

No. 2016-1137

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

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 capacity as
Chairman of the Massachusetts Gaming Commission,

Third Party-Defendants.

On Appeal from the United States District Court for the District of Massachusetts
in Case No. 1:13-cv-13286-FDS, Judge F. Dennis Saylor, IV

**PLAINTIFFS-APPELLEES AQUINNAH/GAY HEAD COMMUNITY
ASSOCIATION, INC.'S AND TOWN OF AQUINNAH'S PETITION FOR
PANEL REHEARING OR REHEARING EN BANC**

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April 24, 2017

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CORPORATE DISCLOSURE STATEMENT

The Aquinnah/Gay Head Community Association, Inc., is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts; it has no parent corporation and no publicly-held corporation owns more than 10% of its stock.

Pursuant to Federal Rules of Appellate Procedure 35(b) and 40, the Aquinnah/Gay Head Community Association, Inc. (“AGHCA”), and the Town of Aquinnah (“Town”) respectfully join the Commonwealth of Massachusetts’s (“Commonwealth”) petition for a panel rehearing or a rehearing *en banc*, and also respectfully petition for a panel rehearing or a rehearing *en banc* in this matter.¹

STATEMENT OF COUNSEL

The panel’s decision in this matter is inconsistent with Supreme Court precedent providing that implied repeals are strongly disfavored, *Dorsey v. United States*, 567 U.S. 260, 132 S. Ct. 2321, 2340 (2012), and that a general statute will not be nullified by a more specific statute, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987).

Further, based on our professional judgment, we believe this appeal requires an answer to the following precedent-setting question of exceptional importance: whether, through a statute of general application, Congress effected an implied repeal of a more specific statute enacted by the same Congress fourteen months earlier. The importance of this question is underscored by the fact that the Fifth Circuit came to the opposite conclusion as the panel of this Court in *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1334-1335 (5th Cir. 1994), and the panel failed to

¹ Pursuant to First Circuit Local Rule 35(b), the AGHCA and the Town combine their alternative requests for *en banc* or panel rehearing in this single petition.

address the Fifth Circuit’s decision in its opinion in this matter. It also raises an issue of substantial political and governmental importance.

/s/ Felicia H. Ellsworth

FELICIA H. ELLSWORTH

/s/ Ronald H. Rappaport

RONALD H. RAPPAPORT

BACKGROUND

On April 10, 2017, a panel of this Court issued its decision reversing the decision below. The panel concluded that: (1) the Indian Gaming Regulatory Act (“IGRA”) applied to the Settlement Lands the Wampanoag Tribe of Gay Head (Aquinnah), the Wampanoag Tribal Council of Gay, Head, Inc., and the Aquinnah Wampanoag Gaming Corporation (collectively, “the Tribe”) received pursuant to a 1983 litigation settlement agreement entered into by the Tribe, the Commonwealth, the Town, and the AGHCA²; and (2) IGRA effected an implied repeal of the gaming-specific language contained in the *Wampanoag Tribal Council of Gay Head, Inc., Indian Land Claims Settlement Act of 1987*, Pub. L. No. 100-95, *codified at* 25 U.S.C. §§ 1771 *et seq.* (“the Federal Act”), despite the fact that the

² At the time the settlement agreement was executed, the Town of Aquinnah was known as the Town of Gay Head, and the AGHCA was known as the Taxpayers’ Association of Gay Head, Inc. APP445; APP 446 at ¶ 1; APP 456.

Citations to “APP” refer to the Appendix filed with the Tribe’s opening brief.

Federal Act was passed by the same Congress only fourteen months before IGRA and expressly includes language providing that the Tribe must comply with Commonwealth and Town laws related to gaming in engaging in gaming activity. *See* Slip. Op. at 3-4, 16, 23.³

ARGUMENT

I. THE AGHCA AND THE TOWN JOIN IN THE COMMONWEALTH’S PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

The AGHCA and the Town join in the Commonwealth’s petition for a panel rehearing or a rehearing *en banc* and submit that the petition should be granted for the reasons advanced by the Commonwealth in its petition.

II. THE PANEL’S DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT

For the reasons set forth in the Commonwealth’s petition for a panel rehearing or a rehearing *en banc*, the AGHCA and the Town contend that the panel’s decision is inconsistent with the Supreme Court’s precedent holding that implied repeals are strongly disfavored, *Dorsey*, 132 S. Ct. at 2340 (noting that a “strong presumption against implied repeals” exists), and that a general statute will not be nullified by a more specific statute, *Crawford Fitting Co.*, 482 U.S. at 445. Although the AGHCA and the Town extensively briefed both of these issues (Br. at 37-38, 43-45), the panel’s decision fails to address the fact that the gaming

³ Citations to “Slip Op. at ___” refer to the panel’s decision in this matter dated April 10, 2017.

language within the Federal Act makes the Federal Act the more specific act as compared to IGRA: it governs gaming by the Tribe in the Town whereas IGRA applies to all tribes nationwide. *Compare* 25 U.S.C. § 1771g (providing that lands “in the town of Gay Head, Massachusetts, shall be subject to the civil and criminals 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*)” (emphasis added)), *with* 25 U.S.C. §§ 2703, 2710 (describing gaming permissible under IGRA). And, as set forth in the Commonwealth’s petition, the panel’s decision fails to meaningfully address Supreme Court precedent providing that there is a strong presumption against implied repeals.

III. THE FIFTH CIRCUIT AND THE D.C. CIRCUIT HAVE REACHED DIFFERENT CONCLUSIONS THAN THE PANEL

The AGHCA and the Town further note that the panel failed to address the Fifth Circuit’s decision in *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994)—a decision with striking similarities to this case.⁴ In *Ysleta*, the Fifth Circuit concluded that the Ysleta Tribe’s Restoration Act governed its ability to game on its lands, not IGRA. *Id.* at 1332, 1334-1335. The Restoration Act was enacted approximately a year before IGRA and contained gaming-specific

⁴ The AGHCA and the Town cited to and discussed the Fifth Circuit’s decision in *Ysleta* in their brief. Br. at 39, 43-44, 49.

language. *See id.* at 1333, 1335. The Fifth Circuit reasoned that the Restoration Act controlled as: (1) “the Restoration Act clearly is a specific statute, whereas IGRA is a general one” because “[t]he former applies to two specifically named Indian tribes located in one particular state, and the latter applies to all tribes nationwide”; and (2) “Congress, when enacting IGRA ... after the Restoration Act, explicitly stated in two separate provisions of IGRA that IGRA should be considered in light of other federal law” and “Congress never indicated in IGRA that it was expressly repealing the Restoration Act.” *Id.* at 1335.

Each element of the Fifth Circuit’s reasoning and decision is applicable to the Federal Act. Similar to the Restoration Act, the Federal Act was enacted fourteen months before IGRA was enacted (by the *same Congress*), and the Federal Act contains gaming-specific language. *See id.* at 1333, 1335; *see also* 25 U.S.C. § 1771g; Pub. L. No. 100-95 (Federal Act; enacted by 100th Congress on Aug. 18, 1987); Pub. L. No. 100-497 (IGRA; enacted by 100th Congress on Oct. 17, 1988).⁵ The Federal Act is the more specific act as to IGRA since the Federal Act governs gaming by the Tribe in the Town whereas IGRA governs gaming by all tribes nationwide. *See Ysleta*, 36 F.3d at 1335; *see also* 25 U.S.C. § 1771g; 25

⁵ Indeed, the Restoration Act and the Federal Act were enacted on the same day. *See* Pub. L. No. 100-89 (Restoration Act; enacted on Aug. 18, 1987); Pub. L. No. 100-95 (Federal Act; enacted on Aug. 18, 1987).

U.S.C. §§ 2703, 2710. And, there is no express repeal of the Federal Act's gaming restrictions in IGRA. *See* 25 U.S.C. §§ 2701 *et seq.*

Given the substantial similarities between the Restoration Act considered in *Ysleta* and the Federal Act considered by the panel here, the AGHCA and the Town submit that the panel's failure to cite to and consider the Fifth Circuit's decision in *Ysleta* was error. The panel's failure to consider the Fifth Circuit's decision is even more troubling given that this Court previously cited language from *Ysleta* with approval in concluding that IGRA did not effect an implied repeal of a settlement act governing tribes in Maine. *See Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 791 (1st Cir. 1996) (citing *Ysleta* with approval for the proposition 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*" (emphasis added)).

The Fifth Circuit's decision in *Ysleta* is not the only prior decision that is inconsistent with the panel's decision in this matter; the D.C. Circuit also came to a contrary conclusion. In considering the Narragansett Tribe's challenge to the constitutionality of the amendment to the Rhode Island Indian Claims Settlement Act, the D.C. Circuit in *Narragansett Indian Tribe v. National Indian Gaming Commission* ("*Narragansett II*") specifically pointed to the Federal Act as an act

that “specifically provide[s] for *exclusive state control over gambling*.” 158 F.3d 1335, 1341 (D.C. Cir. 1998) (emphasis added) (citing 25 U.S.C. § 1771g). Like the Fifth Circuit’s decision in *Ysleta*, the panel also failed to cite to and consider the D.C. Circuit’s decision in *Narragansett II*.

The AGHCA and the Town submit that the panel’s failure to address and consider the Fifth Circuit’s decision in *Ysleta* and the D.C. Circuit’s decision in *Narragansett II* are additional reasons that a panel rehearing or a rehearing *en banc* is warranted in this matter.

IV. THE QUESTION OF IMPLIED REPEAL RAISES AN ISSUE OF EXCEPTIONAL POLITICAL AND GOVERNMENTAL IMPORTANCE

The Federal Act ratified a carefully negotiated settlement agreement among the Tribe, the Commonwealth, the Town, and the AGHCA. *See* 25 U.S.C. § 1771. Yet, the panel’s decision eviscerates a core principle of that negotiation evidenced in the Federal Act (and the settlement agreement): that the Tribe’s lands in the Town were to be subject to the Commonwealth’s and Town’s jurisdiction and laws, including those governing gaming. *See* 25 U.S.C. § 1771g; APP446-447 at ¶ 3; APP448-449 at ¶ 5; APP453 at ¶ 13. Indeed, the uncertainty as to the parties’ respective duties and obligations under the Federal Act and the settlement agreement in light of the panel’s decision is highlighted by this litigation itself. In the course of attempting to begin construction of the contemplated gaming facility on its property on the Settlement Lands, the Tribe flouted Town permitting and

building code requirements; as a result, the Town sought and secured an injunction. APP355 n.6. These disputes will only proliferate, and were precisely the type of uncertainties the Federal Act and settlement agreement were designed to prevent.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Commonwealth's petition for a panel rehearing or a rehearing *en banc*, the AGHCA and the Town respectfully request that the Court grant a panel rehearing or a rehearing *en banc* in this matter.

Respectfully submitted,

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April 24, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 1,760 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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April 24, 2017

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Plaintiff-Appellee Aquinnah/Gay Head Community Association, Inc.'s Petition for Rehearing En Banc with the Clerk of the United States Court of Appeals for the First Circuit via the CM/ECF system this 24th day of April, 2017 to be served on the following counsel of record via ECF:

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