Nos. 19-1661, 19-1729, 19-1857, 19-1922

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

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

*Plaintiffs-Appellants/Cross-Appellees,*

COMMONWEALTH OF MASSACHUSETTS,

*Plaintiff-Appellee,*

v.

THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH);
THE AQUINNAH WAMPANOAG GAMING CORPORATION,

*Defendants-Appellees/Cross-Appellants,*

CHARLES D. BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts; MAURA T. HEALEY, in her official capacity as Attorney General of the Commonwealth of Massachusetts; CATHY JUDD STEIN, in her capacity as Chairwoman of the Massachusetts Gaming Commission,

*Third Party-Defendants-Appellees*.

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On Appeal from the United States District Court
for the District of Massachusetts, No. 1:13-cv-13286-FDS

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# BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS AND USET SOVEREIGNTY PROTECTION FUND IN SUPPORT OF APPELLANTS AND REVERSAL

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Daniel Lewerenz
NATIVE AMERICAN RIGHTS FUND
1514 P Street NW,
Suite D
Washington, DC 20005
(202) 785-4166
lewerenz@narf.org
*Counsel of record*

Derrick Beetso
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P Street NW
Washington, DC 20005
(202) 466-7767
dbeetso@ncai.org
*Counsel for NCAI*

Gregory A. Smith
HOBBS STRAUS DEAN & WALKER, LLP
2120 L Street, NW,
Suite 700
Washington, DC 20037
(202) 822-8282
gsmith@hobbsstraus.com
*Counsel for USET SPF*

## CORPORATE DISCLOSURE STATEMENT

The National Congress of American Indians and USET Sovereignty Protection Fund, pursuant to Fed. R. App. P. 26.1, certify that it has no parent corporation and certifies that it has no stock and, therefore, no publicly held corporation owns 10% or more of its stock.

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## INTERESTS OF *AMICI CURIAE*[1]

*Amicus* NCAI Fund is the non-profit public-education arm of the National Congress of American Indians, the Nation's oldest and largest organization of Alaska Native and American Indian Tribal governments and their citizens. NCAI Fund's mission is to educate the general public, and Tribal, Federal, and State government officials about Tribal self-government, treaty rights, and policy issues affecting Indian Tribes, including the interpretation of Indian statutes.

*Amicus* USET Sovereignty Protection Fund ("USET SPF") is a non-profit organization representing 27 federally recognized tribal nations in 13 states from Texas to Maine. USET SPF works at the regional and national level to educate Federal, State, and local governments about the unique historical and political status of its member tribal nations.

The NCAI Fund and USET SPF are uniquely suited to serve as *amici*. NCAI Fund frequently participates in the courts of the United States, and has particular expertise in the interpretation of Indian statutes. USET SPF has expertise in the interpretation of statutes acknowledging Indian Tribes—by land claims settlement,

[1] Undersigned counsel hereby certifies that: all parties have consented to *amici*'s submission of this brief; no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person or entity—other than *amici curiae*, their members, or their counsel—contributed money intended to fund the preparation or submission of this brief.

tribal restoration, or otherwise—due to its members' locations in the South and Eastern United States. *Amici* share a substantial interest in preserving the unique government-to-government relationship between the United States and Indian Tribes, and in ensuring that statutes enacted in furtherance of that duty are fully implemented.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case, like *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618 (1st Cir. 2017) ("*Wampanoag Tribe*), asks this Court to determine (1) whether a provision of the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987 ("Settlement Act"), Pub. L. 100-95, 101 Stat. 704 (1987), conflicts with the Indian Gaming Regulatory Act ("IGRA"),[2] and if there is a conflict (2) which statute should prevail.

This Court previously answered that question in favor of the Wampanoag Tribe of Gay Head (Aquinnah) ("Tribe"). In *Wampanoag Tribe*, this Court concluded both (1) that IGRA applies to the Tribe and its Settlement Lands, 853 F.3d at 624-26; and (2) that, to the extent that the Settlement Act conflicts with IGRA, IGRA effected an implied partial repeal of the Settlement Act, *id.* at 626-29. Thus, the laws of the Commonwealth of Massachusetts ("State") and the Town of

[2] Pub. L. 100-497, 102 Stat. 2467 (1988), *codified at* 25 U.S.C. §§ 2701 *et seq.*

Aquinnah ("Town") regulating bingo and other games of chance were held to be inapplicable to the Tribe's proposed gaming operation.

This Court's Order, entered on April 10, 2017, provided a clear and simple instruction: "the opinion of the district court is reversed and the case is remanded to the district court **for entry of judgment in favor of the Tribe**." *Id.* at 629 (emphasis added). The Town's petition for certiorari to the U.S. Supreme Court was denied on January 8, 2018. (Dkt. No. 175.) This Court's Mandate was issued on May 9, 2018, and entered on the District Court's docket on May 18, 2018. (Dkt. No. 176.) And yet, the District Court did not enter judgment in favor of the Tribe, as instructed. Instead, almost a year after this Court's Mandate was entered on the District Court's docket, the Town made a Motion for Entry of Judgment that proposed an entirely different outcome—judgment for the Tribe only on the application of the State's and the Town's gaming laws, and judgment for the Town on the application of its non-gaming laws. *See generally* Town's Mem. Supp. Mot. Entry J. (Dkt. No. 181). Notwithstanding the District Court's pronouncement in its Order on Summary Judgment (Dkt. No. 151) that it was deciding only gaming-related questions,[3] and

[3] The District Court's statement in this regard is worth repeating at length:

> This case presents two fairly narrow issues. The first is whether a statute passed by Congress in 1988 (the Indian Gaming Regulatory Act, or IGRA) applies to the lands in question, which in turn raises the questions whether the Tribe exercises "jurisdiction" and "governmental power" over the lands. The second is whether IGRA repealed, by implication, the statute passed by Congress in 1987 (the act that approved the 1983 agreement). If the 1988 law

the lack of any language in the Judgment (Dkt. No. 158) specifically applying the Town's building code, the District Court granted the Town's motion. *See generally* Mem. & Order on Mot. Final J. (Dkt. No. 200); Am. Final J. (Dkt. No. 201); 2d Am. Final J. (Dkt. No. 215); 3d Am. Final J. (Dkt. No. 230) (collectively, the "Judgments").

*Amici* submit that the District Court erred in issuing these Judgments without performing the analysis outlined by this Court for determining whether the application of a state or local non-gaming law would unlawfully interfere with a

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> (IGRA) controls, the Tribe can build a gaming facility in Aquinnah. If the 1987 law controls, it cannot.
>
> Whether an Indian tribe should be permitted to operate a casino on Martha's Vineyard is a matter of considerable public interest, and the question touches upon a variety of complex and significant policy issues. This lawsuit is not, however, about the advisability of legalized gambling. Nor is it about the proper course of land development on Martha's Vineyard, or how best to preserve the unique environment and heritage of the island. And it is not about the appropriate future path for the Wampanoag people. If there are answers to those questions, they are properly left to the political branches in our system of government.

Dkt. No. 151.

Nor was this the only time the District Court observed that the core dispute concerned the State's and Town's direct efforts to regulate gaming. *See* Order Den. Mot. Remand at 10 (Dkt. No. 31) (published at *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 36 F. Supp. 3d 229, 235 (D. Mass. 2014) ("The present dispute, however, does not concern local zoning regulations or state public records laws, which principally involve matters of local and state law. Instead, the issue is gaming on Indian lands, a matter that is subject to extensive federal legislation and regulation.").

Tribe's authority to conduct gaming pursuant to IGRA.[4] *See Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 705-06 (1994).

## BACKGROUND

Over more than 85 years, Congress has enacted a variety of statutes with the goal of empowering Indian Tribes to build strong economies that can support the

[4] *Amici* also agree with the Tribe on two critical procedural questions. First, the Judgments violate the so-called "mandate rule," which holds that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948); *United States v. Ticchiarelli*, 171 F.3d 24, 31 (1st Cir. 1999) ("The 'mandate rule' generally requires that a district court conform with the remand order from an appellate court."). This especially holds when an appellate court's instruction is, as this Court's was, clear and complete. *Hynning v. Partridge*, 359 F.2d 271, 273 (D.C. Cir. 1966).

Second, even if the mandate rule permitted further adjudication of this case, the Town's motion was improper. Under the Local Rules of the District of Massachusetts, when this Court issues a mandate that does not call for further proceedings, that mandate constitutes judgment when entered on the district court's docket. L.R. 58.2(d) ("**Mandate of an Appellate Court.** An order or judgment of an appellate court in a case appealed from this court shall, if further proceedings are not required, become the order or judgment of this court and be entered as such on receipt of the mandate of the appellate court.") (emphasis in original). This Court issued just such a mandate, which was docketed on May 18, 2018. (Dkt. No. 176.) Thus, the Town's motion for entry of judgment was improper, as judgment already was entered; the Town instead should have moved under Rule 59 to alter or amend judgment.

Tribes' exercise of their inherent sovereignty[5]: the Indian Reorganization Act;[6] the Indian Financing Act;[7] the Indian Employment, Training and Related Services Demonstration Act;[8] the American Indian Agricultural Resource Management Act;[9] the Native American Business Development, Trade Promotion, and Tourism Act,[10] among others.

IGRA is a key component of Congress's effort to create self-sufficient and self-governing Tribes. The declared purpose of IGRA is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. §

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[5] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 810 (2014) ("A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding.") (Sotomayor, J., concurring); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (recognizing "a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development."); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983) ("[B]oth the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes.").

[6] Pub. L. 73-383, ch. 576, 48 Stat. 984 (1934), *codified at* 25 U.S.C. §§ 5101 *et seq.*; *see Morton v. Mancari*, 417 U.S. 535, 542 (1974) ("The overriding purpose of that particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.")

[7] Pub. L. 93-262, 77 Stat. 88 (1974), *codified at* 25 U.S.C. §§ 1451 *et seq.*

[8] Pub. L. 102-477, 106 Stat. 2302 (1992), *codified at* 25 U.S.C. §§ 3401 *et seq.*

[9] Pub. L. 103-177, 107 Stat. 2011 (1993), *codified at* 25 U.S.C. §§ 3701 *et seq.*

[10] Pub. L. 106-464, 114 Stat. 2012 (2000), *codified at* 25 U.S.C. §§ 4301 *et seq.*

2702(1).[11] Gaming operations and other Tribal businesses "are critical to the goals of tribal self-sufficiency because such enterprises in some cases 'may be the only means by which a tribe can raise revenues.'" *Bay Mills Indian Cmty.*, 572 U.S. at 810 (Sotomayor, J., concurring) (quoting Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137, 169 (2004)). And it works: Tribal gaming generated $33.7 billion in revenues in Fiscal Year 2018 alone. Mavis Harris, *2018 Indian Gaming Revenues of $33.7 Billion Show a 4.1% Increase*, National Indian Gaming Commission (Sept. 12, 2019), https://www.nigc.gov/news/detail/2018-indian-gaming-revenues-of-33.7-billion-show-a-4.1-increase.

This case presents this Court—again—with the question of whether the State's and the Town's laws may be applied to impede the Tribe's ability to avail itself of IGRA.

[11] Courts considering IGRA emphasize its central purpose of tribal economic development. *See, e.g.*, *Citizens Against Casino Gambling v. Chaudhuri*, 802 F.3d 267, 288 (2d Cir. 2015) ("The explicit policy underlying IGRA was to benefit tribes by helping them to achieve self-sufficiency and to grow economically."); *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Attorney for W. Dist. Of Mich.*, 369 F.3d 960, 971 (6th Cir. 2004); *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1079 (7th Cir. 2015); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003); *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003).

## ARGUMENT

### A. *Narragansett* instructs courts on how to address continuing conflicts over jurisdiction, and the District Court failed to follow those instructions.

This Court previously considered the application both of IGRA and of the Settlement Act in *Wampanoag Tribe*. 853 F.3d 618. In that case, this Court concluded both that IGRA applies to the Tribe and its Settlement Lands, *id.* at 624-26; and that, to the extent that the Settlement Act conflicts with IGRA, IGRA effected an implied partial repeal of the Settlement Act, *id.* at 626-29.

Now, as then, *Narragansett* lights the way. Both *Narragansett* and this case concern the intersection of IGRA with an Indian land claims settlement act by which Congress delegated certain jurisdiction to state and local governments without diminishing the relevant tribe's inherent and concurrent jurisdiction. In both instances, this Court determined that "Congress, after having granted to the state non-exclusive jurisdiction over the settlement lands via the Settlement Act, impliedly withdrew from that grant, via the Gaming Act, the state's jurisdiction over gaming." *Narragansett*, 19 F.3d at 705; *accord Wampanoag Tribe*, 853 F.3d at 629. However, as this Court wrote in *Narragansett*, "the withdrawal of jurisdiction over gaming cannot be interpreted to signify a withdrawal of *all* residual jurisdiction." 19 F.3d at 705 (emphasis in original). Some state regulatory authority—this Court specifically identified as examples "zoning, traffic control, advertising, [and]

lodging"—are not so clear and "may—or may not" also be impliedly repealed by IGRA. *Id.*

So what State authority did remain, in that case and in this one? In *Narragansett*, this Court did not need to resolve that question. *Id.* at 705-06. It did, however, offer "guidance" to courts subsequently presented with this question. This Court pointed to two competing principles at issue: first, that "nondiscriminatory burdens imposed on the activities of non-Indians on Indian lands are generally upheld," *id.* at 705 (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980); and second, that "a comprehensive federal regulatory scheme governing a particular area typically leaves no room for additional state burdens in that area," *id.* (citing *White Mountain Apache*, 448 U.S. at 148 (1980)). This Court also suggested how a subsequent court might determine which principle prevails:

> Which activities are deemed regulable, therefore, will probably depend, in the first instance, on which activities are deemed *integral to gaming*. Although the core functions of class III gaming on the settlement land are beyond [the state's] unilateral reach, the distinction between core functions and peripheral functions is tenebrous, as is the question of exactly what [the state] may and may not do with respect to those functions that eventually are determined to be peripheral.

*Id.* at 705-06 (emphasis added).

Thus, this Court instructed in that, when questions arise as to whether a state's residual jurisdiction allows it to regulate an activity on a settlement tribe's lands,

courts should first ask whether the activity is "integral to gaming." If it is, then state regulation of that activity is prohibited by IGRA—and, to the extent that Congress previously had delegated such regulatory authority to a state (as it did here through the Settlement Act), such delegation is impliedly repealed for the same reasons that delegations of regulatory authority over "core functions" of gaming were impliedly repealed. If, on the other hand, the activity is merely "peripheral" to gaming, then at least some state jurisdiction remains, and a further inquiry is necessary to determine how much.

In this case, the District Court erred by failing to conduct any such inquiry. The District Court itself recognized both the importance of this inquiry, and that this Court had not had the occasion to take up the question. Mem. & Order on Mot. Final J. at 9 (Dkt. No. 200) (characterizing this Court's decision in *Wampanoag Tribe*: "There was no discussion as to whether state and local permitting laws are "integral" to gaming. Nor was there any discussion of the "tenebrous" line between those activities that state and local authorities may regulate on tribal Settlement Lands and those it may not."). So why did the District Court fail to conduct this important inquiry?

First, the District Court erroneously asserted that the Tribe did not challenge the applicability of State and Local non-gaming laws in its prior appeal to this Court. However, the District Court itself expressly stated, both in its summary judgment

order and previously, that the case itself concerned only gaming laws and not other laws by which the State and Town might seek to regulate a proposed tribal gaming enterprise. *See supra* note 2. Thus, if the Tribe did not appeal on this question, it was only because the District Court expressly stated that it had not ruled on this question. To the extent that the District Court had ruled on this question, the Tribe's Notice of Appeal challenged the District Court's summary judgment holding in its entirety—and, thus, challenged State and Town assertions of regulatory authority over a proposed tribal gaming enterprise in their entirety. Notice of Appeal (Dkt. No. 159).

In addition, the District Court wrongly justified its conclusion by stating that curtailing State and Town authority over non-gaming aspects of a tribal gaming enterprise "would destroy—not leave intact—the jurisdiction over the Settlement Lands granted to the Commonwealth and the Town by the Settlement Act." Order on Mot. Final J. at 9 (Dkt. No. 200). Here, the District Court makes two errors. First, in considering the effect on State and Town jurisdiction, the District Court performed precisely the sort of analysis that Congress instructed courts not to perform. S. Rep. No. 100-446, 100th Cong., 2d Sess. 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076 (IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands," and admonishing courts not to "balance competing Federal, State, and tribal interests"). This Court already

determined Congress, through IGRA, divested the State and Town of authority delegated to them to regulate tribal gaming on tribal lands. Thus, the inquiry now is simply whether a State or Town attempt to regulate affects something "integral to gaming"; if it is, then such regulation is precluded by IGRA and balancing of interests is inappropriate. Second, the District Court dramatically overstates the effect of IGRA divesting the State and Tribe of authority over nongaming matters that are integral to gaming. Any implied repeal effected by IGRA applies only to the Tribe's gaming operations, and not to any non-gaming activities or facilities of the Tribe. Such a minor excision from the State's and Town's authority—authority they had only by delegation from Congress—cannot be said to "destroy" the State's and Town's jurisdiction.

At the very least, this Court should remand to the District Court to perform the analysis that this Court prescribed in *Narragansett*: a determination of whether construction and maintenance of a tribal gaming facility is "integral to gaming," or is merely peripheral. *Amici*, however, do not think remand necessary.

### B. Under the *Narragansett* analysis, construction and maintenance of a tribal gaming facility are integral to gaming and, thus, the State and Town cannot apply such laws to construction and maintenance of a tribal gaming facility.

This Court, in *Narragansett*, instructed courts to weigh States' authority to regulate the activities of non-Indians on Indian lands against the rule that

comprehensive Federal regulation of activities on Indian lands displaces competing state regulation. Here, the latter rule prevails.

First, construction and maintenance of tribal gaming facilities is encompassed within the comprehensive Federal regulation of Indian gaming. IGRA itself provides that the National Indian Gaming Commission ("NIGC"), in its regulation of Class II gaming, must consider whether a tribe's proposed gaming ordinance provides that "the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety[.]" 25 U.S.C. § 2710(b)(2)(E); *see also* 25 C.F.R. § 522.4(b)(7) (same). And, in fact, the Tribe's gaming ordinance does so provide.[12] The NIGC's regulations further provide that

> each place, facility, or location where class II . . . gaming will occur . . . obtains an attestation certifying that the construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner that adequately protects the environment and

[12] The Tribe's Gaming Ordinance addresses construction and maintenance of a gaming facility: § 3.8 (facility licenses issued only upon showing that "construction and maintenance of the Gaming Facility and the operation of Gaming, shall be conducted in a manner which adequately protects the environment and the public health and safety[,]" and facility "shall comply with the requirements of all applicable health, safety and environmental standards enacted by the Tribe and any applicable federal and state laws"); § 4.3(c) (violations of the Gaming Ordinance may be grounds for denial, suspension, or revocation of gaming license). Wampanoag Tribe of Gay Head (Aquinnah), Tribal Gaming Ordinance No. 2011-01, https://www.nigc.gov/images/uploads/gamingordinances/Wampanoag-2013.08.29%20Letter%20to%20Tribe%20fr%20NIGC%20re%20Amendment%20approval%20-%20Wampanoag.pdf (last visited Jan. 28, 2020).

> the public health and safety, pursuant to the Indian Gaming Regulatory Act.

25 C.F.R. § 559.1(a); *see also id.* § 559.4 (further requiring documentation that construction, maintenance, and operation of a gaming facility adequately protects the environment, public health, and safety); *id.* § 559.6 (same). To ensure that these regulations are given full effect, the NIGC's regulations allow that agency to close any gaming facility that fails to comply with these requirements. 25 C.F.R. § 573.4(a)(12).[13] In light of IGRA's comprehensive regulatory scheme, which expressly includes regulation of the building, maintenance, and operation of a gaming facility, State and Town laws purporting to regulate the same[14] have been impliedly repealed. *White Mountain Apache*, 448 U.S. at 148; *Narragansett*, 19 F.3d at 705-06.

Other courts applying *White Mountain Apache* have reached similar conclusions. Most relevant is *Flandreau Santee Sioux Tribe v. Haeder*, in which the court upheld the imposition of a state excise tax on the gross receipts of a contractor

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[13] *See also United States v. Seminole Nation*, 321 F.3d 939, 945 (10th Cir. 2002) (recognizing NIGC's authority to issue a Notice of Violation to, and even to close, a gaming facility for violation of a tribal environmental, public health and safety ordinance); *Confederated Tribes of Grand Ronde Cmty. v. Jewell*, 75 F. Supp. 3d 387, 418 (D.D.C. 2014) (same).

[14] To the extent that the State and Town seek to enforce regulations unrelated to the environment, public health, and safety—such as regulations governing scenic value or other land development objectives—application of such regulations to a tribal gaming facility are incompatible with IGRA's stated purpose of promoting Tribal self-determination and economic self-sufficiency.

completing a renovation and expansion of a tribal casino. 938 F.3d 941 (8th Cir. 2019). The Eighth Circuit determined that the excise tax itself constituted "only a small percentage of the gross Casino revenues," and that "this indirect financial burden is simply too indirect and too insubstantial to support the Tribe's claim of preemption" by IGRA. *Id.* at 945 (internal quotation, citation, and alteration omitted). However, notwithstanding that holding, that court twice remarked that its analysis might have been different had the regulation in question directly affected construction of a tribal gaming facility. *Id.* ("a tax which does not regulate or interfere with the Tribe's design and completion of the construction project" is neither expressly nor impliedly preempted by IGRA); *id.* at 946 ("The additional federal interests reflected in IGRA and in the history of tribal independence—promoting strong tribal government and ensuring tribal control of gaming operations in Indian country—are not implicated by an excise tax that does not regulate Casino construction or gaming activities.") The clear implication is that a tax (or other regulation) that would "regulate Casino construction" or "interfere with the Tribe's design and completion of the construction project"—as would the application of State and Town laws to construction of the Tribe's proposed gaming operation in this case—would be preempted by IGRA.

## CONCLUSION

For the foregoing reasons, *amici* join the Wampanoag Tribe of Gay Head (Aquinnah) in respectfully urging this Court to vacate the District Court's Amended Final Judgment (Dkt. No. 201), Second Amended Judgment (Dkt. No. 215), and Third Amended Judgment (Dkt. No. 230).

Respectfully submitted by:

DATED: January 28, 2020

s/ Daniel D. Lewerenz
Daniel D. Lewerenz
NATIVE AMERICAN RIGHTS FUND
1514 P Street NW, Suite D
Washington, D.C. 20005
*Counsel of Record for Amici*

Derrick Beetso
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P Street NW
Washington, D.C. 20005
*Counsel for Amicus NCAI*

Gregory A. Smith
HOBBS STRAUS DEAN & WALKER, LLP
1899 L Street NW, Suite 1200
Washington, D.C. 20036
*Counsel for Amicus USET Sovereignty Protection Fund*

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because this brief contains 3,957 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Word 2016.

2. This document 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 proportionally-spaced typeface, including serifs, using Microsoft Word 2016, in Times New Roman 14-point font.

DATED: January 28, 2020

s/ Daniel D. Lewerenz
Daniel D. Lewerenz

## CERTIFICATE OF SERVICE

I hereby certify that, on January 28, 2020, I electronically 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 and that they will be served by the CM/ECF system:

**Counsel for Commonwealth of Massachusetts, Charles D. Baker, Maura T. Healey, and Cathy M. Judd-Stein:**
Carrie M. Benedon: carrie.benedon@state.ma.us
Elizabeth A. Kaplan: elizabeth.kaplan@state.ma.us
Elizabeth N. Dewar: bessie.dewar@mass.gov

**Counsel for Aquinnah/Gay Head Community Association, Inc.:**
Felicia H. Ellsworth: felicia.ellsworth@wilmerhale.com
Claire Specht: claire.specht@wilmerhale.com

**Counsel for Town of Aquinnah, MA:**
Douglas J. Kline: dkline@goodwinlaw.com
William M. Jay: wjay@goodwinprocter.com
Joshua J. Bone: jbone@goodwinlaw.com
Michael A. Goldsmith: mgoldsmith@rrklaw.net
Ronald H. Rappaport: rrappaport@rrklaw.net

**Counsel for Aquinnah Wampanoag Gaming Corporation, Wampanoag Tribal Council of Gay Head, Inc., and Wampanoag Tribe of Gay Head (Aquinnah):**
Scott David Crowell: scottcrowell@hotmail.com
Lael Ruth Echo-Hawk: lael@mthirtysixllc.com
Elizabeth J. McEvoy: emcevoy@barrettsingal.com
Bruce A. Singal: bsingal@barrettsingal.com

DATED: January 28, 2020 s/ Daniel D. Lewerenz
Daniel D. Lewerenz