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,

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
U.S. District Court for the District of Massachusetts
(CASE NO: 1:13-cv-13286-FDS)

APPELLANTS REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

I. INTRODUCTION

Appellants Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Wampanoag Gaming Corporation (collectively "Aquinnah" or "Tribe") submit this Reply Brief in support of their appeal. Aquinnah secured all the proper approvals required by the federal Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA") and the regulations promulgated by the National Indian Gaming Commission (the "NIGC") for the Tribe to proceed with establishing and operating a Class II-only gaming facility on its Indian lands in Dukes County, Massachusetts. As a federally-recognized Indian tribe subject to the plenary authority of the United States Congress, Aquinnah is entitled to benefit from acts of Congress' legislation of Indian affairs.

Currently, Aquinnah sits as the proverbial "odd man out" with the Commonwealth of Massachusetts (the "Commonwealth"). While fighting at every turn against Aquinnah's efforts to conduct gaming on its Indian lands, the Commonwealth applies a double standard by embracing the gaming efforts of the Commonwealth's other federally-recognized Indian tribe. The disparity in the Commonwealth's conduct towards the two Massachusetts tribes casts a dark shadow over this litigation. This is particularly true in light of the recent clarification by the D.C. Circuit that the 1994 amendment to the Indian Reorganization Act (the "IRA") requires the federal government, including the

Department of the Interior (the "DOI") and NIGC, to treat tribes equally and with fairness, thereby prohibiting any Agency from:

> "classifying, enhancing or diminishing the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized Tribes"

Act of May 31, 1991, Pub. L. No. 103-263,108 Stat. 707, 709 (codified at 25 U.S.C. § 476(g). *See Akiachack Native Community v. United States*, 935 F. Supp. 2d 195, 198 (D.C. Dist. 2013), *appeal dismissed for want of jurisdiction*, ___F.3d.____, Dkt. 13-5360 (D.C. Cir. July 1, 2016). This development underscores the error in, and permeates the analysis of, many of the arguments raised by the Commonwealth and the other Appellees, as they are attempting to forge a result that violates the 1994 Amendment to IRA. Such a result would preclude Aquinnah from conducting gaming on its Indian lands, effectively placing Aquinnah on the outside looking in, while other tribes pursue opportunities to generate governmental revenue through gaming. Aquinnah merely seeks to enjoy the same privileges and immunities that are afforded to other federally-recognized tribes.

IGRA's provisions, particularly as they relate to Class II gaming, which is governed exclusively by federal and tribal law, are inherently repugnant to the application of the Commonwealth's gaming laws that were previously applicable under the Massachusetts Indian Land Claim Settlement Act (the

"MILCSA(Aquinnah)"), 25 U.S.C. §§ 1771, *et seq*. When the Tribe informed the Commonwealth that it would proceed with the establishment under IGRA of a Class II gaming facility on Aquinnah Indian lands in order to generate governmental revenue needed to create and fund a myriad of governmental programs and opportunities for its tribal members, the Commonwealth responded by filing an action against the Tribe in the Commonwealth's Supreme Court, opposing the Tribe's efforts in their entirety. After removal of the action by the Tribe to federal court, Appellees the Town of Aquinnah (the "Town") and the Aquinnah Gay Head Community Association (the "AGHCA") (the AGHCA and the Town being collectively referred to as the "Taxpayers/Town", and the Commonwealth, the Town and the AGHCA being collectively referred to as the "Appellees", intervened in the action.

The Tribe's Opening Brief sets forth three material errors of the District Court's reasoning in granting summary judgment in favor of Appellees. The United States has submitted an amicus brief in support of the Tribe's position on the primary issues on appeal[1]. While the two Opposition Briefs generally repeat

[1] The United States' Amicus Brief is silent on the question of what deference, if any, should be afforded the formal opinions of the DOI Interior Solicitor's Office and the NIGC. Appellees suggest that the United States' silence on the issue means that the United States takes a position on such issue contrary to that of the Tribe. There is no basis for that assertion. The United States only informs that it does not

arguments made to the Trial Court below, which arguments are adequately addressed in the Tribe's Opening Brief, this Reply Brief is submitted to address the Appellees' arguments.

II. CLARIFICATION OF STATEMENT OF THE CASE: APPELLEES DISTORT, MUDDLE AND CONFLATE REFERENCES TO MILCSA(AQUINNAH) WITH THE 1983 JOINT MEMORANDUM OF UNDERSTANDING.

Appellees conflate the 1983 Joint Memorandum of Understanding (the "MOU") and the actual MILCSA(Aquinnah)[2]– even going so far as to delete a critical clause from the MOU in their brief. Appellees argue that the MOU does not allow for any tribal jurisdiction or the application of tribal law, but in their analysis of the MOU, Appellees conveniently leave out the phrase "except to the extent modified in this agreement and in the accompanying proposed legislation." [Taxpayer/Town Opposition brief pp. 3 and 19]. The addition and presence of this clause in the

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agree with the Tribe's analysis that the NIGC is a necessary party to this litigation under Fed. R. Civ. P. 19.

[2] Three different Indian Land Claim statutes are discussed extensively throughout this Reply Brief. To facilitate the reading of this Reply Brief, the acronyms of the different statutes are followed by a parenthetical that identifies the Tribe or Tribes to which the statute applies. "MILCSA(Aquinnah)" refers to the Massachusetts Indian Land Claim Settlement Act, 25 U.S.C. §§ 1771–1771i, which only applies to Aquinnah. "RIILCSA(Narragansett)" refers to the Rhode Island Indian Land Claims Settlement Act, 25 U.S.C. §§ 1701-1716, which only applies to the Narragansett Tribe. "MICA(Maine)" refers to the Maine Indian Claims Act, 25 U.S.C. §§ 1721-1735, which applies to three different tribes with Indian lands in Maine.

MOU clearly confirms that all parties contemplated and understood that Congress could change the terms of the MOU at such time as Congress enacted the MILCSA(Aquinnah). In fact, Congress did precisely that. This provision in the MOU acknowledges Congress' plenary authority over Indian tribes and does not purport to limit Congress' plenary authority in any way.

III. ARGUMENT

A. IGRA Preempts Prior Legislation Regarding Gaming on Aquinnah Indian Lands: The District Court Erred in Ruling that MILCSA(Aquinnah)'s Application of the Commonwealth's Gaming Laws Remains In Effect.

In its Opening Brief, the Tribe establishes that this Appeals Court's analysis in *Rhode Island v. Narragansett*, 19 F.3d 685 (1st Cir. 1994), which found that IGRA and RIILCSA(Narragansett) are inherently repugnant to one another, directs this Court to reach the same conclusion regarding the repugnancy of IGRA and the MILCSA(Aquinnah). If Appellees' allegations are correct that Congress intended to deprive Aquinnah of the opportunities available under future federal legislation intended to benefit Indian tribes, Congress would have used the same language or "savings clause" in the MILCSA(Aquinnah) that Congress previously used in the MICA(Maine). The Tribe sets out the exact language at issue in each of the three statutes at issue in its Opening Brief at pp. 14-15. The Tribe sets forth ten errors in the District Court's analysis (Opening Brief at pp. 21-30). Each of those ten errors warrants a decision by this Appeals Court to vacate the District Court's decision.

The Tribe establishes (Opening Brief at p. 21) the error of the District Court's conclusion that the MILCSA(Aquinnah) is a federal statute that "prohibits" gaming. The Tribe establishes that Massachusetts laws permitted gaming at the time of passage of the MILCSA(Aquinnah), and that Massachusetts laws permit gaming currently. The Commonwealth argues in response that Massachusetts laws prohibit gaming because any gaming that does not comply with Massachusetts law is prohibited. That analysis is flawed. Massachusetts law authorizes gaming in a broad variety of forms and circumstances. The Supreme Court looked to the same issue in the landmark decision of *California v. Cabazon Band,* 480 U.S. 202 (1987). In *Cabazon*, the Supreme Court held that a state law scheme which allows for gaming subject to regulation that may be enforced by criminal penalties is a civil/regulatory scheme rather than a criminal/prohibitory scheme, finding California gaming laws and regulations to be civil/regulatory in nature rather than criminal/prohibitory in nature, and therefore inapplicable on Cabazon Indian lands. 480 US at 201-201. In his treatise, Frank Ducheneaux, a Senate Committee on Indian Affairs staffer at the time of the passage of IGRA, explains that IGRA's finding "in effect, adopts the holding of the *Cabazon* case as the foundation of IGRA." Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 Ariz. St. L.J. 99, 170 (2010). Congress understood the difference between "prohibited" and "regulated," and the Senate Report addressing

IGRA identifies those five states that criminally "prohibit" any type of gaming, which would bar any tribe in those states from gaming. "In the other 45 states [including the Commonwealth], some forms of bingo are permitted and tribes with Indian lands in those States are free to operate bingo on Indian lands, subject to the regulatory scheme set forth in the [IGRA]." S. Rep. No. 446, 100th Cong. 2d Sess. 11,12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3081-82. "If such game is not criminally prohibited by the State in which the tribes are located, then the tribes, as governments, are free to engage in such gaming."

The Commonwealth alleges that the Tribe and the United States (in its Amicus Brief) conflate *Cabazon*'s analysis with the plain meaning of the word "prohibited." That is not correct. *Cabazon* clearly held that a state gaming law scheme that allows for regulated gaming, even if the gaming law scheme is enforced by criminal penalties, is not "prohibited" gaming. 480 US at 201-201. At best, Appellees have provided argument that "prohibited" as used in MILCSA(Aquinnah) is ambiguous, which leads us to, the Indian Canon of Construction, which informs that all statutory ambiguities must be interpreted in favor of an Indian tribe. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S.

130, 152 (1982). Applying the Indian Canons of Construction, games expressly allowed under Massachusetts State law subject to enforceable regulations is not prohibited gaming.

The Commonwealth argues (Commonwealth Opposition Brief at pp. 17-18) that the Tribe and the United States conflate Massachusetts law and federal law. That too is wrong. The "federal" law at issue is MILCSA(Aquinnah), which looks to Massachusetts gaming laws, which laws allow for gaming. The Tribe is not conflating the two statutes – the federal statute refers to Massachusetts State law, accordingly, because Massachusetts law does not prohibit gaming, the MILCSA (Aquinnah) does not prohibit gaming.

The Commonwealth also argues that the Tribe and the United States conflate IGRA's provision requiring that a tribe's Indian lands be located in a state that permits gaming, 25 U.S.C. § 2710(b)(1)(A), with IGRA's provision that IGRA does not apply to gaming specifically prohibited on Indian lands by federal law. 25 U.S.C. § 2710(b)(1)(A) (Commonwealth Opposition Brief at. p. 19*)*. This analysis is also incorrect. Whether the Commonwealth permits gaming is not in dispute. Rather, the Commonwealth's scheme for addressing gaming falls within the meaning of "prohibited" gaming is in dispute.

That the Commonwealth refers to its own gaming laws as prohibiting gaming lacks credulity, particularly since 2011, when the Commonwealth changed

its laws from allowing only for bingo and charitable casino nights to allowing full-blown casino resorts. Under the Commonwealth's analysis, even Nevada's wide-ranging liberal gaming laws would be construed as "prohibiting gaming", which of course would be an absurd result. The Commonwealth cannot escape the straightforward error of the District Court. Does the MILCSA(Aquinnah) allow for gaming? Answer: yes, so long as the gaming is done in compliance with Commonwealth law. Accordingly, because the MILCSA(Aquinnah) looks to Commonwealth gaming law, and because Commonwealth gaming law permits, rather than prohibits, gaming, the MILCSA(Aquinnah) does not prohibit gaming.

Attempting to argue that the phrase referencing gaming in the MILCSA(Aquinnah) is somehow a "prohibition" on gaming (which it is not), Appellees take the position that the phrase "not otherwise specifically prohibited by Federal Law" in IGRA refers to the language in the MILCSA(Aquinnah). 25 U.S.C. § 2710(b)(1)(A). However, as the United States' amicus brief correctly points out, Congress took care to clarify that the phrase "not otherwise [specifically] prohibited" refers "to gaming that utilizes mechanical devices as defined in 15 U.S.C. § 1175." S. Rep. No. 446, 100th Cong. 2d Sess. 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082. As *Ducheneaux* explains,

> Although casino gaming had not yet become a major part of the Indian Gaming scene, a few tribes had developed operations that would be class III under the pending legislation and other tribes saw definite possibilities in casino gaming. However, the Johnson Act (15

> U.S.C. §§ 1171 *et seq.*) was a Federal criminal prohibition against slot machines on Indian lands. These most lucrative activities were barred by Federal criminal law.

42 Ariz. St. L.J. at p.163. IGRA ultimately included a waiver from this federal prohibition for Class III games if conducted under a tribal-state compact. In other words, Congress was opening the door for Class II game development, which could be played without a compact so long as it did not violate the Johnson Act. 15 U.S.C. § 1171.The reference to the Johnson Act provisions had nothing whatsoever to do with the language of MILCSA(Aquinnah). Despite the Appellees' self-serving attempt to rewrite Congressional intent, the truth is that the phrase was intended only to refer to the prohibition on playing Class III Johnson Act slot machines without a compact – not to the MILCSA(Aquinnah).

The Tribe establishes (Opening Brief at pp. 22-23) the error of the District Court's distinction of the language used in RILCSA(Narragansett) from MILCSA(Aquinnah), based on a parenthetical that clarifies that the laws and regulations of the Commonwealth include the Commonwealth's gaming laws and the Town's regulations. The Tribe establishes that the canon of construction used by the District Court to attempt to provide meaning to every word in a statute does not apply to parentheticals, which by grammatical rules are intended to be clarifying in nature and do not change the meaning of the sentence (within which the parenthetical is included) without the parenthetical. Appellees fail to address

this analysis in their Opposition Briefs, and such failure should be fatal to their overall argument. Without an incorrect and distorted misinterpretation of the parenthetical language contained in the MILCSA(Aquinnah), neither the District Court nor Appellees can distinguish the statutory language found in MILCSA(Aquinnah) from the statutory language found in RIILCSA(Narragansett).

Appellees argue (Commonwealth Opposition Brief at p. 22) that Congress' insertion of the parenthetical language into the MILCSA(Aquinnah) was the result of a deliberate effort by Congress to allow the provisions of MILCSA(Aquinnah) to be harmonized in the future with the provisions of IGRA (which had yet to be passed by Congress). There is no legislative history or other evidence that such was Congress' intent. Nor is there any evidence that Congress intended to deprive Aquinnah of the benefits arising from future legislation passed by Congress and intended comprehensively to benefit Indian tribes. Appellees urge this Court to look to testimony given by a former tribal official in the context of a Committee Hearing that occurred during a prior session of Congress, which Committee Hearing was considering materially different legislative language (that did not mention gaming and did have an explicit restriction on tribal jurisdiction). While the former tribal official did state that no gaming would be allowed under the legislation being considered at that time, such testimony on a materially different

bill than MILCSA(Aquinnah), with materially different statutory language than MILCSA(Aquinnah), given during a different session of Congress than the session that enacted MILCSA(Aquinnah), has no relevance to the interpretation of MILCSA(Aquinnah) or this appeal. If such testimony is to be considered, however, it actually supports the Tribe's position, as the language ultimately adopted by Congress in MILCSA(Aquinnah), which expressly allows Aquinnah to game subject to Massachusetts laws and regulations, directly conflicts with the tribal official's testimony that the Tribe will never offer gaming. Indeed, as discussed in further detail in section "B" below, the draft bill at issue in the prior Congress included an express and complete prohibition on the Tribe's exercise of jurisdiction over the Settlement Lands. The tribal official's testimony was consistent with that language. However, Congress did not adopt the language of the original bill, and instead, adopted language for MILCSA(Aquinnah) that was similar in structure and intent to the language utilized by Congress in RIILCSA(Narragansett). The previous session of Congress considered and included in the bill language that was not utilized or included by the subsequent session of Congress is evidence that the subsequent session of Congress expressly rejected the language of the prior bill that would have barred the Tribe from gaming. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 (1973).

The Commonwealth argues that the passage in the Senate Report indicating that Congress did not intend for IGRA to alter Indian land claims (Commonwealth Opposition Brief at pp. 22-23) further evidences Congressional intent that IGRA not govern Aquinnah gaming activities. That passage expressly references RIILCSA(Narragansett) and does not expressly mention MILCSA(Aquinnah). This Appeals Court has already rejected the invitation to use such legislative history to preclude the Narragansett Tribe from gaming. *Narragansett*, 19 F.3d at p. 700. It follows that the Appeals Court should reject the similar invitation here.

Despite the clear guidance provided by this Appeals Court in *Narragansett* and *Passamaquoddy Tribe v. Maine*, 75 F.3d 784 (1st Cir. 1996), the Commonwealth urges this Court to look to other Circuits for guidance. The Commonwealth cites *Texas v. Ysleta del Sur Pueblo*, 36 F.3d 1325 (5th Cir. 1994), in which the Fifth Circuit held that the Ysleta Pueblo's adoption of a Tribal Resolution committing it to refrain from gaming at the time of enactment of the Ysleta Pueblo's Restoration Act and into the future, and the express incorporation of that Tribal Resolution into the Ysleta Pueblo's Restoration Act, precludes the Ysleta Pueblo from offering gaming under IGRA. *Id.* The facts, legislative history and statutory language at issue in *Ysleta* are critically distinguishable and also markedly different than the statutory language at issue here. Preliminarily, however, Appellees offer no analysis as to why this Appeals Court should apply

Fifth Circuit case law over First Circuit case law. Also, Appellees offer no analysis as to how this Appeals Court may reject its own precedent and apply Fifth Circuit case law. Moreover, the Solicitor's Office of the DOI has recently expressly repudiated the Fifth Circuit's analysis in a detailed opinion supporting the NIGC's approval, under IGRA, of the Ysleta Pueblo's gaming ordinance (Aquinnah Opening Brief at pp. 53-54). The United States maintains that it is entitled to reject the *Ysleta* decision and offer a new interpretation consistent with Congressional intent under IGRA (Aquinnah Opening Brief at pp.53-54). The effect of that repudiation is now pending in litigation. *Texas v. Ysleta del sur Pueblo*, Dkt. 3:99-cv-00320-KC (W.D. Texas).

The Appellees cite to clear *dictum* from *Narragansett II*, 158 F.3d at 1341 (Taxpayers/Town Brief at p. 19) for the proposition that Aquinnah is totally divested of jurisdiction over gaming activities. [3] After this Appeals Court issued its opinion in *Narragansett*, Rhode Island pursued the proper venue for its attempts to preclude Narragansett from conducting tribal gaming.[4] In 1996, Congress passed

[3] Appellees use this same argument on the governmental powers analysis (Taxpayers/Town Opposition Brief at p. 19) in a failed attempt to argue Aquinnah lacks the capacity to exercise its governmental power. The flaws demonstrated above are also applicable to the governmental powers analysis set out below.

[4] Ironically, all Appellees argue that the subsequent action by Congress provides evidence that Congress has always intended for IGRA not to apply to *Narragansett.* In actuality, it evidences that the proper forum for Rhode Island to redress its grievances is Congress. Appellees here are free to make a similar

legislation expressly stating that the Narragansett Tribe may not offer gaming under IGRA. Pub. L. No. 104-208, 110 Stat. 3009-227 (1996) (codified at 25 U.S.C.A. § 1708(b)). Narragansett challenged the constitutionality of the subsequent act of Congress. In *dictum*, without any evidence or argument in the briefing, the D.C. Circuit wrongfully concluded that the Maine Tribes, the Catawba Tribe (South Carolina) and Aquinnah are barred from gaming under IGRA, and that Catawba and Aquinnah are subject to "exclusive" state control over gaming. That is not correct. Aquinnah was not a party to that action. Moreover, the District Court has already concluded that Aquinnah has concurrent jurisdiction and no party has appealed that issue. Further, a closer look at the amendment to the Rhode Island statute and at the Maine and Catawba statutes provides the language that Congress would have used to preclude Aquinnah gaming activities if indeed Congress had such intent:

> For purposes of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. settlement lands should not be treated as Indian lands.

125 U.S.C. § 708(b)(Rhode Island – Chafee Amendment)

> The provisions of any federal law enacted after October 10, 1980 [the effective date of the Settlement Act], for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt

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congressional effort if Aquinnah prevails on appeal. That task, in the wake of Massachusetts' recent authorization of full-blown non-Indian casino resorts, will be formidable.

> 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.

25 U.S.C. § 1725(b) (Maine)

> The Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq*.) shall not apply to the Tribe.

25 U.S.C. § 941l (Catawba Land Claim Settlement Act). The Tribe accepts the Commonwealth's point that Congress does not operate in a vacuum. However, the parenthetical language in MILCSA(Aquinnah) fails to come anywhere close to the specific language used by Congress to manifest its intent to deprive a tribe of the benefits that would otherwise flow from the comprehensive scheme established by IGRA. These examples underscore the point that, had Congress intended to preclude Aquinnah from gaming, it would have used language expressly stating and evidencing that intent. Such statements and such intent are lacking with respect to Aquinnah.

Both the Tribe in its Opening Brief at p. 30 and the United States in its Amicus Brief at p. 24, n. 19, debunk the District Court's analysis that MILCSA(Aquinnah) is more specific than IGRA and therefore controlling. Appellees merely repeat the assertion that MILCSA(Aquinnah) is more specific because it deals with one tribe. That same argument was rejected by this Appeals Court in *Narragansett,* 19 F.3d at p. 704, n. 21. *See also Narragansett* 816 F.Supp.

796, 804 (D. R.I. 1993) ("I believe petitioners have reversed the characterization of the laws—that is, the Settlement Act is the *general* statute and the Gaming Act the *specific* statute"). IGRA provides a very detailed and extensive paradigm to govern tribal gaming activities – and with far more specificity as it relates to gaming than found in MILCSA(Aquinnah). The Commonwealth argues that it is the parenthetical language that allows this Court to distinguish MILCSA(Aquinnah) from the RIILCSA(Narragansett) at issue in *Narragansett*, but that too is unavailing. The *Narragansett* Court reasoned that RIILCSA(Narragansett)'s application of the laws of the State of Rhode Island included the State's gaming laws, hence RIILCSA(Narragansett) has the same substantive specificity as MILCSA(Aquinnah), and as discussed above, the parenthetical language does not change the substance of the sentence – the sentence means exactly the same with the parenthetical language as it does without the parenthetical language.

Both the Tribe in its Opening Brief at pp. 34, and the United States in its Amicus Brief at pp. 25-26, debunks the Commonwealth's argument that the 14-month window between the earlier passage of MILCSA(Aquinnah) and the later passage of IGRA must mean that Congress intended for IGRA not to apply to Aquinnah. In response, the Commonwealth merely repeats the District Court's words that it strains logic to believe that Congress would impliedly repeal a statute

passed 14 months earlier.

Congress possesses plenary authority over Indian tribes to further its trust obligations to the tribes. As "domestic dependent nations," Indian tribes exercise "inherent sovereign authority" that is subject to plenary control by Congress. *Michigan v. Bay Mills Indian Community*, ___U.S.___, 134 S. Ct. 2024, 2017 (2014); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505 (1991). Unless and "until Congress acts, the tribes retain" their historic sovereign authority. *United States v. Wheeler*, 435 U.S. 312 (1978). The strained logic is that Congress would limit its own plenary authority to exercise its trust responsibility to tribes – including Aquinnah – by being silent in the passage of IGRA. If Congress in the passage of MILCSA(Aquinnah) did intend to temporarily restrict its own plenary power by limiting the application of later statutes enacted for the benefit of tribes, how long did Congress intend for the moratorium to last? 14 months? 15 months? Two years? Ten years? Would the result be different if Congress had enacted IGRA in 1989, rather than 1988? Appellees' analysis also conflicts with Appellees' mantra that Congress does not legislate in a vacuum. If Congress had intended for IGRA not to apply, it would have said so, and it would have used language similar to MICA(Maine) or Catawba to manifest its intent, make its intent clear, and drive the point home – which it did not. It would establish a horrible precedent to allow for statutory language to restrict Congress' plenary authority

over Indian tribes pursuant to the federal government's trust responsibility without requiring express statutory language evidencing Congress' intent to do so. To require anything less opens up a potential floodgate of litigation, where parties may seek to establish a denial of rights and benefits afforded Indian tribes through comprehensive federal legislation, such as IGRA, by arguing that convoluted statutory language, rather than clear and convincing statutory language, operates to deprive a tribe of those rights and benefits. There is nothing in the present case to suggest a clear intent on the part of Congress to deprive Aquinnah of the rights and benefits comprehensively afforded to Indian tribes under IGRA.

The Commonwealth, in an effort to defeat the United States' argument that uncertainty over what Congress would ultimately do with tribal gaming explains the inclusion of gaming language in MILCSA(Aquinnah), contradicts its own analysis regarding two pieces of legislation passed 14 months apart. The Commonwealth correctly notes that Congress had been struggling with the issue of Indian gaming for several years prior to the passage of MILCSA(Aquinnah) and IGRA, with competing views on the regulatory scheme, the respective roles of tribal, state and federal governments, the scope of gaming activities and a host of other detailed regulatory controls (Commonwealth's Opposition Brief at p. 33). In contrast, Taxpayers/Town in their Opposition Brief assert that Congress passed MILCSA(Aquinnah) "with full knowledge and understanding of the then-draft

IGRA." (Taxpayers/Town Opposition Brief at p. 47). Taxpayers/Town's assertion provides no evidence or citation of authority, has no basis in fact, and directly contradicts the more detailed and specific history offered by the Commonwealth. That history supports the Tribe, and not the Appellees. At the time of passage of MILCSA(Aquinnah), Congress had already been struggling for years without enacting tribal gaming legislation, and there was no indication at the time MILCSA(Aquinnah) was passed that 14 months later, Congress would finally come to an agreement on the comprehensive scheme and the language to implement it. Congress had considered and failed to pass legislation for nearly a decade, so how does the fact that IGRA was adopted 14 months later evidence in any way that there was certainty, at the time MILCSA(Aquinnah) was passed that a comprehensive gaming law would be enacted, such that MILCSA(Aquinnah)'s gaming language was intended to limit Congress' plenary authority over Aquinnah gaming? In other words, there was great uncertainty at the time MILCSA(Aquinnah) was passed as to both the substance and the timing of the tribal gaming legislation. Indeed, there was so much uncertainty regarding IGRA at the time MILCSA(Aquinnah) was passed that it "strains logic" to believe that Congress predetermined that Aquinnah would be excluded from a comprehensive regulatory scheme that was not yet even developed.

The Commonwealth argues that due to the fact that the Maine Tribes and

Catawba are unable to game, IGRA and MILCSA(Aquinnah) can be "harmonized" because other tribes are also outside of the reach of IGRA (Commonwealth Opposition Brief at pp. 27-28). The Commonwealth is conflating such argument here with its separate argument of statutory interpretation. In every circumstance where Congress has been deemed to take an Indian tribe out from under the IGRA umbrella, clear language of Congress' intent was present in the text of the statute at issue. No similar language is present here. The repugnancy analysis turns on the inherent conflict between two distinct regulatory schemes that cannot co-exist. The repugnancy analysis does not change because there are three instances where Congress has expressed its intent to impose the severe, drastic and devastating measure of depriving a tribe of the right to conduct gaming under the comprehensive scheme established by IGRA.

Lastly, the Tribe establishes that it was error to give no deference to the August 2013 Solicitor's Opinion. DOI Solicitor's Opinion, Opening Brief at App. Vol. I, 213 (Add. 78) (August 23, 2015). The Solicitor's Opinion contains an extensive, detailed analysis supporting the Tribe's position on both the implied repeal and the governmental powers issues. The degree of appropriate deference, from a *Chevron* analysis to a *Skidmore* analysis, can be debated, but to give short shrift to the formal opinion of the federal agency tasked with implementing and interpreting IGRA is error. The Appellees' naked assertion that the formal opinion

has "no power to persuade" has no basis in fact or in law. The Tribe encourages this Appeals Court to review the opinion at issue. The DOI and the Solicitor's Office do have extensive experience in the interpretation and implementation of potentially conflicting laws impacting Indian tribes. The opinion presented to this Court was generated out of a formal process wherein the NIGC requested the opinion of the Solicitor, and upon receiving such opinion, took it into consideration in taking the NIGC's final agency action of allowing the Tribe's Class II Gaming Ordinance to go into effect.

B. Aquinnah Exercises Sufficient Governmental Power over its Indian Lands for Aquinnah Indian Lands to Qualify for Gaming Under IGRA: The District Court Erred in Concluding That the Tribe's Struggling Efforts to Establish and Expand its Governmental Presence are Deficient.

Appellees persist in arguing that the Tribe's demonstrated concrete manifestations of its governmental authority are insufficient under IGRA. Appellees argue that this requirement is to meet IGRA's purpose of shielding Indian gaming from "organized crime and other corrupting influences." (Taxpayers/Town Opposition Brief p. 35). Without citing any support for this proposition, Taxpayers/Town manufacture a standard that neither a court nor the NIGC has ever required a tribe to satisfy. Further, Taxpayers/Town argue that the governmental power inquiry must be a "robust one… supplanting local authority." (Taxpayer/Town Opposition Brief p. 34). The goals of IGRA are "to promote tribal

economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). At the time IGRA was enacted, most tribal governments were funded solely by support funds and grants from the United States. Ironically, if Appellees' position were the law, only those few tribes with the needed resources and developed governmental resources, excluding intergovernmental service agreements, would be eligible for gaming under IGRA. Tribes wishing to engage in Class II gaming (as here) are subject to the robust federal regulatory system under IGRA which Congress thus deemed sufficient to "shield [Indian Gaming] from organized crime and other corrupting influences." Taxpayers/Town Opposition Brief at p. 35, citing 25 U.S.C. § 2702(2).

In order to ensure the required regulation over *Class III* gaming facilities, IGRA allows tribes wishing to engage in Class III gaming to enter into agreements, or compacts, with their surrounding state jurisdictions, thus creating the necessary regulatory structures. The drafters of IGRA understood that "it is simply unrealistic for any but a very few tribes to set up regulatory systems." [Sen. Inouye, 134 Cong. Rec. 24023 (Sept. 15, 1988)]. For tribes wishing to enter into Class III gaming, "[the] assessment provisions [of IGRA] may also be used to provide an avenue by which the tribes may contract with the State for its regulatory services and reimburse the State for its expense." [Sen. Inouye, 134 Cong. Rec. 24025 (Sept. 15, 1988)]. This intergovernmental agreement system which has been

utilized by both Class II and Class III facilities has brought prosperity, employment, and economic development to many state and local municipalities that could never have been otherwise achieved. Indeed, this "intergovernmental system" did not appear out of thin air; rather, it is a system modeled on the governmental service systems around the United States. As an example in fact, the Town of Aquinnah does not itself have a school, only limited emergency services, and it does not itself have a jail. What it does have, however, are agreements with other towns, the County and the Commonwealth to perform those services for the Town. To hold a tribal government to a much higher standard simply because the tribe wishes to develop a gaming operation to pull its people out of poverty, to provide economic self-sufficiency, to build a strong tribal government and to fulfill the United States trust responsibility to tribes would eviscerate the stated purpose of IGRA.

This case allows this Appeals Court to reaffirm what concrete manifestations of tribal governmental authority are sufficient to qualify for gaming under IGRA. The question is not, however, whether those manifestations "exist to assure that the tribe has the capacity to take on the burdens, as well as the benefits, inherent in gaming,"[5] rather, the question here is whether the Tribe, in fact, exercised governmental authority on its Indian lands. Nothing in IGRA requires the Tribe to

[5] Taxpayers/Town Opposition Brief at p. 35.

exercise governmental power over gaming in order for the lands to qualify for gaming. Once the land does qualify for gaming, the Tribe has an obligation to comply with IGRA, which is done by the development of tribal programs such as a Gaming Commission, and infrastructure such as parking, traffic mitigation and other measures, and often through intergovernmental agreements. See Opening Brief at p.42.

Appellees argue that the Tribe's extensive showing of ordinances, agreements and tribal programs is inadequate to meet the robust standard they have articulated for exercising governmental powers. The Tribe concedes that since its federal recognition in 1987, it has struggled, but it also has survived and persevered in the development of governmental programs. Most recently, many tribes have encountered the same problem: despite the best of intentions, the lack of governmental revenue prevents the tribe from developing as quickly as it desires. What Appellees try to spin as a failed tribe lacking the robust infrastructure to handle a gaming operation is in actuality a great success story of the Tribe maturing in legislative, administrative and judiciary capacity, despite the lack of sufficient governmental revenue. The Tribe has a Court, albeit one that uses an out-of-state judge – this Appeals Court should look to the Tribe's success in establishing the Court rather than embracing the District Court's analysis criticizing the Tribe for the Court not being more robust. The Tribe has a health

clinic, albeit one that is attended by a practicing registered nurse who refers members to other doctors as needed – this Appeals Court should look to the Tribe's success in establishing health services for its members rather than embracing the District Court's analysis criticizing the Tribe for not having a doctor available at all times. The Tribe does not have yet have a tribal school, but provides for educational opportunities and scholarships to its youth – this Appeals Court should look to the Tribe's success in establishing educational opportunities and scholarships for its members rather than embracing the District Court's analysis criticizing the Tribe for not yet having a brick and mortar tribal school. The Tribe has a housing department, albeit limited in resources to HUD grants – this Appeals Court should look to the Tribe's success in establishing the housing department and working diligently to provide adequate housing to tribal members. The list goes on and on – the answer to every criticism by Appellees and the District Court is that Aquinnah's programs are struggling. But that struggling is precisely why IGRA was enacted – to provide tribes with resources and opportunities they would otherwise not have – and each and all of the examples of Aquinnah's exercise of governmental jurisdiction are sufficient under any test other than Appellees' manufactured test wherein a robust, mature tribal governmental infrastructure must already be in place. IGRA was designed, at its essence, to provide a source of governmental revenue that would allow a tribe to

develop and attain a strong tribal government, and to achieve tribal economic self-sufficiency – Aquinnah is a postcard example of the type of Indian tribe that IGRA was intended to benefit. Appellees' argument that some of the Tribe's Ordinances are no longer in effect (Taxpayers/Town Opposition Brief at p. 27), while others remain in effect, does not negate the fact that the Tribe exercises governmental power over its Indian lands.

Notably, Appellees and the District Court ignore the evidence that the Tribe has been a self-governance tribe since the early 1990s pursuant to the Indian Self-Determination and Education Assistance Act 25 U.S.C. §§ 5301 et seq., and remains a self-governance tribe, meaning that the Tribe contracts with the federal government to take over many of the services that would otherwise be provided directly from the federal government. Similarly, Appellees ignore the many agreements between the Tribe and the United States Environmental Protection Agency wherein it is specified that the Tribe will be treated in the same manner as a state, which gives the Tribe the ability to enforce federal environmental laws on its Indian lands and on off-reservation sources of on-reservation pollution.

Appellees' and the District Court's treatment of the law enforcement issue is perhaps the most glaring example of flawed analysis: no tribe, as a matter of law and fact, has criminal jurisdiction over non-Indians for actions that occur on Indian lands, except in the limited circumstances of the recently-passed Violence Against

Woman Act, 42 U.S.C. § 13981. Accordingly, to criticize Aquinnah for not having that authority is to criticize every single tribe in the country, including all tribes currently conducting gaming. The law enforcement issue is typically resolved by cross-deputization agreements, such as the one in effect between the Tribe and the Town. It is revealed in the Taxpayers/Town's Opposition Brief at p. 28 that the Town (as opposed to the Tribe) exercises police authority, including the enforcement of the Tribe's laws. First, that statement is a concession that the Tribe has laws to be enforced, which is itself an exercise of governmental power. Second, if the Town is credited for enforcing tribal law through a the cross-deputization agreement, it follows that the Tribe's enforcement of Town and Commonwealth law against non-Indians on the Tribe's Indian lands, through the same cross-deputization agreement, is also a manifestation of the Tribe's exercise of governmental power. Appellees drop a footnote properly noting that when cross-deputized, Tribal law enforcement officials are acting as agents of the Town, and not the Tribe. Taxpayers/Town Opposition Brief at p. 28, n.17. Conversely, the cross-deputization agreement authorizing Town law enforcement personnel to enforce tribal law means that Town law enforcement personnel are likewise acting as agents of the Tribe. Both the cross-deputization agreement and its use as a means to enable Town law enforcement to act as agents of the Tribe are sufficient examples of the Tribe exercising governmental power.

For the purpose of argument, however, even if the Tribe must have a robust governmental infrastructure capable of addressing impacts from tribal gaming, as it relates to Class II gaming (the only type of gaming at issue in this dispute), the question should be whether the Tribe has sufficiently manifested its ability to co-regulate Class II gaming with its federal partner. Here, the Tribe has adopted a gaming ordinance with a regulatory structure that has been affirmatively approved by the NIGC. Resolution 2012-04 at Opening Brief, Add. 34, p. 9. The Tribe has issued a facility license and has secured the property – all concrete manifestations of governmental authority.

The Taxpayers/Town cite to *dicta* in *Cheyenne River Sioux Tribe v. S. Dakota*, 830 F. Supp. 523 (1993), *aff'd.* 3 F.3d 273 (8th Cir. 1993) for the proposition that the Tribe's exercise of governmental authority is not sufficient. *Cheyenne River* involved a dispute over whether the State of South Dakota negotiated a compact in good faith with the Cheyenne River Sioux Tribe. In analyzing the "Indian lands" NIGC regulation, the Court declined to make a determination on "governmental authority" because there was nothing on the record, but in the context of its opinion the Court offered up a non-dispositive list of potential facts that would have helped with making the decision had that decision been before the Court. Several of the potential facts identified by the *Cheyenne River* Court are included in the facts listed by the Taxpayer/Town.

These potential facts are helpful, but not dispositive – but even if they were, it is undeniable that Aquinnah has developed the lands at issue; that tribal members reside on the land; that numerous governmental services are provided by the Tribe to its members on the land; that law enforcement is provided in collaboration with the Commonwealth; and that the Tribe has entered into numerous intergovernmental agreements with the Commonwealth and United States regarding the Tribe's lands. This Appeals Court held in *Narragansett* that the establishment of a housing authority, the administration of health care programs, job training, public safety, conservation, and other governmental programs were sufficient "concrete manifestations," 19 F.3d at 702-703, – all of which Aquinnah clearly meets or exceeds.[6]

The District Court was repeatedly invited to review the Indian Lands determinations made by the NIGC.[7] Consistent with the position of the Appellees is the NIGC's position that an applicant tribe must establish both that it possesses jurisdiction and exercises governmental power.[8] Those administrative decisions

[6] Appellees argue that Narragansett is not instructive because Rhode Island did not dispute the examples provided by the Tribe. Taxpayers/Town Opposition Brief at p. 31, n. 24. That observation does not negate the First Circuit's analysis, nor do Appellees argue that the analysis is incorrect.

[7] The NIGC maintains an on-line public library of its Indian Land Determinations. *See* nigc.gov. Click General Counsel and then click "Indian Lands Opinions."

[8] Appellees contend that the Tribe's argument of comparing Aquinnah's exercise of governmental powers with other tribes is a new argument, raised for the first

are helpful in that Aquinnah meets or exceeds the requirements relative to a showing of governmental power in those circumstances. For example, in 2008, the NIGC analyzed whether a tribe had "governmental authority" over non-reservation lands for the Fort Sill Apache Tribe[9]. The NIGC noted that because IGRA is silent as to how the NIGC is to decide whether a tribe exercises governmental power over its lands, the NIGC reviews the question in each case based upon all the circumstances. The NIGC identified the *Narragansett* and *Cheyenne River* factors as examples of governmental authority, and then found the following actions to be sufficient "concrete manifestations of governmental authority":

(1) The tribe had fenced off the land;

(2) The tribe had begun construction of a gaming facility on the site;

(3) The tribe had issued a facility license to the gaming facility; and

(4) The tribe was in the process of improving the roads on the site.

(Fort Sill decision, p. 6). Similarly, the NIGC found the Quinault Nation exercised sufficient governmental power over an individual's off-reservation trust allotment

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time on appeal. Taxpayers/Town Opposition Brief at p. 30. That clearly is not the case. The discussion of *Narragansett* and *Cheyenne River* are impossible without a comparison of the facts therein to Aquinnah. Aquinnah's analysis that the Court should consider (and give deference to) NIGC's extensive public record on Indian Lands Determinations inherently brings into issue a comparison with Aquinnah's manifestation of its government authority.

[9] Fort Sill Apache – Akela Flats: http://www.nigc.gov/images/uploads/indianlands/051808ftsillapachelunaconmproperty.pdf]

because two tribal law enforcement officers would take breaks on the coastal property while travelling to Quinault's fishery, and the land owner had entered into a lease agreement with a business for a flea market, which lease stated that the lessee was subject to the jurisdiction of the Quinault Nation.[10] These are two decisions finding sufficient governmental power where there is far less evidence of actual manifestation of that governmental power than that proffered by Aquinnah.

In this matter, Aquinnah meets the requirements imposed by the NIGC – the expert agency tasked by Congress with making the governmental authority determination. To find insufficient governmental authority here would be to eviscerate the purpose of IGRA to provide tribes with a means of achieving "strong tribal governments," and to disregard the expertise of the NIGC in making these decisions. Even if the Court does not give *Chevron* or *Skidmore* deference to the NIGC and/or the DOI letters, the Court should take judicial notice of the nearly 100 administrative Indian Lands Determinations made by the NIGC regarding "governmental authority". Appellees argue that the Tribe lacks adequate jurisdiction. Judge Saylor found that Aquinnah possesses the requisite jurisdiction and the Appellees did not appeal. Accordingly, Appellees are barred from raising the issue on appeal. *See Figueroa v. Rivera*, 147 F.3d 77, 81 (1st Cir. 1998) ("A party who neglects to file a cross-appeal may not use his opponent's appeal as a

[10] http://www.nigc.gov/images/uploads/indianlands/43_quinaultindnnation.pdf

vehicle for attacking a final judgment in an effort to diminish the appealing party's rights thereunder").

The Commonwealth joins in the Taxpayers/Town's argument despite the fact that the Commonwealth is openly supporting a tribal casino to be operated by the Mashpee Tribe on land yet to be taken into trust, where there is no possibility that the Mashpee Tribe has provided examples of the manifestation of governmental power over the identified lands. Aquinnah supports Mashpee's efforts to game on the lands now in trust (pending litigation). *Littlefield v. Dept. of Interior*, Dkt. 1:16-cv-10184-ADB (D. Mass.).

Appellees are now arguing that even if Aquinnah fully and robustly developed a mature tribal government that took full advantage of those areas where it does exercise concurrent or exclusive jurisdiction, it would be insufficient to establish the requisite governmental power. That is a shift from the arguments before the District Court wherein Appellees argued that, despite the Tribe's jurisdiction as a matter of law, it has not exercised governmental power as a matter of fact. Now, for the first time on appeal, the Appellees contend that the Tribe lacks sufficient jurisdiction even though all Appellees stipulated that "[t]he Commonwealth, the Town, and the Tribe have each exercised jurisdiction over the Settlement Lands pursuant to the provisions of the Federal Act" (Opening Brief App. Vol. 1, 182 at ¶ 22). The new argument relies upon establishing a high

bar (robust and capable infrastructure) – that the Tribe must have in place now, without any intergovernmental agreements, to provide all the infrastructure and services that are required for operating a viable gaming facility. As discussed above, the Tribe need only establish, and establishes that in fact, the Tribe exercises some governmental power over its Indian lands.

The Tribe notes that the Court's factual conclusion that Aquinnah does not exercise sufficient governmental power over its Indian lands cannot support a ruling of summary judgment against the Tribe, because that factual question is material and in dispute such that the Court cannot determine as a matter of undisputed fact that the Tribe does not exercise governmental authority. Appellees suggest that because the underlying documents are not in dispute, that the District Court was able to determine that there were no material facts in dispute (Taxpayers/Town Opposition Brief at p. 36). That analysis is particularly egregious here, where Appellees and the Court acknowledge the Tribe's exercise of governmental power, but then go further to say that the Court system is not good enough, that the Housing program is not good enough, that the education program is not good enough, and on and on. That the programs exist and that the parties dispute the adequacy of those programs creates genuine issues of material fact such that summary judgment should not have been issued, and the question of governmental power should proceed to trial.

This Appeals Court, in *Narragansett,* includes a thorough discussion about the manner in which a tribe may lack jurisdiction over Indian lands. 19 F.3d at pp. 701-702. Appellees argue that *Narragansett*'s discussion suggests that Aquinnah lacks jurisdiction over its Indian lands. The *Narragansett* Court noted that there were ways to allow for tribal concurrent jurisdiction in some situations and not others. The *Narragansett* Court discussed the entire range of actions, from unfettered federal recognition of a tribe's reservoir of sovereign authority, to termination of the Tribe, and a full range of possibilities in between. Aquinnah was included in this extensive discussion as an example of where Congress can limit the reach of a tribe's authority or expand the reach of a state's authority. 19 F.3d at 702. The *Narragansett* Court cited the MILCSA(Aquinnah) as an example where tribal jurisdiction remains, even though, like RIILCSA(Rhode Island), Congress subjected Narragansett lands to also be governed by the laws and regulations of the State of Rhode Island. Appellees' assertion that Aquinnah can never meet the criteria for the exercise of governmental power relies on the faulty assumption/assertion that Aquinnah must have a robust infrastructure already in place.

C. The United States Continues to Assert Jurisdiction Over Gaming Activities on Aquinnah Indian Lands to the Exclusion of the Commonwealth: The District Court Erred in Concluding that the Commonwealth's Lawsuit Could Proceed Without the National Indian Gaming Commission as a Party.

The Tribe recognizes that the United States, in its Amicus Brief supporting the Tribe, did not join in the Tribe's argument that the Court erred in not requiring the NIGC to be a party to this litigation. That, however, does not end the analysis. The United States asserts jurisdiction over Aquinnah gaming regardless of the outcome of this lawsuit. The United States advocates and concurs in the Tribe's analysis that IGRA and MILCSA(Aquinnah) are repugnant and cannot be harmonized. Those two facts alone establish the correctness of the Tribe's analysis that if the District Court is affirmed, the Tribe will be placed in an untenable catch-22. Operating under IGRA will place the Tribe in violation of Commonwealth gaming laws, while operating under Commonwealth gaming laws will place the Tribe in violation of IGRA. That untenable situation compels the joinder of the United States into this lawsuit. It was clear error for the District Court to proceed without the NIGC.

D. The District Court erred in failing to give deference to the Solicitor and NIGC opinions.

The Tribe demonstrates in its Opening Brief that the Court should provide *Skidmore*[11] deference to the well-reasoned and detailed analysis in the two federal agency opinions that have addressed the same issues now before this Court. Appellees conclude that the opinions have no persuasive authority and are

[11] *Skidmore v. Swift Co.*, 323 U.S.134 (1944)

therefore not entitled to deference, but Appellees provide no analysis whatsoever for their position. The Tribe encourages the Appeals Court to indulge in a review of the two federal agency opinions (August 23, 2013 DOI Solicitors Opinion letter to Jo-Ann Shyloski (Opening brief, Vol. 1 App. 213, Add. 78 and October 25, 2013 NIGC Opinion letter to Cheryl Andrew-Maltais (Opening Brief, Vol. 1 App. 232, Add. 96), which review will both inform and educate this Court on the issues before it. The Tribe is not seeking to avoid *de novo* analysis. It simply is seeking a platform where the Court will consider the excellent, detailed analysis of the United States.

The Tribe contends that *Chevron*[12] deference, rather than *Skidmore* deference, applies to the NIGC's determination that Aquinnah exercises sufficient governmental powers for its lands to qualify under IGRA. The NIGC is the agency tasked with making the governmental authority determination under IGRA, and unless those decisions are determined to be arbitrary or capricious, a court is required to defer to that decision. Unlike the argument regarding implied repeal, the determination of the requisite exercise of governmental power does turn on the facts. The NIGC has issued nearly 100 Indian Land Determinations with an experienced and knowledgeable staff tagged by Congress to make such determinations. Accordingly, Chevron deference is appropriate.

[12] *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)

I. CONCLUSION

The most glaring and troubling aspect of the District Court's decision is the precedent it would set on implied restrictions upon Congress' plenary authority over Indian affairs. Appellees argue that the MILCSA(Aquinnah) should be interpreted as Congress restricting its plenary authority for some undefined, short time, groping for arguments that Congress intended to do so. Appellees often note that Congress does not legislate in a vacuum. The Tribe agrees. To take the parenthetical that Appellees improperly argue to distinguish MILCSA(Aquinnah) from RIILCSA(Narragansett), and elevate that parenthetical to mean the exact same thing as the saving clause at issue in MICA(Maine) would be a tragic injustice. Had Congress intended for MILCSA(Aquinnah) to restrict Congress' plenary power and deprive the Tribe of the benefits from future Acts of Congress intended to benefit Indian Tribes, it would have used the same language it used in MICA(Maine). It did not.

Equally glaring, is the District Court's manufactured and distorted interpretation of IGRA's requirement that the Tribe exercise governmental power over the lands in question. A primary purpose of the passage of IGRA is to allow for tribes with struggling, underfunded and underserviced programs to seize upon a source of revenues to enable such tribes to advance toward tribal self-sufficiency and strong tribal governments. Aquinnah does indisputably exercise governmental

power over its land. Appellees and the District Court's reasoning that a tribe must now have those programs in place before being eligible for gaming turns Congress' intent in the passage of IGRA on its head.

For the reasons set forth herein, The Tribes Opening Brief, the United States Amicus Brief, and in the pleadings below, this Appeals Court should vacate the judgment against the Tribe and direct the District Court to grant the Tribe's motion for summary judgment, deny the summary judgment motions of the Commonwealth, the Town of Aquinnah and AGHCA, and enter Final Judgment in favor of the Tribe. Alternatively, the case should be remanded with instructions that partial summary judgment be entered in favor of the Tribe that IGRA, rather than MILCSA(Aquinnah) governs gaming on the Tribe's Indian lands and allow the question of whether the Tribe exercises sufficient governmental power over its Indian lands to proceed to trial. Alternatively, the Appeals Court should vacate the judgment and remand the matter with instructions to dismiss the Complaints against the Tribe with leave to amend to include claims against the NIGC to be brought pursuant to the APA.

Dated: October 3, 2016

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9, 293[13] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief 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 this brief has been prepared in proportionally spaced typeface using Microsoft Word 2011 in 14 point Times New Roman.

Dated: October 3, 2016

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[13] On September 20, 2016 the Court Granted Aquinnah's Motion to file an oversized Reply Brief not to exceed 10,000 words.

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2016 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 and that they will be served by the CM/ECF system:

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