No. 17-215

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

Argument 2

I. The First and Fifth Circuits are split on whether IGRA impliedly repealed prior state- and tribe-specific statutes giving states authority over gaming on particular lands. 2

II. There are no impediments to resolving the question presented. 6

Conclusion 7

TABLE OF AUTHORITIES

Page

Cases

Crawford Fitting Co. v. J.T. Gibbons, Inc.,
482 U.S. 437 (1987) 3

Ysleta del Sur Pueblo v. Texas,
36 F.3d 1325 (1994) ..... *passim*

Statutes, Ordinances, and Resolutions

Indian Gaming Regulatory Act,
Pub. L. No. 100-497, 102 Stat. 2467
(codified at 25 U.S.C. §§ 2701-21,
18 U.S.C. §§ 1166-68) ..... *passim*

25 U.S.C. § 2710(b)(1)(A) 3, 5

25 U.S.C. § 2701(5) 3

Mass. Gen. Laws ch. 23K, § 37 6

Mass. Gen. Laws ch. 271, § 3 6

Wampanoag Tribal Council of Gay Head,
Inc., Indian Claims Settlement Act of
1987, Pub. L. No. 100-95, 101 Stat. 704
(codified at 25 U.S.C. §§ 1771-1771i) 5-6

25 U.S.C. § 1771g 5-6

Ysleta Del Sur Pueblo Restoration Act,
Pub. L. No. 100-89, 101 Stat. 666 (codified
at 25 U.S.C. §§ 1300g-1300g-7) ..... *passim*

25 U.S.C. § 1300g-6(a) 5

25 U.S.C. § 941l(a) 4

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The Commonwealth of Massachusetts respectfully submits that the brief in opposition to certiorari confirms the need to resolve the issue presented: whether the Indian Gaming Regulatory Act impliedly repealed federal statutes that codify specific agreements between states and Indian tribes that give the states regulatory authority over gaming. This question remains the subject of controversies in both the First and Fifth circuits, where it is of great importance to the States and tribes involved. Moreover, Respondents have not even attempted to identify an impediment to this Court's review; none exists. This Court should therefore grant certiorari to resolve the question presented.

ARGUMENT

Respondents fail in their attempt to downplay the extent and significance of the conflict between the decision of the court below and the Fifth Circuit's decision in *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (1994). Indeed, the continued salience of this question is evident in the recent federal administrative determinations disagreeing with *Ysleta*. And, contrary to Respondents' suggestion, Br. in Opp. 18, if the Court grants certiorari here, the Court could definitively resolve this question. The Court can and should take the opportunity to put to rest these decades-long disputes.

I. The First and Fifth Circuits are split on whether IGRA impliedly repealed prior state- and tribe-specific statutes giving states authority over gaming on particular lands.

Ysleta presented the Fifth Circuit with several questions, among them the very question here: whether IGRA impliedly repealed a federal statute, recently passed by the same Congress, imposing state restrictions on gaming on particular tribal lands. *See* 36 F.3d at 1334-35; *see also* Pet. 16-17. In contrast with the First Circuit below, the Fifth Circuit found no such implied repeal. 36 F.3d at 1335. In attempting to argue that the two circuits' contrary holdings can be reconciled, Respondents place undue emphasis on immaterial differences in wording between the Restoration Act at issue in *Ysleta* and the Settlement Act here, glossing over the Fifth Circuit's actual reasoning. That reasoning applies in full here, should have compelled the same result below, and demonstrates the split of authority.

The Fifth Circuit's analysis began by acknowledging "that 'repeals by implication are not favored,'" and that "'where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" 36 F.3d at 1335 (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442, 445 (1987) (emphasis in original)). Respondents cannot and do not dispute these basic governing principles. *See* Br. in Opp. 21-23.

Applying these principles, the Fifth Circuit found that, "[w]ith regard to gaming, the Restoration Act clearly is a specific statute, whereas IGRA is a general one": "The former applies to two specifically named Indian tribes located in one particular state, and the latter applies to all tribes nationwide." 36 F.3d at 1335. The same point stands here; Massachusetts's Settlement Act applies to only one tribe and its lands, whereas IGRA applies to "Indian lands" wherever located. *See also* Pet. 23-24.

The Fifth Circuit then observed that "Congress, when enacting IGRA less than one year after the Restoration Act, explicitly stated in two separate provisions of IGRA that IGRA should be considered in light of other federal law." 36 F.3d at 1335. The court cited to IGRA's provision that tribes may engage in Class II gaming only if "'such gaming is not otherwise specifically prohibited on Indian lands by Federal law.'" *Id.* at 1335 n.21 (quoting 25 U.S.C. § 2710(b)(1)(A) and also citing related congressional finding in 25 U.S.C. § 2701(5)). The court further noted that "Congress never indicated in IGRA that it was expressly repealing the Restoration Act," nor "include[d] in IGRA a blanket repealer clause as to other laws in conflict in IGRA." *Id.* at 1335. All of

these points apply with equal force to Massachusetts's Settlement Act, passed by Congress the very same day as Texas's Restoration Act, *see* Pet. 15.

"Finally," the court noted, "in 1993, Congress expressly stated that IGRA is *not* applicable to one Indian tribe in South Carolina, evidencing in our view a clear intention on Congress's part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands." 36 F.3d at 1335 & n.22 (citing 25 U.S.C. § 941l(a)). "Therefore," the court concluded, "the Restoration Act survives today," and "it—and not IGRA—would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law." *Id*. at 1335.

Thus, every single sentence of the Fifth Circuit's implied repeal analysis applies equally here.[1]

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[1] So too the one additional paragraph of the relevant subsection of the *Ysleta* opinion. *See* 36 F.3d at 1335. That paragraph rebutted an argument by the tribe that related to both the implied repeal question and the separate issue in the case—addressed by the court's opinion immediately before the discussion of implied repeal—regarding whether the Restoration Act's prohibition of "gaming activities which are prohibited by the laws of the State of Texas" referred to all Texas prohibitions, civil and criminal, or only to criminal prohibitions. *See id.* at 1332-34 (rejecting the tribe's argument that only criminal prohibitions were included). The Fifth Circuit discounted the tribe's argument that "our conclusion (*i.e.*, that Texas gambling laws and regulations are surrogate federal law) will constitute a substantial threat to its sovereignty in that '[e]very time the State modifies its gambling laws, the impact will be felt on the reservation.'" *Id.* at 1335. Such a threat, the court found, was not unexpected; the tribe had "noted in its resolution that it viewed [the gaming provision] of the Restoration Act as 'a substantial infringement upon [its] power of self government' but nonetheless concluded that relinquishment of that power was

In attempting to distinguish *Ysleta* from this case, Respondents seize onto the final three words of the Fifth Circuit's analysis: the court's characterization of Texas law as "surrogate federal law." *See* Br. in Opp. 16.[2] Respondents argue that, whereas the gaming at issue in Texas was "prohibited by federal law" in the Restoration Act, the Settlement Act contains no such prohibition and therefore does not fall within IGRA's provision precluding Class II gaming on tribal lands if "specifically prohibited by federal law," 25 U.S.C. § 2710(b)(1)(A). *See* Br. in Opp. 16 (quoting 25 U.S.C. § 1300g-6(a) ("All 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.")).

This argument not only ignores the Fifth Circuit's express reasoning, just described, but also is not a viable basis for distinguishing the cases. The

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necessary to secure passage of the Act." *Id.* In testimony to Congress, the Aquinnah tribe likewise acknowledged and accepted the gaming limitations in the Settlement Act. *See* Pet. 8. Indeed, and contrary to Respondents' arguments, *see* Br. in Opp. 22, that congressional testimony and Congress's subsequent insertion of gaming-specific text into the Settlement Act, *see* 25 U.S.C. § 1771g, underscores that jurisdiction over gaming was a key element of the agreement.

[2] Notably, the Fifth Circuit's choice of this phrase "surrogate federal law" does not appear to relate to the implied repeal analysis but instead refers back to the opinion's earlier conclusion that, contrary to the tribe's argument, the Restoration Act's prohibition of "gaming activities which are prohibited by the laws of the State of Texas" referred to all Texas prohibitions, both civil and criminal, not solely criminal laws. *See* 36 F.3d at 1334 (concluding that "Congress—and the Tribe—intended for Texas's gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas").

Settlement Act, too, was and is federal law, just like Texas's Restoration Act. *See* Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, 101 Stat. 704 (codified at 25 U.S.C. §§ 1771-1771i). And because the Settlement Act provides that the Aquinnah tribe's settlement lands shall be subject to Massachusetts's laws, "including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance," 25 U.S.C. § 1771g, the Settlement Act is federal law that prohibits gaming without a state license. *See* Mass. Gen. Laws ch. 23K, § 37; ch. 271, § 3. Respondents therefore err in asserting that the Settlement Act merely grants Massachusetts jurisdiction over gaming but does not prohibit gaming. *See* Br. in Opp. 17. By stating that the settlement lands shall be subject to Massachusetts laws with regard to gaming, the Settlement Act incorporated by reference all such laws, which prohibit the unlicensed gaming that the Aquinnah tribe seeks to conduct.

Finally, the recent letters from the National Indian Gaming Commission and the Department of the Interior that Respondents cite as repudiating *Ysleta*, Br. 17-18, do not lessen the importance of this Court's resolving the question presented. To the contrary, they demonstrate that the question whether IGRA impliedly repealed statutes like the Settlement Act and the Restoration Act remains unsettled and of considerable importance well beyond Martha's Vineyard.

II. There are no impediments to resolving the question presented.

As Respondents tacitly concede, there are no vehicle problems that would preclude this Court's review of the question whether IGRA impliedly

repealed state- and tribe-specific statutes giving states regulatory authority over gaming. *See* Pet. 25-26.

Respondents assert without explanation that the recent federal agency letters somehow preclude this Court bringing these disputes to a resolution. *See* Br. in Op. 18 ("granting certiorari here could not resolve whether the agencies have reasonably determined that IGRA displaces the conflicting provisions of the Texas Restoration Act"). To the contrary, notwithstanding such agency pronouncements, this Court on the merits could and should conclude that—consistent with the presumption against implied repeal and following the canon that a more specific statute will control over a more general one—IGRA did not impliedly repeal statutes like Massachusetts's Settlement Act and Texas's Restoration Act. *See* Pet. 22-25; *see also* Br. for Appellee Commonwealth of Massachusetts, No. 16-1137, at 35-37 (1st Cir. Sept. 2, 2016) (arguing to the court below that the district court had properly rejected the argument that agency opinion letters concluding that IGRA impliedly repealed the Settlement Act's gaming-specific text required deference).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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