibit gaming on the Ysleta Tribe's lands. For two reasons, however, there is no conflict between the First Circuit's decision and that one: (a) the respective tribe-specific pre-IGRA statutes are

different and (b) federal agencies have exercised their authority to deprive *Ysleta* of legal force.

a. The Fifth Circuit's *Ysleta* decision would not dictate a different outcome than the First Circuit reached here.

The Texas Restoration Act provides that "[a]ll gaming activities which are prohibited by the laws of the State of Texas *are hereby prohibited* on the reservation and on lands of the tribe." 25 U.S.C. § 1300g-6(a) (emphasis added). This Act reinforces its federal prohibition by cross-referencing a tribal resolution declaring that "all gaming . . . shall be prohibited on the Tribe's reservation or on tribal land." *Ysleta*, 36 F.3d at 1328 n.2 (quoting Ysleta del Sur Pueblo Resolution No. TC-02-86); *see* 25 U.S.C. § 1300g-6(a); *see also Ysleta*, 36 F.3d at 1334 n.19 (purpose of Texas Restoration Act was "to ban gaming on the reservations as a matter of federal law" (citation omitted)). In light of this statutory language and incorporation-by-reference, the Fifth Circuit reasoned that the Texas Restoration Act constitutes a federal prohibition on gaming, thus falling within IGRA's provision disallowing gaming that is otherwise "prohibited by federal law." *See Ysleta*, 36 F.3d at 1335 n.21 (quoting 25 U.S.C. § 2710(b)(1)(A)); *see also id.* at 1334 (explaining that Texas Restoration Act made state laws prohibiting gaming "surrogate federal law").

The Massachusetts Settlement Act contains no such federal prohibition. The Settlement Act provides simply that settlement lands "*shall be subject to* the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts." 25 U.S.C. § 1771g (emphasis added). In other words, as the First

Circuit explained, the Settlement Act does not "prohibit anything. It merely grants Massachusetts jurisdiction over gaming." Pet. App. 18a-19a. That being so, *Ysleta*'s reasoning based on IGRA's "prohibited by federal law" proviso, 25 U.S.C. § 2710(b)(1)(A), would not apply here.

b. In any event, the NIGC and the Department of the Interior recently exercised their authority in a way that deprives the Fifth Circuit's decision of practical effect. When the Fifth Circuit decided *Ysleta*, no federal agency had taken a position on whether IGRA controlled over the conflicting provisions of the Texas Restoration Act. But in 2015, the NIGC determined that the two Restoration Act tribes could game on their land and therefore approved their gaming ordinances.[4] In so doing, the NIGC adopted the Interior Solicitor's conclusion that "IGRA impliedly repeals the portions of the Restoration Act repugnant to IGRA." Ysleta Letter at 3; *see also* Alabama-Coushatta Letter at 2; Ysleta Letter Attach. A at 19-21.

The Department "recognize[d] that the Fifth Circuit in *Ysleta del Sur* held that the Restoration Act, and not the IGRA, governs gaming on the Tribe's lands." Ysleta Letter Attach. A at 9. But the Department explained that when a federal statute does not unambiguously foreclose the agency's view, "[a]n agency charged with implementing a statute may

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[4] Letter from Jonodev O. Chaudhuri, Chairman, Nat'l Indian Gaming Comm'n, to Governor Hisa, Ysleta del Sur Pueblo (Oct. 5, 2015) [hereinafter Ysleta Letter], http://bit.ly/2h406t5, at 4; Letter from Jonodev O. Chaudhuri, Chairman, Nat'l Indian Gaming Comm'n, to Nita Battise, Chairperson, Alabama-Coushatta Tribe of Tex. (Oct. 8, 2015) [hereinafter Alabama-Coushatta Letter], http://bit.ly/2zpwxcV, at 3.

'choose a different construction' of the statute than that embraced by a circuit court, 'since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.'" *Id.* at 9 n.79 (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)). The Department expressly invoked that authority to declare that "IGRA, and not the Restoration Act, governs gaming on the Tribe's reservation and tribal lands." *Id.* at 10; *see also id.* at 9 n.79.

To be sure, the State of Texas insists in ongoing litigation that these determinations are not entitled to *Brand X/Chevron* deference. *See* Plaintiff Texas' Response to Tribal Defendants' Motion for Relief from Judgment at 2-5, *Texas v. Alabama-Coushatta Tribe of Tex.*, No. 9:01-CV-299 (E.D. Tex. Sept. 6, 2016), ECF No. 77. But this contention is misguided.[5] And in any event, granting certiorari here could not resolve whether the agencies have reasonably determined that IGRA displaces the conflicting provisions of the Texas Restoration Act.

2. The claimed conflict with the D.C. Circuit's *Narragansett II* decision is a red herring. In that case, the D.C. Circuit held that Congress did not violate the Due Process Clause when it amended the Rhode Island

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[5] As numerous courts have recognized, Congress has delegated authority to the NIGC to interpret IGRA. *See, e.g.*, *Kansas v. United States*, 249 F.3d 1213, 1228-29 (10th Cir. 2001) (recognizing NIGC's reasonable constructions of IGRA in granting gaming licenses are entitled to *Chevron* deference). Moreover, the Department of the Interior, which is charged by Congress with administering the Restoration Act, *see* Texas Restoration Act, Pub. L. No. 100-89, § 2, 101 Stat. 666, 666 (1987), has reached the same conclusion regarding the interface of IGRA and the Restoration Act as the NIGC.

Settlement Act to exclude the Narragansett lands from IGRA. *Narragansett II*, 158 F.3d at 1336. In the course of that holding, the D.C. Circuit stated that the Massachusetts Settlement Act and other statutes not before the court "specifically provide for exclusive state control over gambling." *Id.* at 1341. But this conclusory statement was supported with a bare citation (in a string of such citations) to the U.S. Code section where the Massachusetts Settlement Act is codified; the D.C. Circuit did not conduct any implied repeal analysis with respect to the Act. And even if it had, the Town itself acknowledges the statement would be nothing more than "dicta." Town Pet. 30.

III. The First Circuit's decision is correct.

Petitioners criticize the First Circuit for resolving the statutory issue here "by comparison to two of its own prior decisions concerning other settlement acts"—namely, *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir.), *cert. denied*, 513 U.S. 919 (1994) (*Narragansett I*), and *Passamaquoddy Tribe v. Maine*, 75 F.3d 784 (1st Cir. 1996)—instead of directly applying this Court's governing precedent. Town Pet. 26-27; Commonwealth Pet. 12. But those prior First Circuit decisions carefully applied this Court's jurisprudence concerning how to identify and resolve irreconcilable conflicts between two federal statutes. *See, e.g.*, *Narragansett I*, 19 F.3d at 703-04 (citing *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1871); *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503-04 (1936)). Appropriately comparing the facts and holdings of those decisions to this case, the First Circuit correctly agreed with the United States that here, as in *Narragansett I*, IGRA controls over the Massachusetts Settlement Act with respect to gaming.

Pet. App. 2a; *see also* U.S. CA1 Br. 21-22; Aquinnah NIGC Letter at 4; Aquinnah DOI Letter at 1, 17-18.

A. IGRA and the Settlement Act are in irreconcilable conflict.

It has long been established that two statutes irreconcilably conflict when the second law "permits what the first law prohibits." *See Tynen*, 78 U.S. at 93; *see also Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 279, 281-82 (2007); *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 690-91 (1975). That is the situation here.

Under IGRA, "any Indian tribe" that is recognized as eligible for federal government services and possesses the powers of self-government, 25 U.S.C. § 2703(5), has certain jurisdictional rights related to gaming. First, tribes have "exclusive jurisdiction" over Class I gaming. *Id.* § 2710(a)(1). Second, tribes have the right to "engage in, or license and regulate, Class II gaming," so long as such gaming is not entirely prohibited in the state. *Id.* § 2710(b)(1)(A). IGRA, therefore, places Class II gaming "within the jurisdiction" of covered tribes. *Id.* § 2710(a)(2). Third, tribes can conduct Class III gaming under negotiated tribal-state compacts that "may" provide for "the allocation of criminal and civil jurisdiction between the State and the Indian tribe." *Id.* § 2710(d)(3)(C).

The Settlement Act, in contrast, operates as a "grant of jurisdiction" to state and local governments over gaming on the Tribe's lands. Pet. App. 14a (quoting *Narragansett I*, 19 F.3d at 704); *see* 25 U.S.C. § 1771g. In other words, the Act leaves it to the Commonwealth and the Town whether and how to regulate gaming under state and local law.

The Settlement Act thus clashes with IGRA insofar as it grants “jurisdiction touching on gaming” to state and local authorities. *Narragansett I*, 19 F.3d at 704. Of particular relevance here, IGRA’s provision giving tribes jurisdiction over gaming free from state interference cannot coexist with that portion of the Settlement Act. *Id.*; *see also* Pet. App. 14a.

B. IGRA prevails over the Settlement Act.

Given the clash between IGRA and the gaming provision of the Settlement Act, the First Circuit properly held that IGRA, rather than the Settlement Act, governs the Tribe’s right to conduct gaming.

1. The rule that a later-enacted statute prevails over an earlier conflicting one dictates that IGRA displaces the Settlement Act with regard to gaming. The later-enactment rule is sometimes called the “implied repeal” doctrine: When two federal statutes “are in irreconcilable conflict,” this Court has said, “the later act to the extent of the conflict constitutes an implied repeal of the earlier one.” *Posadas*, 296 U.S. at 503. In other cases, the Court has characterized this rule as one that gives primacy to a later-enacted law “deal[ing] comprehensively with the subject.” *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 437-38 (1989). Regardless of labeling, this Court has found such displacement on numerous occasions when necessary to effectuate congressional intent. *See, e.g.*, *Dorsey v. United States*, 567 U.S. 260, 264 (2012) (later-enacted statute controlled because “a contrary determination would seriously undermine [that statute’s] objectives”).

Applying the later-enactment rule here, IGRA trumps the Settlement Act and governs gaming on the Tribe’s lands. *See* Pet. App. 14a-15a. This outcome is

especially appropriate because it "minimize[s] the aggregate disruption" of both statutory regimes. *Id.* 15a (quoting *Narragansett I*, 19 F.3d at 704). Denying the Tribe the benefit of IGRA "would do great violence to the essential structure and purpose of [IGRA]." *Id.* (quoting *Narragansett I*, 19 F.3d at 705). IGRA is a comprehensive scheme to "promot[e] tribal economic development," 25 U.S.C. § 2702(1), by "establish[ing] a new regulatory framework for tribal gaming," Aquinnah DOI Letter at 4. The Tribe desperately needs revenue to fund essential services such as health care, education, elder and day care, and tribal housing.

On the other hand, precluding state and local jurisdiction over the Tribe's gaming plans would "le[ave] undisturbed the key elements of the compromise embodied in the Settlement Act." Aquinnah DOI Letter at 18 (quoting *Narragansett I*, 19 F.3d at 704). The main purpose of the Settlement Act was not to regulate gaming but instead to resolve the long-running dispute over property rights which was "clouding the titles to much of the land in the town." *See* 25 U.S.C. § 1771(1)-(7); *see also* H.R. Rep. No. 100-238, at 4 (1987). In addition, as to the Settlement Act's provision related to other state and local jurisdiction, nothing in the First Circuit's decision suspends any obligation the Tribe has to comply with state and local laws that do not touch on its right to game.

2. The canon that a specific statute prevails over a general one, invoked by petitioners (Commonwealth Pet. 23-24; Town Pet. 21-22), does not dictate a different outcome.

As an initial matter, this canon does not offer meaningful guidance under the circumstances of this

case. The Town recognizes that the specific/general canon is grounded in the assumption that "[w]hen Congress enacts sweeping legislation, it may not envision every possible statute that may be incidentally affected." Town Pet. at 21. But Congress was keenly aware of the Settlement Act when it passed IGRA. "[T]he same Congress enacted both statutes," *id.* (emphasis omitted), and moreover, both statutes emerged from the same committees, *id.* at 26.

This "historical context" makes it more sensible for IGRA, the later enactment, to control. *See* U.S. CA1 Br. 25. The Settlement Act was passed before Congress completed its response to this Court's holding in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), that states could not regulate gaming on Indian lands. Against this backdrop, "Congress intended for the Massachusetts Settlement Act's provisions on gaming to address the uncertainty in gaming regulation created by *Cabazon*," U.S. CA1 Br. 25, until it could "create a comprehensive Indian gaming regime to fill the regulatory gap created by *Cabazon*," *id.* 21. Once Congress enacted IGRA, the Settlement Act's stopgap resolution of the gaming question was no longer needed.

In any event, applying the specific/general canon does not undercut the First Circuit's holding. The canon requires consideration of which of two statutes has more "specific terms covering the given subject matter." *Balt. Nat'l Bank v. State Tax Comm'n*, 297 U.S. 209, 215 (1936) (citation omitted). It also turns on whether one statute has "a comprehensive scheme" that "deliberately target[s] specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted).

Based on these criteria, the First Circuit and the United States have correctly suggested that IGRA is more specific than settlement acts like the one here with respect to gaming. *See Narragansett I*, 19 F.3d at 704 n.21; Aquinnah DOI Letter 17-18; U.S. CA1 Br. 24-25 n.18. IGRA is the more specific statute because it pertains only to gaming, whereas "the Settlement Act's purpose is to cover the entire field of relationships between the State and the Tribe." Aquinnah DOI Letter at 17. Moreover, IGRA lays out a "comprehensive" and detailed scheme for regulating tribal gaming. Town. Pet. 10. The Settlement Act contains no such comprehensive gaming scheme.

3. At the end of the day, the doctrine of implied repeal—like other rules of statutory construction—"depends on the intention of Congress as expressed in the statutes." *United States v. Will*, 449 U.S. 200, 222 (1980) (citation omitted). Here, other indicia of congressional intent confirm that IGRA should be construed to overtake the Massachusetts Settlement Act's jurisdictional provision with respect to gaming.

Congress is "presumed to have acted intentionally" when it includes language in one statute but not another dealing with the same subject. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009); *see also Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002); *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485 (1996). Such a contrast here is highly illuminating.

When Congress means for a tribe-specific law to control over IGRA, it has said so explicitly. The Maine Settlement Act gives the state jurisdiction over settlement lands and provides that any future federal law passed "for the benefit of Indians, Indian nations,

or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, . . . shall not apply within the State of Maine" unless the later statute expressly says otherwise. 25 U.S.C. § 1735(b). The Catawba Indian Tribe of South Carolina Land Claims Settlement Act provides that "[t]he Indian Gaming Regulatory Act shall not apply to the tribe." *Id.* § 941*l*(a). And Congress explicitly amended the Rhode Island Settlement Act in 1996 to provide that IGRA does not apply to the Narragansett Tribe's settlement lands. *See id.* § 1708(b).

As the First Circuit correctly observed, the Maine Settlement Act, enacted before the Massachusetts Settlement Act, "leaves no doubt that Congress knew how to draft a savings clause, and that the parenthetical in the [Massachusetts Settlement Act] is not such a savings clause." Pet. App. 18a. The explicit carve-outs from IGRA in the South Carolina Settlement Act and the amendment to the Rhode Island Settlement Act confirm that the Massachusetts Settlement Act should not be construed to deny the Tribe its jurisdictional rights under IGRA.

Contrary to petitioners' assertions, this reasoning in the First Circuit's decision does not "adopt[] a rule" that always gives primacy to a later-enacted law over an earlier-enacted law "unless a savings clause enables them to facially coexist." Town. Pet. 27; *see also* Commonwealth Pet. 19. Rather, Congress's pattern of passing tribe-specific statutes with clauses that explicitly exclude tribes from IGRA simply supports the inference that when Congress does not include such a clause—as it did not in the Settlement Act—courts should not insert one. The First Circuit's decision says nothing about how, absent Congress's frequent inclusion of savings clauses in a particular

regulatory regime, courts should resolve a conflict between statutes.

Congress's decision not to exercise its plenary authority to explicitly exclude the Tribe from IGRA is particularly probative because federal agencies have long taken the view that IGRA grants the Tribe jurisdiction over gaming on lands it has or acquires. The Department of the Interior first reached that conclusion in 1997. *See supra* at 5. It reaffirmed that view several years ago, and the NIGC agreed. *See supra* at 6-7. Twenty years of congressional inaction in the face of an agency interpretation "constitute[s] persuasive evidence that that interpretation is the one intended by Congress." *See Zemel v. Rusk*, 381 U.S. 1, 11 (1965) (citation omitted); *see also N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982).

C. Petitioners' reliance on legislative history is misplaced.

Petitioners lastly contend that the legislative histories of IGRA and the Massachusetts Settlement Act dictate that the latter's gaming provision controls. Commonwealth Pet. 25; Town Pet. 23-26. But legislative history should not control where, as here, the text and structure of IGRA and Settlement Act indicate that IGRA should prevail. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *Shannon v. United States*, 512 U.S. 573, 583-84 (1994). If any doubt remains, it should be resolved not by looking to legislative history, but on the ground that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (citation omitted).

In any case, the fragments of legislative history that petitioners have unearthed do not prove what petitioners contend. Petitioners cite a tribal leader's statements from a hearing on the Settlement Act that she understood that the bill would preclude the Tribe from conducting high-stakes gaming. Commonwealth Pet. 8; Town Pet. 8. But the leader was referring to an earlier draft of the Settlement Act, which contained a fuller grant of jurisdiction to the Commonwealth and the Town. *See* S. 1452, 99th Cong. § 7 (1985). Moreover, IGRA had not passed at this point, so the leader's statements say nothing about her understanding of the gaming landscape after that statute became law.

Petitioners also cite a committee report suggesting that the bill that became IGRA would preserve grants of state jurisdiction in certain settlement acts, such as Rhode Island's. Commonwealth Pet. 4 (citing S. Rep. No. 100-446, at 12 (1988)); Town Pet. 14 (same). At the time the committee report made this statement, however, the bill contained a provision that granted Rhode Island jurisdiction over the Narragansett Tribe's gaming activities. *Narragansett I*, 19 F.3d at 700. After the report was published, Congress removed that provision from the bill. *Id.* This shows that Congress intended IGRA to override grants of state jurisdiction regarding gaming activities, not the reverse. *See Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 716 n.23 (1974) ("[W]e are reluctant specifically to read into the statute the very [language] that Congress eliminated.").

To be sure, Congress later amended the Rhode Island Settlement Act to preclude IGRA from applying to the Narragansett Tribe. But while Congress

considered making a similar change respecting other tribes, including Aquinnah, Congress declined to do so. This comported with the wishes of the Massachusetts governor, who at the time was in the process of negotiating a gaming compact with the Tribe under IGRA. *See Amendments to Indian Gaming Regulatory Act: Hearing on S. 2230 Before the S. Comm. on Indian Affairs Part I*, 103rd Cong. 133-34 (1994) (statement of Hon. Bruce Sundlun, Governor, Rhode Island). This Court should not "read an . . . exemption into the statute" that Congress contemplated yet never enacted. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 15-16 (2001); *see also Bell v. New Jersey*, 461 U.S. 773, 784 (1983) ("view of a later Congress . . . does have persuasive value").

IV. Congress is fully capable of accommodating individual tribes' gaming authority and state interests without this Court's intervention.

If there are any lingering concerns respecting the First Circuit's decision here, Congress is well-positioned to resolve them. Congress has a long history of actively legislating to settle tribe-specific disputes. Between 1975 and 2013, Congress passed 353 tribe-specific bills. Kirsten Matoy Carlson, *Congress and Indians*, 86 U. Colo. L. Rev. 77, 126 (2015). And, as noted above, Congress has enacted several laws since IGRA clarifying particular tribes' gaming rights. *See supra* at 24-26.

There is no evidence that Congress is dissatisfied with the resolution the First Circuit and the federal agencies have reached here. But if it were, one can be sure that the Commonwealth and the Town would be able to seek legislative relief—as Rhode Island did when it convinced Congress to amend the Rhode

Island Settlement Act in response to the First Circuit's holding in *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir.), *cert. denied*, 513 U.S. 919 (1994) (*Narragansett I*), that the tribe could conduct gaming under IGRA. *See* 25 U.S.C. § 1708(b). Either way, this is not the sort of dispute for which this Court's time and resources are needed.

The same is true with respect to the Town's complaint that "different rules" now govern the Aquinnah Tribe and the two Texas tribes subject to the Restoration Act, Town Pet. 28. At present, the NIGC's decision means that the Texas tribes, just like Aquinnah, may engage in Class II gaming. *See supra* at 17-18. But even if divergent gaming rights were to emerge, they would provide no basis for this Court's intervention. Allowing one tribe in Massachusetts to operate a bingo facility while two tribes in Texas are prevented from doing so would not subject any entity to conflicting legal obligations. And Congress has already signaled through its post-IGRA legislation pertaining to various tribes that it is prepared to act if it perceives any inequities that warrant addressing.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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