NO. 16-1137

United States Court of Appeals
for the First Circuit

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

v.

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

v.

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

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

APPELLEE COMMONWEALTH OF MASSACHUSETTS AND THIRD-PARTY DEFENDANTS' PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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Plaintiff-Appellee the Commonwealth of Massachusetts and the Third-Party Defendants (collectively the "Commonwealth") seek an *en banc* or panel rehearing, under Rules 35 and 40 of the Federal Rules of Appellate Procedure ("Rules"), respectively, from the decision in this appeal.[1, 2]

RULE 35 STATEMENT

The Commonwealth requests an *en banc* or panel rehearing on a single, dispositive issue: whether the 1988 Indian Gaming Regulatory Act ("IGRA") impliedly repealed the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987's ("Settlement Act") grant of state and local jurisdiction over gaming on the Wampanoag Aquinnah Indian tribe's ("Aquinnah") lands on Martha's Vineyard. The panel's holding on that issue—that IGRA impliedly repealed the Settlement Act—eviscerates a core part of the settlement agreement ("Settlement Agreement") that gave rise to the Settlement Act and has, for over thirty years, governed the relationship among the agreement's four signatories—the Aquinnah, the Commonwealth, the Town of Aquinnah ("Town"), and a group of Martha's Vineyard landowners ("Community Association"). *See*

[1] The Commonwealth combines its alternative requests for an *en banc* or panel rehearing in this single Petition, as required by Local Rule 35(b).

[2] The panel's opinion is cited as "Slip Op. at [page number]."

Slip Op. at 16-23.[3] A rehearing is necessary to protect the sanctity of that agreement, and is supported by Rules 35 and 40, for a number of reasons.

First, the decision conflicts with Supreme Court precedent because the panel did not assiduously apply the Supreme Court's rule that implied repeals are disfavored. Second, it conflicts with the Fifth Circuit's decision in *Ysleta del Sur Pueblo v. Texas* ("*Ysleta*"), 36 F.3d 1325, 1335 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995). In *Ysleta*, which presented facts remarkably like those of this case, the Fifth Circuit concluded that IGRA did not impliedly repeal an earlier enacted statute that specifically gave the state jurisdiction over gaming on lands held by an Indian tribe in Texas. By holding the opposite with respect to the Settlement Act, the panel put this Court in conflict with the Fifth Circuit. Third, the decision conflicts with this Circuit's precedent. In *Passamaquoddy Tribe v. State of Me.* ("*Passamaquoddy*"), 75 F.3d 784 (1st Cir. 1996), a panel of this Court emphasized that this Circuit is "unequivocally committed to 'the bedrock principle that implied repeals of federal statutes are disfavored,'" *id.* at 790 (quoting *State of Rhode Island v. Narragansett Indian Tribe* ("*Narragansett*"), 19 F.3d 685 (1st Cir. 1994)), and cited *Ysleta* to support its holding that IGRA did not impliedly repeal provisions in Maine's land claims settlement act, *id.* at 791. This panel's very different approach puts this decision and *Passamaquoddy* in conflict.

[3] That entity's formal name is the Aquinnah Gay Head Community Association.

Additionally, the implied repeal question itself is one of "exceptional" importance. It implicates governmental (state, local, and tribal) sovereignty and jurisdiction over land and, also, a topic of significant political consequence and interest: high-stakes Indian gaming operating in the Commonwealth without state or local oversight. *See* Fed. R. App. P. 35(b)(1)(B). It is a question worthy of an *en banc* rehearing by this Court.

STATEMENT OF THE ISSUE

Although the parties presented several issues on appeal below, the Commonwealth seeks an *en banc* or panel rehearing on just one.

Congress enacted the Settlement Act in August 1987. Pub L. No. 100-95 (1987) (*codified at* 25 U.S.C. §§ 1771-1771i). Fourteen months later, the same session of Congress (the 100th) enacted IGRA. Pub. L. 100-497 (1988) (*codified at* 25 U.S.C. §§ 2701-2721). Did the District Court correctly conclude that Congress did not intend to impliedly repeal the just-passed Settlement Act by enacting IGRA, where Congress explicitly provided in the Settlement Act that bingo and other forms of gaming on the Aquinnah's lands would remain subject to state and local law?

STATEMENT OF THE CASE

Congress enacted the Settlement Act in August 1987, to ratify the 1983 Settlement Agreement and resolve nearly a decade of contentious litigation arising

from the Aquinnah's claim to aboriginal title to property on Martha's Vineyard. *See* 25 U.S.C. §§ 1771-1771i. Relevant here, the parties to the Settlement Agreement—the Commonwealth, Aquinnah, Town, and Community Association—agreed to the transfer of 485 acres of land to the United States, to hold in trust for the Aquinnah. App.II.408-411, 412-413 (Settlement Agreement ¶¶ 4-7, 10).[4] Those "Settlement Lands" included both public (Town) lands and private lands, with the latter purchased by funds contributed equally by the Commonwealth and United States. The parties agreed that those Settlement Lands would forever remain subject to state and local jurisdiction, including civil regulatory jurisdiction over activities such as gaming. App.II.407-408, 414-416 (Settlement Agreement ¶¶ 3, 13).[5]

The Congressional ratification process made that last point—state and local jurisdiction over gaming—clear. In 1986, the Aquinnah's then-chair acknowledged to the United States Senate that the agreement would prevent the Aquinnah from conducting bingo or gaming on those lands "now or . . . in the

[4] Citations to the Tribe's Appendix to Opening Brief are in the form "App.[volume number].[page number]" and to the Community Associations' Supplemental Appendix in the form "Supp.App.[page number]."

[5] The only exceptions concerned taxation and hunting.

future."[6] When Congress enacted the Settlement Act in 1987, it inserted specific text to reaffirm that those Settlement Lands would remain "subject to" state and local law, "including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance." 25 U.S.C. § 1771g.

Twenty-six years later, on August 29, 2013, the Aquinnah secured from the National Indian Gaming Commission ("NIGC") approval of the Aquinnah's proposal to build a bingo casino on the Settlement Lands, without securing approval from the Commonwealth or Town. App.I.188 (SF ¶¶ 54-55). The Aquinnah asserted that Congress's enactment of IGRA in 1988, just more than a year after the Settlement Act, swept away the parties' earlier, Congressionally-ratified agreement that the Settlement Lands would remain subject to the Commonwealth's and Town's jurisdiction, including over the "the conduct of bingo or any other game of chance." The NIGC agreed, without seeking any input from the Commonwealth or Town. *Id.*

After NIGC issued its approval, the Commonwealth sued the Aquinnah in the Massachusetts Supreme Judicial Court in December 2013. App.II.425-442. The Commonwealth sought a declaration that the Settlement Act's explicit text remains effective and forbids the Aquinnah from opening a bingo casino without

[6] Supp.App.156-91 (*Indian Land Claims in the Town of Gay Head, MA: Hearing on S. 1452 Before the Senate Select Committee on Indian Affairs*, 99th Cong. (Apr. 9, 1986)).

following state and local law. App.II.425-442. The Aquinnah removed the case to the United States District Court for the District of Massachusetts ("District Court"), and the Town and Community Association intervened. App.II.495-496.

After procedural motions and summary judgment briefing by the parties, the District Court (Saylor, J.) entered summary judgment in favor of the Commonwealth and other plaintiffs in a thorough decision. App.II.343-382. As relevant to this Petition, the District Court held that Congress had not intended IGRA to impliedly repeal the Settlement Act's conferral of jurisdiction to the Commonwealth and the Town over gaming on the Settlement Lands. *Id.*

The Aquinnah appealed. All parties briefed the appeal and the United States also submitted a brief as *amicus curiae* in support of the Aquinnah. On April 10, 2017, the panel issued a decision reversing the District Court.

ARGUMENT

This Court should rehear this appeal *en banc* for three independent reasons, two of which alternatively support a panel rehearing.

First, the panel did not follow and apply the Supreme Court's "strong presumption against implied repeals," *Dorsey v. United States*, 567 U.S. 260, 132 S. Ct. 2321, 2340 (2012), and ignored the principle that "a specific statute will not be controlled or nullified by a general one," *Crawford Fitting Co. v. J.T. Gibbons*,

Inc., 482 U.S. 437, 445 (1987). That failure requires correction through an *en banc* or panel rehearing. Rule 35(b)(1)(A).

Second, the panel's treatment of implied repeal created a conflict with the Fifth Circuit's *Ysleta* decision. *Ysleta* found no implied repeal on nearly identical facts. Yet, even though this Court previously cited *Ysleta* approvingly to support its own holding in *Passamaquoddy*, the panel did not mention it, in conflict with both this Circuit's own and the Fifth Circuit's precedent. Those conflicts call for an *en banc* or panel rehearing. *See* Rules 35(b)(1)(A) and (B).

Third, the issue of implied repeal is one related to governmental jurisdiction over land and gaming—questions of "exceptional" political, governmental, and public importance that require *en banc* consideration. *See* Rule 35(b)(1)(B).

I. An *En Banc* or Panel Rehearing is Necessary to Correct the Panel's Failure to Apply the Supreme Court's Strong Presumption Against Implied Repeals.

Supreme Court precedent establishes a "strong presumption against implied repeals." *Dorsey*, 132 S. Ct. at 2340; *see also Morton v. Mancari*, 417 U.S. 535, 549 (1974) (holding that "repeals by implication are not favored") (internal quotations omitted). Applied here, the panel was bound to scrupulously examine all facts relevant to the Settlement Act, to harmonize the Act with IGRA if possible, to avoid finding any implied repeal of the former by the latter. *See, e.g.*, *Watt v. Alaska*, 451 U.S. 259, 267 (1981) ("We must read the statutes to give effect

to each if we can do so while preserving their sense and purpose."). If a "strong presumption against implied repeals" is to mean anything, it must mean that, when presented with two plausible interpretations of statutes, one of which requires finding an implied repeal and the other of which does not, a court should generally prefer the second.

Yet the panel decision follows the opposite approach. The panel's conclusion that IGRA impliedly repealed the Settlement Act is a *possible* reading of the statutes but surely not the *only* reading—indeed, the District Court came to the opposite conclusion (as did the Fifth Circuit in *Ysleta* on similar facts, *see infra* Part II). Thus, although the panel incanted this presumption at the outset of its analysis, Slip Op. at 16, it failed to meaningfully apply it. Aside from that prefatory recitation, the decision never again acknowledged the presumption or engaged with it. *See generally id.* Instead, the decision lays out a far less deferential review by comparing the facts of this appeal to *Passamaquoddy* (holding that IGRA did not impliedly repeal the Maine Indian Claims Settlement Act) and to this Court's decision in *Narragansett* (holding that IGRA impliedly repealed Rhode Island Indian Claims Settlement Act), to decide which of those precedents this appeal more closely approximates. *See* Slip Op. at 17. That analysis broke with Supreme Court precedent.

To begin, while it was clearly proper for the panel to examine this Court's prior precedent, the panel's comparative analysis, standing alone, was not enough to satisfy the presumption against implied repeal. Just because *Passamaquoddy* and *Narragansett* lie on different ends of the implied repeal spectrum, it does not follow that the line between the two falls in the middle. So, even if the panel was right and this appeal was "very close" to *Narragansett*, Slip Op. at 17, it does not necessarily follow that IGRA impliedly repealed the Settlement Act.[7] Nonetheless, the panel's analysis did not further engage the issue. Instead, the panel simply held that "[b]ecause the present case is very close to *Narragansett*, and readily distinguished from *Passamaquoddy*, we find for the Tribe on [the implied repeal] issue." Slip Op. at 17. That analytical framework contradicted the Supreme Court's rule disfavoring implied repeals. *See id.*

Next, in its comparative analysis, the panel did not consider every fact differentiating this appeal from *Narragansett*, as it must in order to follow the strong presumption against implied repeals. For example, while Congress enacted the Rhode Island settlement act ("Rhode Island Act"), at issue in *Narragansett*, a decade before IGRA, it was the same session of Congress that enacted both IGRA and the Settlement Act. The panel decision never mentions that fact, although it

[7] Indeed, *Narragansett* was a 2-to-1 panel decision, in which the dissenting Justice noted the "closeness" of that case, 19 F.3d at 706 (Coffin, J., dissenting).

was briefed by the Commonwealth, Commonwealth Br. at 25-26, and acknowledged by the District Court, App.II.378. That fact is important because "[w]here both laws are passed at the same session, the presumption against implied repeal is all the stronger." *Pullen v. Morgenthau*, 73 F.2d 281, 283 (2d Cir. 1934); *see also Traynor v. Turnage*, 485 U.S. 535, 547 (1988) (absent affirmative congressional intent that later act repealed or amended earlier one passed by same Congress, later act effected no repeal, and both should be read harmoniously). Ignoring this point is inconsistent with applying the "heavy presumption" against implied repeal.

Similarly, the Settlement Act is more specific than the Rhode Island Act because the latter gives Rhode Island civil jurisdiction on Indian lands only generally, *Narragansett I*, 19 F.3d at 703-05, while the former includes gaming-specific text. Commonwealth's Br. at 24-25. Moreover, the Settlement Act is also more specific than IGRA because it applies to a single tribe, in a single state, on specific lands, whereas IGRA establishes a nationwide default rule for all tribes. The Settlement Act's specificity vis-à-vis IGRA and the Rhode Island Act is important because "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." *Crawford Fitting Co.*, 482 U.S. at 445 (citation omitted); *see also Ysleta*, 36 F.3d at 1335. But, notwithstanding the Commonwealth's argument and

the District Court's analysis of the specific-over-the-general canon, App.II.378-79, the panel's decision never meaningfully discussed it.[8] The panel's analysis was thus once again inconsistent with the "heavy presumption" against implied repeal.

At times, the panel also seemed to flip the presumption on its head. In some of its analysis, the decision focused on whether the Settlement Act's text includes a savings clause like in the Maine Act. Slip Op. at 20-22. Thus, when analyzing the Settlement Act's text, the panel emphasized that the text "says nothing about the effect of future federal laws on the [Settlement Act]" to explain why that text is not a savings clause, as with Maine. Slip Op. at 20. But the Supreme Court has never said that implied repeals are only avoided by savings clauses or where statutory text says something about "the effect of future federal laws." Rather, the Supreme Court says that implied repeals are disfavored, *Morton*, 417 U.S. at 549, and that general statutes do not trump specific ones, *Crawford Fitting Co.*, 482 U.S. at 445. The decision thus departed from Supreme Court precedent when it created a new

[8] At one point, the panel labeled the Settlement Act's text as "hardly specific, as it appears applicable to all types of gaming and references bingo only as an example." Slip Op. at 22. But that fails to engage the point that the Settlement Act is *more* specific than IGRA because of its application to a single tribe and a single state. *Cf. Ysleta*, 36 F.3d at 1335 ("[T]he 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."); Commonwealth Br. at 24-25.

"effect of future federal laws" rule that served to flip the presumption rather than apply it.

Finally, and in this vein, the panel failed meaningfully to consider that IGRA and state-specific acts co-exist, even absent a savings clause. Congress has created such exceptions both before and after IGRA. *See* 25 U.S.C. § 1708(b) (post-IGRA text applicable in Rhode Island); 25 U.S.C. § 941*l*) (post-IGRA text applicable in South Carolina); 25 U.S.C. § 1300g-6(a) (pre-IGRA text applicable in Texas). So, there is nothing intrinsic about IGRA to displace the canon favoring specific statutory provisions over general ones.[9] Accordingly, an *en banc* or panel rehearing is necessary to fix these errors and to adhere to Supreme Court precedent. *See* Fed. R. App. P. 35(b)(1)(A).

[9] These are not the only shortcomings in the decision. For example, the decision cited to a Senate report to support its conclusion that IGRA's text preserving any federal law that "specifically prohibit[s]" gaming on Indian lands was meant to refer to certain mechanical gaming devices identified by federal law and does not apply here. Slip Op. at 23 (*citing* S. Rep. No. 100-446, at 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082). In the *same paragraph* of that report, however, the Senate wrote: "nothing in the provision of this section or 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, including the Rhode Island Claims Settlement Act . . . and the Marine [*sic*] Indian Claim Settlement Act . . .." *Id.* There is no justifiable reason—particularly in light of the presumption against implied repeal—to credit one part of the Senate Report paragraph but not another. *See* Slip Op. at 23; *id*.

II. An *En Banc* or Panel Rehearing is Necessary to Correct Conflicts with Fifth Circuit and First Circuit Precedent.

In *Ysleta*, the Fifth Circuit held that IGRA did not impliedly repeal the Ysleta Del Sur Pueblo Restoration Act's ("Restoration Act") earlier grant of jurisdiction to Texas over any gaming by an Indian tribe with lands in that state. 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."). The Restoration Act, and the circumstances of its enactment, were remarkably like the Settlement Act. Both Acts have gaming-specific text, requiring both Indian tribes to follow state gaming law on tribal land. *Compare* 25 U.S.C. § 1300g-6(a), *with* 25 U.S.C. § 1771g. The same session of Congress enacted both Acts on the same day, August 18, 1987. *Compare* Pub. L. 100-95, *with* Pub. L. 100-89. As with the Settlement Act, the legislative history of the Restoration Act showed that Congress inserted gaming-specific text into that Act at the behest of the state and the Indian tribe, with no evidence that Congress did so only as a placeholder until it could finalize IGRA.[10] In all meaningful respects, the Restoration Act is the same as the Settlement Act.

The Commonwealth thus extensively argued below that the Fifth Circuit's legal analysis in *Ysleta* is persuasive precedent. *See* Commonwealth's Br. at 14,

[10] *Compare* Commonwealth's Br. at 7-8, *with Ysleta*, 36 F.3d at 1328-31.

23, 25, 29. In *Ysleta*, as here, the Indian tribe argued that "IGRA impliedly repeals the Restoration Act." 36 F.3d at 1334. But, the Fifth Circuit rejected that argument, based on the specific-over-the-general canon and the presumption against implied repeal. *Id.* at 1334-35. In addition, the Fifth Circuit noted that "Congress also did not include in IGRA a blanket repealer clause as to other laws in conflict with IGRA," and cited Congress's 1993 decision to exempt a South Carolina tribe from IGRA's purview, "evidencing in our view 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." *Id.* at 1335. The panel in this appeal, however, never cited or mentioned *Ysleta*, including that analysis. *See generally* Slip Op. By ignoring *Ysleta*, the panel put this Circuit in conflict with the Fifth because there is no way to meaningfully distinguish the facts or legal arguments in the two cases.

Furthermore, in the course of holding that IGRA did not impliedly repeal an earlier-enacted savings clause in Maine's land claims settlement act ("Maine Act"), 25 U.S.C. §§ 1735(b), this Court in *Passamaquoddy* approvingly described *Ysleta* as "holding that the Gaming Act did not impliedly repeal a federal statute granting Texas jurisdiction over Indian gaming because Congress never indicated in the Gaming Act that it intended to rescind the previous grant of jurisdiction." 75 F.3d at 791. The parenthetical explanation used by *Passamaquoddy* to describe *Ysleta*

demonstrates that the panel in *Passamaquoddy* knew the facts and conclusions of *Ysleta* and viewed that decision persuasive authority. *See id.*; Commonwealth's Br. at 30. Yet, here, the panel made no mention of the proposition for which *Passamaquoddy* cited *Ysleta*, even though the Commonwealth argued it. *See* Commonwealth Br. at 22-24. Indeed, the facts on this appeal are far more like *Ysleta* than the facts in *Passamaquoddy* were, making the omission glaring.[11] This Court should address that conflict through an *en banc* or panel rehearing. *See* Rule 35(b)(1)(A)-(B).

III. An *En Banc* or Panel Rehearing is Necessary to Decide an Issue of Exceptional Political, Governmental, and Public Importance.

Under Rule 35(b)(1)(B), this Court may review *en banc* questions of "exceptional importance," even absent a Circuit or Supreme Court conflict. The implied repeal issue presents such a question.

The Settlement Act ratified a Settlement Agreement that ended nearly a decade of litigation among these parties and one that has, for over thirty years, governed these parties' relationships largely free from conflict. The panel's decision threatens this state of affairs because jurisdiction over "gaming" cannot easily be excised from the Commonwealth's and Town's remaining civil

[11] The D.C. Circuit Court of Appeals previously concluded that IGRA did not impliedly repeal the Settlement Act. *Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1341 (D.C. Cir. 1998) (recognizing that the Settlement Act "exclude[s]" the Tribe from IGRA).

regulatory jurisdiction over the Settlement Lands, even in relation to a bingo casino. For example, while this case was in the District Court, the Aquinnah took steps to construct its bingo casino, and, when it would not answer to Town inspectional authorities on issues such as building codes or zoning, the Town sought and secured an injunction. App.II.355. The panel's decision thus opens the door for future conflicts, specific even to "gaming" in a bingo casino. Such conflicts would be a devastating epilogue to the Settlement Agreement, welcomed by all parties in 1983 as an end to many years of litigation.

Moreover, this appeal implicates important government and public issues. Those issues include governmental (state, local, and tribal) sovereignty and jurisdiction over land, a federally-ratified intergovernmental Settlement Agreement, and a topic of significant political consequence and interest: gaming. This question is one of "exceptional importance," proper for the *en banc* Court's consideration through rehearing.

CONCLUSION

For the reasons set forth above, this Court should order a rehearing of this appeal *en banc* under Fed. R. App. P. 35, or the panel should rehear this appeal under Fed. R. App. P. 40.

Respectfully submitted,

The COMMONWEALTH OF MASSACHUSETTS,

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April 24, 2017

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This Petition complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 40(b)(1) because it contains 3,757 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by Microsoft Word's "Word Count" function. This Petition further complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman style, 14-point font.

/s/ Bryan Bertram
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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2017 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers on the Court's Service List and that they will therefore be served by the CM/ECF system:

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