No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Indian Gaming Regulatory Act, a statute of general application, impliedly repealed federal statutes that codify state- and tribe-specific agreements giving states regulatory authority over gaming, a question that has divided the courts of appeals.

PARTIES TO THE PROCEEDINGS

Petitioner, the Commonwealth of Massachusetts, was an appellee in the court of appeals.

Respondents, the Wampanoag Tribe of Gay Head (Aquinnah), Wampanoag Tribal Council of Gay Head, Inc., and the Aquinnah Wampanoag Gaming Corporation, were appellants in the court of appeals.

The Aquinnah/Gay Head Community Association, Inc. and Town of Aquinnah were appellees in the court of appeals.

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The Commonwealth of Massachusetts respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-19a) is reported at 853 F.3d 618. The district court's opinion (App. 21a-68a) is reported at 144 F. Supp. 152.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2017. A timely petition for rehearing was

denied on May 10, 2017. App. 69a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The 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), provides that the lands thereby granted to the Aquinnah are "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. Further provisions of the statute are reproduced at App. 134a-151a.

The relevant provisions of the 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), are reproduced at App. 152a-157a.

INTRODUCTION

Under the Indian Non-Intercourse Act of 1834, 25 U.S.C. § 177, Congress requires the United States' consent to any conveyance of claimed title to land held by an Indian tribe or individual Indians. Accordingly, Congress has sometimes considered and approved such land conveyances by statute. In the 1970s and 1980s, some Indian tribes filed lawsuits against states claiming title to lands based on alleged past violations of this act. After exhaustive negotiations, certain of these tribes and states sought to settle their disputes through agreements granting lands to tribes in exchange for those tribes' release of their claims and,

in some instances, continuing state authority over the lands. In due course, Congress approved those agreements. That included the 100th Congress's approval of one such agreement for Massachusetts, along with several other laws expressly giving states authority to regulate Indian tribes' gaming on lands specified in those enactments.

This case presents the question whether the same 100th Congress repealed those laws just one year later—silently—in the Indian Gaming Regulatory Act. Congress's enactment of IGRA resulted from concern on the part of states and the federal government that they largely lacked authority to regulate tribal gaming. By 1983, more than 80 tribes had gaming enterprises on their lands, and, starting that same year, bills to regulate that gaming were introduced in Congress each year but did not pass. Finally, in 1988, Congress passed IGRA, which provided federal and state regulatory authority over tribal gaming. Several Indian tribes that previously agreed to state authority over gaming through settlement acts and similar legislation have sought to open gaming enterprises, arguing that IGRA impliedly repealed those laws. The First and Fifth Circuits are divided on the question, which is of great and on-going importance to both states and tribes.

In Massachusetts, for more than thirty years, the Commonwealth's relationship with the federally-acknowledged Wampanoag Tribe of Gay Head (Aquinnah) ("the Aquinnah") has been governed by just such a settlement act (the "Settlement Act") that resolved land claims on Martha's Vineyard. That act ratified an earlier settlement agreement among the Commonwealth, the Aquinnah, the Town of Aquinnah ("Town"), and a group of interested local landowners

now known as the Aquinnah/Gay Head Community Association, Inc. (the "Community Association"). Through their agreement and the Settlement Act, those parties, with Congress's approval, delineated their respective authority over 485 acres of settlement lands conveyed to the Aquinnah. In the Settlement Act, Congress expressly provided—at the parties' behest—that the lands thereby granted to the Aquinnah are "subject to" state and local "laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance." 25 U.S.C. § 1771g. Recently, the Aquinnah have sought to carry out gaming on Martha's Vineyard without any regulation by Massachusetts, despite the terms of the Settlement Act. Their only basis for contending they have the right to do so is that IGRA impliedly and silently repealed the statute settling their land claims.

The Fifth Circuit has appropriately rejected this argument, as did the district court below. The First Circuit should have done so too. As this Court has often reiterated, there is a "strong presumption" against implied repeals, *e.g.*, *Dorsey v. United States*, 567 U.S. 260, 290 (2012), and the presumption takes on even greater force where the same Congress passes both laws. The court below could readily have harmonized the Settlement Act and IGRA and avoided such a repeal by interpreting the far more specific Settlement Act as an exception to IGRA. Legislative history also weighs against implied repeal: the Senate's report on IGRA disclaimed any intent to repeal such state-specific federal enactments. *See* S. Rep. No. 100-446, at 12 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3082 ("[N]othing . . . in this act will supersede any specific restriction or specific grant of Federal authority or

jurisdiction to a State which may be encompassed in another Federal statute").

But the First Circuit instead created a split with the Fifth—and, in so doing, fundamentally undermined the presumption against implied repeal. The First Circuit viewed as decisive the fact that Congress had not, in the text of the Settlement Act itself, specifically stated that the Act should not be impliedly repealed in the future. App. 17a. The requirement that Congress make such an express statement to preserve its legislation is, of course, the opposite of a presumption *against* implied repeal.

For these reasons and the reasons that follow, this Court should grant certiorari to resolve the split of authority between the First and Fifth Circuits and to clarify the presumption against implied repeal.

STATEMENT OF THE CASE

1. This case arises from the settlement, by Congressional enactment, of a long-running dispute over land on Martha's Vineyard. The western peninsula of Martha's Vineyard is the historical home of the Aquinnah. In 1869 and 1870, the Commonwealth conferred state citizenship on the Aquinnah and incorporated the Aquinnah Indian district as the Town of Gay Head (renamed the Town of Aquinnah in 1997). *See Kitras v. Town of Aquinnah*, 474 Mass. 132, 137, 49 NE.3d 198, 203 (2016); App. 24a. After these enactments, title to lands previously held by the Aquinnah or for its benefit transferred to the Town or others over time.

In 1972, individuals of Aquinnah lineage formed the Wampanoag Tribal Council of Gay Head ("Tribal Council") and incorporated the body as a state-

chartered, non-profit corporation. App. 24a. At the time, the Tribal Council acted for the Aquinnah, because the federal government had not yet acknowledged the Aquinnah as an Indian tribe. *Id.* The non-Indian population on Martha's Vineyard was then increasing, and the Tribal Council was concerned about preserving their traditional common lands held by the Town. *Id.* at 107a.

The Council filed suit in federal court in 1974, alleging that historical transfers of titles to their land violated the Indian Non-Intercourse Act and were therefore void. *Id.* The pending case had an immediate, negative economic impact across Martha's Vineyard, casting a widespread cloud on titles to land beyond the common lands held by the Town. By 1975, due to the concern that the Aquinnah would later also claim title to private land, the island's real estate market froze. *See* 25 U.S.C. § 1771(2)-(3).

Finally, in 1983, the four parties to the lawsuit—the Commonwealth, Aquinnah, Town, and Community Association—negotiated a settlement agreement. App. 77a-86a. Under that agreement, the Tribal Council was to receive title to 485 acres of public and private land, including the common lands. *Id.* at 25a, 77a-86a. In return, the Aquinnah relinquished claims to title to any other land on Martha's Vineyard or in Massachusetts. *Id.* at 81a. All parties agreed that, after the transfer to the Aquinnah, the settlement lands would remain subject to all state and local laws and to the jurisdiction and authority of the Commonwealth and Town.[1] *Id.* at 78a-79a, 83a-85a.

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[1] The settlement agreement and Congress's later codification thereof expressly excepted two items from the reach of state and

In 1983, both the Tribal Council and Town voted to approve the settlement agreement. In 1985, Massachusetts approved the settlement agreement through enactment of "An Act to Implement the Settlement of Gay Head Indian Land Claims," Mass. Stat. 1985, ch. 277.

2. On August 18, 1987, Congress ratified the agreement in the Settlement Act. *See* 25 U.S.C. §§ 1771(4), 1771d(c), 1771d(d), 1771f(10). The statute is published in Chapter 19 of Title 25 of the United States Code, alongside many other such laws settling state-tribal disputes. In this Settlement Act, Congress also ratified the Department of the Interior's decision, earlier that year, acknowledging the Aquinnah as an Indian tribe with a government-to-government relationship with the United States. *Id.* § 1771f(2); *see also* Final Determination for Federal Acknowledgement of the Wampanoag Tribal Council of Gay Head, Inc., 52 Fed. Reg. 4193 (Feb. 10, 1987). Congress authorized the Secretary of the Interior to take title to the settlement lands into trust for the Aquinnah, 25 U.S.C. § 1771d(f), and set aside federal funds to match funds supplied by the Commonwealth to purchase title to private land that would comprise part of the settlement lands, *id.* § 1771d(a).

Throughout the Settlement Act, Congress codified portions of the settlement agreement. As relevant here, Congress ratified the parties' agreement that the settlement lands would still be subject to state and local law, including regulatory authority. 25 U.S.C. § 1771g. The statute expressly included regulatory authority over gaming: "[T]he settlement lands . . .

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local law, property taxation on the lands and hunting. Neither exception has ever been claimed to be relevant to the present dispute.

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.*

Congress's inclusion of the gaming-specific limitation—subjecting the settlement lands to state and local "laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance"—followed testimony concerning that very aspect of the settlement agreement. The Tribal Council's president, Gladys A. Widdiss, submitted a prepared statement to the Senate's Select Committee on Indian Affairs, saying, "Lastly, Mr. Chairman, we are aware of the growing concern of Congress regarding the issue of gaming on reservations. This bill would not permit such activity on Gay Head. . . . We recognize and accept that no gaming on our lands is now or will in the future be possible." *Hearing on S. 1452 Before the Senate Select Committee on Indian Affairs*, 99th Cong. (Apr. 9, 1986), App. 115a; *see also* App. 93a (similar, live testimony given to the Committee).

3. Fourteen months after enacting the Settlement Act, the same Congress enacted IGRA, on October 17, 1988. Pub. L. No. 100-497, 102 Stat. 2467. IGRA resulted from the increasing concerns of both the federal government and the states over tribal gaming in Indian country, over which neither had regulatory authority. Gaming had emerged as a commercial revenue source for tribes in the 1970s. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 12.01 (Nell Jessup Newton ed., 2012). By 1984, the Department of the Interior estimated that 80 Indian tribes were

conducting some form of gaming. *Hearing Before the House Committee on Interior and Insular Affairs on H.R. 4566*, 98th Cong., p. 62 (June 19, 1984).

From 1983 to 1988, Congress considered many bills to regulate tribal gaming, and its efforts culminated in IGRA: a statute of general reach to subject gaming on "Indian lands" to federal and sometimes state regulation, in addition to just tribal regulation. *See* Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 Creighton L. Rev. 387, 399 (1993). To do so, IGRA divides tribal gaming into three "classes." Class I comprises ceremonial, non-revenue-generating tribal gaming, which is not at issue here and is not subject to federal or state regulation under IGRA. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming includes "bingo"—proposed by the Aquinnah in this case—and certain other non-banked card games. *Id.* § 2703(7). Class II gaming is subject to federal and tribal regulation, through the National Indian Gaming Commission ("NIGC"), with no state regulation. *Id.* § 2710(a)-(c). Class III gaming includes all other gaming—*i.e.*, traditional casino-style games—and is subject to federal, state, and tribal regulation, implemented through negotiated tribal-state compacts. *Id.* §§ 2703(8), 2710(d).

No provision of IGRA states an intent to repeal or otherwise override Congress's other, prior statutes specific to certain Indian tribes and their lands. To the contrary, the Senate Select Committee on Indian Affairs reported that "nothing . . . in this act will supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute . . . ." S.

Rep. No. 100-446, at 12 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3082.

4. In 2011, the Commonwealth's then-Governor signed into law "An Act Establishing Expanded Gaming in the Commonwealth." Mass. Stat. 2011, ch. 194. The Act authorized a limited, highly-regulated expansion of gaming in Massachusetts, but kept the Commonwealth's prohibition against gaming without a gaming license. Mass. Gen. Laws ch. 23K, § 37; ch. 271, § 3. No provision of Massachusetts law excludes the Aquinnah from applying for such a license, like any other individual or entity within the Commonwealth. The Aquinnah have never applied for and do not now have such a license; nor has the Town altered its zoning or amended its own bylaws to authorize gaming. App. 33a-34a; *cf*. Mass. Gen. Laws ch. 23K, § 15(8)-(9) (requiring local approval to obtain license for gaming facility).

Nonetheless, in November 2011, the Aquinnah adopted a tribal gaming ordinance, Ordinance No. 2011-01, which purports to authorize Class I and Class II gaming on Aquinnah lands. Wampanoag Tribe of Gay Head (Aquinnah) Ordinance No. 2011-01 (effective Feb. 2012), App. 30a. In April 2012, the Aquinnah amended the ordinance to identify the settlement lands as the site of their proposed gaming. Wampanoag Tribe of Gay Head (Aquinnah) Resolution 2012-23, App. 31a. Thereafter, the Aquinnah submitted the amended ordinance to NIGC for approval, as required by IGRA (where IGRA applies). 25 U.S.C. §§ 2710(e), 2712(b). On August 29, 2013, NIGC, having taken no action on the ordinance, notified the Aquinnah that the ordinance had been deemed approved by operation of law "to the extent that it is consistent with IGRA." App. 32a-33a.

4. In December 2013, the Commonwealth sued the Aquinnah in Massachusetts's Supreme Judicial Court for Suffolk County. The Aquinnah removed the case to federal court, where the Community Association and Town intervened as plaintiffs. *Massachusetts v. The Wampanoag Tribe of Gay Head (Aquinnah)*, No. 1:13-cv-13286-FDS (D. Mass.). The Commonwealth sought a declaration that the settlement agreement bars the Aquinnah from engaging in, licensing, or regulating gaming operations unlicensed by the Commonwealth on the settlement lands. *Id.*

On November 13, 2015, the district court granted summary judgment to the Commonwealth. App. 68a. As relevant here, the district court held that, by enacting IGRA, Congress did not impliedly repeal the Settlement Act's gaming-specific text, meaning that the Aquinnah must seek state and local authorization to conduct gaming on the settlement lands. *Id.* at 56a-67a. Applying the presumption against implied repeal, the court recognized that, because IGRA and the Settlement Act "are 'capable of co-existence,' the Court must 'regard each as effective'" in the absence of "explicit Congressional guidance otherwise." *Id.* at 58a-59a (quoting *Traynor v. Turnage*, 485 U.S. 535, 548 (1988)). The court also recognized that "if two statutes conflict, the more specific statute controls," and that the Settlement Act is "clearly more specific than IGRA." *Id.* at 63a-64a (citing *Crawford Fitting Co. v. J.T. Gibbon, Inc.*, 482 U.S. 437, 445 (1987)). And the court acknowledged the unlikelihood that Congress intended to repeal *sub silentio* a provision of the Settlement Act that it had passed just one year earlier. *Id.* at 62a-63a. Accordingly, the court concluded that Congress did not intend IGRA to repeal the Settlement Act.

The court of appeals reversed. *Id.* at 19a. Rather than engaging in a full analysis of whether the presumption against implied repeal was overcome in these circumstances, the court resolved the issue by comparison to two of its own prior decisions concerning other settlement acts, *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994) (finding IGRA effected an implied repeal), and *Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784 (1st Cir. 1996) (finding IGRA did not effect an implied repeal). *Id.* at 14a-16a. The court focused on the lack of a savings clause in the Rhode Island and Massachusetts settlement acts, and the existence of such a clause in the Maine act. *Id.* at 14a-19a. The court thus stated its conclusion: "Because the present case is very close to *Narragansett*, and readily distinguished from *Passamaquoddy*, we find for the Tribe on [the implied repeal] issue." *Id.* at 14a. The court did not distinguish or even mention the primary case on which the Commonwealth relied, *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1334-35 (5th Cir. 1994), in which the Fifth Circuit concluded that IGRA did not impliedly repeal a similar statute limiting gaming on certain tribal lands in Texas, passed by Congress the very same day as the Aquinnah's Settlement Act.

The court of appeals declined to grant panel rehearing or rehearing *en banc* (App. 69a), but did stay its mandate pending the outcome of this petition (App. 71a).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the split of authority over whether, when Congress enacted the Indian Gaming Regulatory Act in 1988, Congress silently intended to repeal federal statutes subjecting certain tribes' gaming on particular lands in specific states to those states' laws. The First Circuit's opinion in this case that IGRA did effect such an implied repeal squarely conflicts with a Fifth Circuit decision holding that IGRA did not impliedly repeal a similar such enactment in Texas. The decision below also injected a dubious new element into implied-repeal analysis not present in this Court's precedent: a requirement that Congress affirmatively state that it wishes to save a statute from implied repeal in the future.

The question presented is one of considerable practical importance to both states and tribes. The First Circuit's decision upends Congress's settlement of a decades-long paralyzing land dispute on Martha's Vineyard, has further fueled Texas's own on-going gaming dispute, and has the potential to reverberate elsewhere. Gaming has tremendous economic and other impacts on states, tribes, and their residents and members. And states and tribes need to be able to rely on the stability of inter-sovereign agreements.

Such stability should be preserved in this case. As the district court below properly concluded in concert with the Fifth Circuit, Congress did not intend IGRA to impliedly repeal the Settlement Act passed just a year earlier. The First Circuit's conclusion to the contrary ignores the salience of the Settlement Act's gaming-specific text, fails to follow basic canons of statutory construction that would avoid a disfavored

implied repeal, and, instead, adopts a mode of analysis under which implied repeal is favored rather than disfavored. Moreover, the court's conclusion is irreconcilable with IGRA's legislative history, which makes plain Congress's intent not to repeal prior, state-specific enactments.

Only a decision of this Court can put to rest the disputes over IGRA's effect on earlier state- and tribe-specific statutes, and this case presents an ideal vehicle for resolving that question.

I. This Court should grant certiorari to resolve a split of authority on whether IGRA impliedly repealed prior state- and tribe-specific statutes giving states authority over gaming on particular lands.

The First Circuit's decision below created two conflicts calling for certiorari. First, the decision conflicts with the Fifth Circuit's decision in *Ysleta*, 36 F.3d at 1334-35. The dispute at issue in *Ysleta* remains on-going today in Texas, more than two decades later, and the Ysleta tribe is already attempting to rely on the First Circuit's decision, despite the Fifth Circuit's binding contrary ruling. Second, the First Circuit's analysis fashioned a new test—focused on whether Congress expressly prescribed what the "effect of future federal laws" on a particular law should be—that undermines this Court's strong presumption against implied repeal.

A. The First and Fifth Circuits are split on the question presented.

The First Circuit's decision below places it squarely in conflict with the Fifth Circuit.

In *Ysleta*, the Fifth Circuit examined the Ysleta Del Sur Pueblo Restoration Act ("Restoration Act"), Pub. L. No. 100-89, 101 Stat. 666 (Aug. 18, 1987) (as relevant here, codified at 25 U.S.C. § 1300g). 36 F.3d at 1327. The Restoration Act implemented Congress's decision to restore the Ysleta del sur Pueblo to federal recognition and supervision. 25 USC § 1300g-2. Congress enacted the Restoration Act the very same day that it enacted the Settlement Act. *Compare* Pub. L. No. 100-89, 101 Stat. 666 (Restoration Act, enacted Aug. 18, 1987), *with* Pub. L. No. 100-95, 101 Stat. 704 (Settlement Act, enacted Aug. 18, 1987). The Restoration Act, like the Settlement Act, contained a provision explicitly subjecting tribal gaming on certain lands to state law. *See* 25 U.S.C. § 1300g-6(a) (providing 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," and that violations of this prohibition "shall be subject to the same civil and criminal penalties" as under state law).

The Fifth Circuit concluded that IGRA did not impliedly repeal the Restoration Act's gaming-specific provision. *Ysleta*, 36 F.3d at 1334-35. In reaching its conclusion, the Fifth Circuit recognized the strong presumption against implied repeal and applied the specific-over-general canon of construction, finding that the Restoration Act "clearly is a specific statute, whereas IGRA is a general one." *Id.* at 1335. The court also noted IGRA's lack of any "blanket repealer clause as to other laws in conflict with IGRA"; to the contrary, "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." *Id.* at 1335 & n.21 (citing 25 U.S.C. §§ 2701(5), 2710(b)(1)(A)).

And the court found "a clear intention on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands" in the fact that Congress, by the time *Ysleta* was decided in 1994, had already provided in a post-IGRA land settlement statute from South Carolina that IGRA would not apply to the tribe settling the dispute. *Id.* at 1335 & n.22 (citing 25 U.S.C. § 941*l*(a)). The Fifth Circuit has since reaffirmed this analysis. *See Alabama Coushatta Tribe of Tex. v. Texas*, 66 Fed. Appx. 525, 2003 WL 21017542 (5th Cir. Apr. 16, 2003) (following *Ysleta* in holding that IGRA did not impliedly repeal the Alabama Coushatta Indian Tribes of Texas Restoration Act, 25 U.S.C. § 737).

The First Circuit below reached the opposite conclusion. The court found that IGRA did impliedly repeal the Settlement Act's grant of state and local jurisdiction over gaming. In so doing, the First Circuit ignored or rejected the same presumption against implied repeal, canons of statutory interpretation, and multifaceted evidence of Congress's intent that the Fifth Circuit had found persuasive. There is no sound basis for justifying the different results as to these similar statutes. *Compare* 25 U.S.C. § 1771g, *with* 25 U.S.C. § 1300g-6(a); *see also Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1341 (D.C. Cir. 1998) (describing the Settlement Act as falling within broader group of "legislative settlements in which [tribes] accepted general state jurisdiction over tribal lands").

Accordingly, the First Circuit's decision stands in irreconcilable conflict with *Ysleta*. The First Circuit's decision does not attempt to distinguish the Fifth Circuit's decision and, indeed, fails to mention it. App. 1a-20a. Congress could not have intended for these

two similar statutes—enacted by Congress *on the same day*—to receive such differing treatment under IGRA. Particularly in a case implicating such important sovereign interests, *see* Part II, *infra*, this Court should grant certiorari to resolve this conflict.

B. The First Circuit's decision below undermines this Court's precedent disfavoring implied repeals.

The First Circuit's decision also breaks with this Court's controlling precedent on implied repeals—and does so in a distinctly damaging way, effectively requiring Congress to insert preemptive explicit buttresses against them.

There is a "strong presumption against implied repeals." *Dorsey*, 567 U.S. at 290; *see also*, *e.g.*, *Hagen v. Utah,* 510 U.S. 399, 416 (1994); *Morton v. Mancari*, 417 U.S. 535, 549 (1974). This presumption finds no exception in Indian law. For example, this Court applied the presumption in holding that the Equal Employment Opportunity Act of 1972 did not impliedly repeal a part of the Indian Reorganization Act of 1934. *See Morton*, 417 U.S. at 550-51.

Yet the First Circuit failed to apply that presumption here—and, indeed, devised the means of the presumption's demise. The court compared the Settlement Act with Maine's land claims settlement act, which the court had previously held was *not* impliedly repealed by IGRA. *See Passamaquoddy Tribe*, 75 F.3d at 788-90. The court correctly noted that Maine's act contains a savings clause, while the Settlement Act does not. App. 15a (citing 25 U.S.C. § 1735(b) ("The provisions of any federal law enacted after [the Maine act], 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 such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.")). The court further emphasized that the Settlement Act's gaming-specific text "says nothing about the effect of future federal laws . . . ." *Id.* at 17a. From this observation, the court erroneously concluded that Congress must have intended that IGRA would impliedly repeal the Settlement Act, simply because the Settlement Act does not *specifically* disclaim future implied repeal. *See id.* Such a conclusion runs directly contrary to this Court's implied repeal doctrine. *See, e.g., Morton*, 417 U.S. at 550 (rejecting the argument that "congressional silence [had] effectuat[ed] a repeal by implication").

Congress may indeed have been silent in 1987 about the effect of future laws on the Settlement Act. But if the presumption against implied repeal is to mean anything, then Congress's silence cannot be determinative of whether a subsequent statute effected an implied repeal. Rather, shielded by and passing legislation under the "strong presumption" against implied repeal, Congress is not obliged to provide in every law that the law shall not be impliedly repealed by hypothetical future federal laws. Such a requirement would deprive the presumption of all force, as it would allow courts to infer a congressional intention to allow for implied repeal unless expressly denied by Congress.

This Court has never required Congress to take such preemptive measures to protect against future implied repeal. For example, this Court held against implied repeal in *Morton*, in the absence of a savings

clause or any text saying something "about the effect of future federal laws." So too in other implied repeal cases. *See, e.g.*, *Traynor*, 485 U.S. at 547-548.[2]

Hinging an implied repeal analysis on the presence or absence of an "effect of future federal laws" clause thus misapplies and undermines the strong presumption against implied repeal. And such an interpretive principle is not cabined to the facts or subject matter of this case. Accordingly, this Court should grant certiorari not only to resolve the particular conflict over whether IGRA effected an implied repeal, but also to clarify the interpretive means by which courts should determine such questions.

II. The question presented is of great national and regional importance.

The conflict over whether IGRA impliedly repealed state- and tribe-specific jurisdictional provisions regarding gaming on particular lands is of on-going, pressing importance both within and beyond Massachusetts. It therefore merits this Court's review.

First, the circuit split on the question presented implicates disputes beyond Martha's Vineyard. In Texas, for example, litigation over the Restoration Act continues, and at least one tribe affected by that act is already attempting to rely on the First Circuit's decision below, despite the Fifth Circuit's binding *Ysleta* decision. *See* Pl.'s Reply to Def.'s Notice of Supplemental Authority, *Texas v. Alabama-Coushatta Tribe of Texas*, No. 01-cv-299, Dkt. No. 111

[2] To be sure, the Commonwealth agrees that a savings clause, if present, is relevant to an implied repeal analysis. But the *absence* of such a clause should not be dispositive.

(E.D. Tex. May 9, 2017) (response of Texas to tribe's attempt to rely on the First Circuit's decision below in action by Texas to halt gaming prohibited by the Restoration Act); *see also*, *e.g.*, *Texas v. Ysleta del Sur Pueblo*, No. 99-cv-320, 2016 WL 3039991, at *11-15 (W.D. Tex. May 27, 2016) (denying tribe's motion to vacate or modify injunction and relying for part of its reasoning on the decision of the district court below in favor of the Commonwealth); *Texas v. del Sur Pueblo*, 220 F. Supp. 2d 668 (W.D. Tex. 2002) (allowing Texas's motion for summary judgment in lawsuit to enjoin gaming activities alleged in violation of the Restoration Act). The First Circuit has already been forced to address this issue with respect to settlement acts from both Maine and Rhode Island. *Passamaquoddy Tribe*, 75 F.3d at 790-91; *State of Rhode Island*, 19 F.3d at 697-701. And Florida too may be affected; a provision in the pre-IGRA Seminole Indian Land Claims Settlement Act of 1987 specifically applies Florida gaming law to the settlement lands at issue. *See* 25 U.S.C. § 1772d (providing that Florida laws "relating to alcoholic beverages, gambling, sale of cigarettes, and their successor laws, shall have the same force and effect within said transferred lands as they have elsewhere within the State"). Certiorari is necessary for this Court to resolve this recurrent issue.

Second, the broader issue of Indian gaming and its regulation is a matter of significant national importance. Recognizing this importance, the Court has repeatedly granted certiorari to resolve interpretive questions arising from IGRA[3] and other

[3] *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014) (deciding whether IGRA authorizes suits against tribes conducting unauthorized gaming on non-Indian lands);

questions relating to gaming on Indian trust lands.[4] This case, too, warrants the Court's attention.

Third, the particular Settlement Act unsettled by the First Circuit implicates important state, local, and regional interests. When it was codified by Congress in 1987, the Settlement Act ratified an agreement between sovereigns as to matters of considerable importance to each, and the Act came at significant cost to the Commonwealth, Town, and even the federal government. The Town relinquished title to hundreds of acres of public land (with the Commonwealth's consent); the Commonwealth paid over two million dollars toward the purchase of title to additional, private lands, the owners of which agreed to sell to consummate the settlement, *see* 25 U.S.C. §§ 1771a, 1771c; and the United States matched the Commonwealth's fiscal contribution out of the federal treasury, *id.* § 1771d. Decades later, the Aquinnah's pursuit of gaming not only will disrupt that agreed-to resolution, but also threatens to

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Chickasaw Nation v. United States, 534 U.S. 84 (2001) (deciding whether IGRA exempted payment of gambling-related excise and occupational taxes); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (deciding whether IGRA abrogated state's Eleventh Amendment immunity from suit for failure to compact in good faith).

[4] *See, e.g.*, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (issues relating to ability to challenge decision taking land into trust for tribal gaming); *Inyo Cty., Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003) (execution of state court warrant on tribal gaming enterprise to investigate off-reservation crime); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (holding that Public Law 280 does not confer authority on state to regulate activities in Indian country).

disrupt the Commonwealth's recent, partial legalization of casino gaming. The nascent state gaming market remains highly regulated, with only a limited number of casinos authorized, on a region-specific basis, to ensure proper supervision of their operations and a smoothly functioning market. *See* Mass. Gen. Laws ch. 23K, § 37; ch. 271, § 3. The First Circuit's decision, if left to stand, is likely to disrupt that careful balance.

III. IGRA did not impliedly repeal prior state- and tribe-specific legislation.

The First Circuit's upending of a thirty-year-old settlement codified in federal law was wholly unnecessary, and the decision is simply wrong, for reasons that go beyond the court's mangling of the presumption against implied repeal. The court should have concluded, consistent with the district court below as well as the Fifth Circuit, that IGRA did not repeal state- and tribe-specific federal statutes.

As discussed, this Court has created a "strong presumption" against implied repeal and has applied that presumption to preserve specific statutory enactments from repeal, even in the face of important general statutes bearing on national policy. *See*, *e.g.*, *Morton*, 417 U.S. at 550-51 (holding that strong presumption shielded Indian Reorganization Act of 1934's hiring preference specific to Indians against later implied repeal by Equal Employment Opportunity Act of 1972). This presumption requires scrupulously examining the terms of the two statutes; "effect should be given to both if possible." *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936). To find an implied repeal, "the intention of the legislature to repeal must be clear and manifest[.]" *Id.*; *accord Watt v. Alaska*, 451 U.S. 259, 267 (1981).

IGRA manifests no such clear intent to repeal the existing tribe- and state-specific statutes, including acts the very same Congress had just enacted. Rather, the statutes and IGRA are readily reconciled, giving full effect to each. IGRA itself supplies textual support for such a reading, twice acknowledging the continuing effect on tribes of other federal laws on gaming. *See* 25 U.S.C. § 2710(b)(1)(A) (providing that tribes may engage in class II gaming if, among other conditions, "such gaming is not otherwise specifically prohibited on Indian lands by Federal law"); 25 U.S.C. § 2701(5) (Congressional finding 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"). IGRA and the state-specific acts are thus "capable of co-existence," and the courts should therefore "give effect to both." *Morton*, 417 U.S. at 551 (quotation omitted).

Such a conclusion is all the more necessary where, as here, the same Congress enacted both IGRA and the Settlement Act only 14 months apart. Where the same Congress passes both laws, the presumption against implied repeal is even stronger. *See Pullen v. Morgenthau*, 73 F.2d 281, 283 (2d Cir. 1934); *Traynor*, 485 U.S. at 547 (absent affirmative congressional intent that later act repealed or amended earlier act of same Congress, later act effected no repeal).

This reading of IGRA is also consistent with the bedrock canon of construction that, "[w]here 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.'" *Crawford Fitting*, 482 U.S. at 445 (emphasis in original; quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), and *Morton*, 417 U.S. at 550-51). As the Fifth

Circuit correctly found, these discrete tribe- and state-specific acts—which apply to only to particular Indian tribes located in particular states—are plainly more specific than IGRA. *Ysleta*, 36 F.3d at 1335. Statutes like the Aquinnah's Settlement Act and the Ysleta del Sur Pueblo's Restoration Act relate to only one (or, in the case of the Restoration Act, three) particular Indian tribe's lands; resolve a particular issue; and, as part of that resolution, specifically limit gaming on particular lands. *See, e.g.*, 25 U.S.C. §§ 1300g, 1771-1771i. By contrast, IGRA is a statute of generalized reach; it supplies federal and state regulatory rules on "Indian lands" wherever located and therefore applies to a great many Indian tribes. *See* 25 U.S.C. §§ 2701-21. IGRA should therefore give way to the more specific terms of the Settlement Act. *See Crawford Fitting*, 482 U.S. at 445.

Additional support for this reading derives from Congress's subsequent enactment of other exceptions from IGRA. Since enacting IGRA, Congress has enacted other dispute-specific statutes imposing state restrictions on gaming with respect to particular tribes. *See* 25 U.S.C. § 1708(b) (post-IGRA exception in Rhode Island); 25 U.S.C. § 941*l*(a) (post-IGRA exception in South Carolina); *see also Narragansett Indian Tribe*, 158 F.3d at 1341 (describing how Rhode Island exception was intended to overrule the First Circuit's holding in *State of Rhode Island*, 19 F.3d 685, that IGRA impliedly repealed Rhode Island's settlement act). As the Fifth Circuit recognized, these later laws demonstrate Congress's view that select tribe- and state-specific exceptions can co-exist with IGRA's overall policy and regulatory framework. *Ysleta*, 36 F.3d at 1335 & n.22.

The available legislative history confirms that Congress intended to leave untouched its prior, more state-specific statutes. The Senate Select Committee on Indian Affairs' report preceding IGRA explicitly states that IGRA's provisions were not meant to "supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute . . . ." S. Rep. No. 100-446, at 12 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3082; *see also* S. Rep. No. 99-493, at 15 (1986).

In sum, in enacting IGRA's general scheme for federal and state regulation of commercial gaming by Indian tribes to supplement those tribes' own regulation, Congress evinced no clear and manifest intent to sweep away state- and tribe-specific restrictions on gaming that Congress itself had codified, including in legislation as recent as the previous year. Because we can "read the statutes to give effect to each . . . while preserving their sense and purpose," we "must" do so. *Watt*, 451 U.S. at 267.

IV. This case is an ideal vehicle for resolving the question presented.

This case is in every respect a suitable vehicle for resolving whether IGRA repealed existing federal statutes permitting state limits on the use of particular lands for tribal gaming. The question was fully aired in the two courts below, which reached contrary conclusions; the relevant facts are straightforward and largely undisputed; and the case has been litigated to final judgment. The case presents no justiciability or other procedural obstacles to reaching the question presented. There is thus no impediment to this Court's resolving the conflict between the First and Fifth Circuits—and thereby

finally settling a longstanding issue of considerable importance to a number of states and tribes, as well as all others affected by gaming.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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August 8, 2017