Nos. 19-1661/19-1857

UNITED STATES COURT OF APPEALS
For the First Circuit

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

Plaintiffs - Appellees/Cross – Appellants,

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff – Appellee,

v.

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

Defendants – Appellants/Cross – Appellees,

CHARLIE BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts; MAURA HEALEY, in her capacity as Attorney General of the Commonwealth of Massachusetts; CATHY JUDD-STEIN, in her capacity as Chair of the Massachusetts Gaming Commission,

Third Party Defendants – Appellees.

Nos. 19-1729/19-1922

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

Plaintiffs – Appellees/Cross – Appellants,

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff – Appellee,

v.

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

Defendants – Appellants/Cross – Appellees,

CHARLIE BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts; MAURA HEALEY, in her capacity as Attorney General of the Commonwealth of Massachusetts; CATHY JUDD-STEIN, in her capacity as Chair 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)

AQUINNAH TRIBE'S RESPONSE IN OPPOSITION TO MARTHA'S VINEYARD COMMISSION AMICUS BRIEF

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Appellants/Defendants Counterclaimants Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Wampanoag Gaming Corporation ("AWGC")(collectively, "Tribe") submit this Response Brief in Opposition to the Brief of Amicus Curiae of the Martha's Vineyard Commission ("MVC") in Support of Plaintiffs-Appellees/Cross-Appellants (such amicus brief referred to herein as "MVCAB"), which includes the Town of Aquinnah ("Town") and the Aquinnah Gay Head Community Association ("AGHCA"), but does not include the Commonwealth of Massachusetts or the state officials named in their official capacities (collectively referred to as "Commonwealth").

This response brief is submitted pursuant to this Court's Order of April 16, 2020. The Tribe advances three arguments directed at the analysis submitted by the MVC. First, the MVCAB reinforces the Tribe's point that affirmance allows the Town, through the MVC, to disapprove the Tribe's gaming project for essentially any reason. Second, the MVC identifies the proper manner in which to deal with the Tribe, which is government-to-government dialogue rather than the assertion of a presumed jurisdiction. Third, the MVC's self-serving delineation between gaming laws and general regulatory laws underscores the error of the District Court on the crux issue in this appeal.

I. THE MVCAB reinforces the Tribe's point: Affirmance allows the Town, through the MVC, to disapprove the Tribe's gaming project for any reason.

Amongst the errors of the District Court is the implicit road map which it provided to the Town to stop or unduly interfere with the Tribe's Class II gaming facility by merely framing the Town's ordinances and regulations, and its permitting decisions, as restricting "construction, occupancy and operation", rather than as illegally restricting the Tribe's full right to develop and conduct it's Class II gaming operations under IGRA. Among the many examples posited by the Tribe, the Tribe's Opening Brief in this appeal (the "ATOB") points to the Town's manipulation of the MVC to cause the MVC to issue an order prohibiting the Town from issuing ***any*** permits for the Tribe's Class II gaming facility, unless and until the MVC approves, in the exercise of its sole and broad discretion, ***all*** aspects of the project:

> More recently, the Town referred the Tribe's project to the MVC, another political subdivision of the Commonwealth, resulting in the MVC, on August 12, 2019, mandating that the Town not issue any permits relative to the proposed site of the Tribe's gaming facility until the MVC dictates, in its sole discretion, how the Tribe must address inter alia: (1) scenic values; (2) character; (3) identity; (4) impact on abutters; (5) burden on existing public facilities; (6) impact on municipal general plan; (7) providing housing for employees; and (8) impact on land development objectives by regional or state agencies. Such requirements are in addition to a further requirement that the MVC determine the Tribe's project to be "consistent with the land development objectives of the MVC."

ATOB at 19. Within the platitudes of benevolence, the MVCAB concedes those facts that prove the Tribe's point made in the ATOB.

First, the MVCAB establishes that no "application" for a proposed Class II Gaming facility's development was ever properly before the MVC. The MVC establishes that such an application must first be made to one of its six member towns in order to trigger MVC jurisdiction:

> The Act also instructs that the agency or board within each municipality that has responsibility for issuing a development permit, **shall review any application** for proposed development to determine if the development is one of regional impact; if so, it shall **refer the application** to the MVC. St. 1977, c. 831, § 13.

MVCAB at 13 (underlined emphasis in original)(**bold font** emphasis added). *See also* MVC DRI Regulations[1] at Section 3 ("Applicant – means any person who applies for a Development Permit") and Section 4.1 ("If the proposed project for which the Development Permit is sought meets one of the criteria on the DRI Checklist, the Town Board shall refer the Development Permit Application to the MVC for review . . . "). The MVCAB then concedes that the Tribe did not at any time submit any such application to the Town or otherwise:

> In this case, taking the position that the Tribe is not subject to generally applicable non-gaming regulations, **the Tribe made no applications for development permits** from the Town. Id. Given the anticipated scope and impact of the project – in particular, the

[1] MVC DRI Regulations can be found at the MVC's official webpage: https://www.mvcommission.org/sites/default/files/docs/CURRENT_DRI_REGS_2014.pdf

> impact that a development of this size and magnitude would have on traffic, housing, public safety, sanitation and the environment, the Town of Aquinnah6 (sic), applying the statutory criteria and MVC guidance, referred the gaming project to the MVC for review. Id.

MVCAB at 15 (emphasis added). The MVC acknowledges that an application triggers the process for referral from the Town to the MVC, and rightfully acknowledges that no application was submitted by the Tribe to the Town, to be referred to the MVC. Despite that fatal flaw, the MVC did the Town's bidding by disapproving the Tribe's Class II gaming project and then, by formal order prohibited the Town from issuing any permits to the Tribe for any reason until the Town received permission from the MVC to do so. The MVCAB at 17 asserts "MVC had no choice but to issue a decision declining to authorize the proposed project," but it never explains how it could act on a referral or deny approval of a project where no application was ever made[2], including enjoining the Town from taking any action until the MVC approves the Class II gaming facility project. The MVC could have simply stood down, and waited for the

[2] Underscoring the MVC's "choice" is the fact that the MVC is comprised of and controlled by the six towns on Martha's Vineyard, including the Town of Aquinnah, five of which are represented by the Town's legal counsel. *See* Tribe's Brief in Opposition to MVC's Motion for Leave to File Amicus Curiae Brief at 4-5. Nor does the MVC dispute that the Tribe is excluded from being represented on the MVC even though the Tribe is the seventh "local" government that exercises jurisdiction over lands on Martha's Vineyard. *Id*. The MVC was able to respond to these facts in its Reply to the Tribe's Opposition to Motion for Leave to File Amicus Curiae Brief, yet it was silent on this point.

case to work its way through the court. Instead, it "chose" to do the Town's bidding, circumventing and manipulating the system to do indirectly what the Town was unable to achieve directly.

Second, the MVCAB at 10 and 12 also concedes and embraces the MVC's asserted broad authority over virtually any and all aspects of the Tribe's gaming project. It does not disagree with the nine examples provided by the Tribe (ATOB at 19). The examples demonstrate how the District Court's Third Amended Final Judgment ("TAFJ") allows the MVC to interfere with the internal affairs of the Tribe by dictating the Tribe's housing policy, or by levying impact fees, or by dictating the Tribe's decisions regarding the size and scope of the facility, or by dictating the Tribe's decisions regarding the nature and "character" of the Tribe's community. The nine subject areas, alone, identified to the Tribe in the July 19, 2019 Decision of the MVC (DRI 690, Add. 99-104), generate an endless list of hypotheticals which, if carried out, enable the MVC to supplant virtually all tribal governmental decisions regarding the Tribe's Class II gaming facility with its own .

The ATOB establishes that this vast range of subject matter over which the MVC may unilaterally disapprove a project, together with the extensive broad discretion Massachusetts courts allow for MVC decisions, essentially allow the MVC to disapprove any project for any reason:

Looking to both the broad scope of the MVC's statutory authority,

> Chapter 831 of Acts of 1977, St.1977, c. 831, as amended St. 2017, c. 831, (included in addendum), and to the Town's exemption to its prohibition of commercial development by "special permit," both the MVC and the Town have such broad discretion that either can deny virtually any project for virtually any reason. *See Kitras v. Eccher*, 2013 WL 5636619 at * 6-7 (Mass. Land Court 2013) ("The court is solely concerned with the validity but not the wisdom of the board's action," citing *Wolfman v. v. Board of Appeals of Brookline*, 15 Mass.App.Ct. 112, 119 (1983); "where the court's findings of fact support any rational basis for the municipal board's decision, that decision must stand", citing *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 639 (1970)).

ATOB at 19-20. *See also Roth v. Beattie*, 2016 WL 2755886 at *10 (Mass. Land Court 2016) ("As a consequence, the board's discretionary power of denial extends up to those rarely encountered points where no rational view of the facts the court has found supports the board's conclusion that the applicant failed to meet one or more of the relevant criteria in the governing statute or by-law"); *Britton v. Zoning Board of Appeals of Gloucester*, 59 Mass.App.Ct. 68, 74 (Mass. App. 2003) (the Board's "highly deferential" discretion allows it "to deny a permit application even if the facts found by the court would support its issuance."). The MVCAB makes no attempt to refute this point. Indeed, it acknowledges the point. MVCAB at 13 ("The MVC also has broad authority and discretion . . . to evaluate and regulate a project. . . ").

II. The MVC identifies the proper manner in which to deal with the Tribe: government-to-government dialogue rather than assertion of jurisdiction.

The ATOB noted the initial efforts of the Tribe and the MVC to work together on a government-to-government basis, without the MVC attempting to assert its perceived jurisdiction over permitting or denying the project:

> The Tribe began friendly, informal discussions with the MVC, which were unfortunately suspended once the Town filed its motion at the District Court asserting regulatory jurisdiction over the Tribe's project. Docs. 180 and 181.

ATOB at 11. The MVCAB acknowledges those same discussions:

> . . . in fact, as explained *supra*, the MVC has made special accommodations for the benefit of the Tribe. Specifically, in connection with the gaming facility, the MVC unsuccessfully attempted to fashion an alternative, "informal" method of review to address the Tribe's jurisdictional concerns.

MVCAB at 11. Indeed, the MVC devotes, *supra*, an entire section of the MVCAB to those same discussions. *Id*. at 15-17, ("[r]ecognizing the unique circumstances. . ."), *id.* at 15; ("[i]n an effort to resolve any jurisdictional dispute, the MVC proposed a process. . ."), *id.* at 16. While failing to address the Tribe's recitation above that the talks were "suspended once the Town filed" its Motion for Entry of Final Judgment seeking an injunction subjecting the Tribe to Town (and MVC) jurisdiction, the MVCAB ignores the circumstances and then feebly asserts that the MVC had "no choice" but to assert its jurisdiction.

The MVC's discussion on the informal government-to-government process supports the Tribe regarding the issues on appeal in two respects. First, the MVC is acknowledging that if this Court vacates the TAFJ, the MVC will still have a process, government-to-government, to express its views or voice its concerns to the Tribe's Gaming Commission or to the National Indian Gaming Commission, which should resolve most disputes. Second, the MVC acknowledges that its own jurisdiction is properly in dispute. By fiating, or decreeing the existence of, its jurisdiction and issuing a sweeping prohibition against any Town-issued permits for the construction, occupancy or operation of the Tribe's Class II gaming facility, the MVC underscores the correctness of the Tribe's concern that, if allowed to exercise jurisdiction over the construction, occupancy and operation of the Tribe's Class II gaming facility, the MVC (and the Town) will have the opportunity to overreach and interfere with or even obstruct Tribal self-governance.

The Tribe does dispute MVC jurisdiction. As set forth in the ATOB at 16-39 and in the Tribe's Response/Reply Brief at 18-36, the preemptive force of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq*. ("IGRA") extends to the regulation of the construction, occupancy and operation of Tribal gaming facilities; hence, the MVC lacks jurisdiction over those matters within the scope of the District Court's improper injunction. But the MVC's perceived jurisdiction over the Tribe was limited or non-existent prior to the passage of

IGRA in 1988. In addition to IGRA preemptive force, the Tribe has not waived its sovereign immunity to MVC actions, and the MVC does not otherwise have jurisdictional authority under the laws of the Commonwealth. Moreover, while the MVCAB at 11, and the Town's and the AGHCA's Principal and Response Brief at 38, n.13, note that the Tribe has twice in the past worked with the MVC, such voluntary cooperative action on the part of the Tribe does nothing to address the legal question of the MVC's perceived authority and jurisdiction over federal Indian lands on Martha's Vineyard.

The MVC acknowledges that its jurisdiction, if any, is derivative of the Memorandum of Understanding Concerning Settlement of Gay Head, Massachusetts Indian Land Claims (the "1983 MOU")(App.Vol.I,137). MVCAB at 8 ("MVC's jurisdiction in this matter derives from a 1983 settlement agreement entered into by and between the Tribe[3], the Commonwealth, the Town and the Aquinnah/Gay Head Community Association, Inc."). Yet, the MVC was not a party to the 1983 MOU. Even if the Town is correct (which it is not) with respect to its assertion that the 1983 MOU provided a waiver of the Tribe's sovereign immunity to the parties to the 1983 MOU, there is no authority that any waiver would extend to non-parties of the 1983 MOU. *See Kiowa Tribe*

[3] The Tribe was not a party to the1983 MOU. Rather, the 1983 MOU was entered into among the Town, the AGHCA, the Commonwealth and the Wampanoag Tribal Council of Gay Head, Inc., a state-organized 501(c)(3) non-profit corporation. *See* discussion in Tribe's Response/Reply Brief at 9-10.

of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 754, (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity"); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940). *See also* discussion in Tribe's Response/Reply Brief at 44-47. There is an "important distinction between being subject to a statute and being able to be sued for violating it." *In re Greektown Holdings, LLC*, 917 F.3d 451, 461 (6th Cir. 2019) (citing *Kiowa*, 523 U.S. at 755). Accordingly, even if IGRA preemption does not resolve the issue, the Tribe has not waived its sovereign immunity from actions of the MVC.

Moreover, the MVCAB fails to acknowledge or address two further limitations on MVC authority identified in the ATOB at 36, n.12. First, the MVC's enabling statute, passed in 1977, expressly exempts the Indian Common Lands, known generally as the Cranberry Bogs, the Clay Cliffs and Herring Creek, set aside for the use and benefit of the members of the Tribe, and the only lands then-acknowledged to be Indian lands, from the MVC's jurisdictional reach. (*See* MVC Add. at 003). At the time, there was no federally-recognized Tribe and no 1983 MOU. But the scope and status of the Indian Common Lands changed upon certain lands on Martha's Vineyard being transferred to the United States, as Indian lands, to be held in trust status on behalf of the Tribe. The same

provision in the MVC's Charter expressly excludes "all lands owned by the Commonwealth or any of its constituent agencies, boards, departments, commissions or offices" (*See* MVC Add. at 003) from MVC jurisdiction. Surely, that includes post-1983 lands purchased by the Commonwealth. It follows that such Indian lands should be treated the same as all other Indian Common Lands in the context of the MVC's Charter. The MVC cannot point to any place in its Charter which evidences an intent that any future Indian lands be within its jurisdictional reach, despite the limiting language in its Charter relative to the status and existence of Indian Common Lands at the time of the Charter's enactment. Second, Section 16 of the 1983 MOU directs that the Settlement Lands will be subject to the Land Use Plan attached thereto. The MVC fails to identify how the Tribe's project in any way violates the Land Use Plan then in effect. Even if the 1983 MOU does otherwise provide the MVC with concurrent jurisdiction relative to the Tribe's Indian lands, the MVC the 1983 MOU applies the 1983 regulations or standards. Accordingly, the MVC cannot look to post-1983 regulations or standards to disapprove any project of the Tribe, gaming or non-gaming. The Town's use/abuse of the MVC, under such tenuous grounds for jurisdiction, further evidences the Tribe's concern that the Town (and the MVC) will overreach and obstruct or interfere with the internal affairs of the Tribe.

The Tribe is not seeking resolution by this Court of these issues regarding

amicus MVC or its purported jurisdiction, other than an affirmation by this Court of the reach of IGRA's preemptive force. These issues are set forth herein for the purpose of (1) rebutting the MVC's wrongful assertion that it has jurisdiction; (2) rebutting the MVC's characterization of its informal talks with the Tribe as an "accommodation" to the Tribe (they are in reality an accommodation to the MVC); and (3) putting into context the length to which local governments will overreach in order to obstruct or interfere with the internal affairs of Indian tribes when given the tools to do so.

III. The MVC'S self-serving delineation between gaming laws and general regulatory laws underscores the error of the District Court.

Throughout the MVCAB, the MVC makes repeated references that it only seeks to address non-gaming issues, or general regulatory issues, rather than gaming issues. *See, e.g.*, MVCAB at 8 ("Town of Aquinnah's ability to enforce local regulatory, permitting, zoning and licensing requirements **as relating to non-gaming activities") (emphasis added);** *id.* at 8 ("this Court held that IGRA impliedly repealed the Commonwealth's authority to **enforce gaming** laws on Tribal lands")(emphasis added). Similarly, the MVCAB makes unsupported assertions of fact that MVC actions would not in any way be related to gaming. MVCAB at 9-11 and 16. Yet, the MVC provides no definition for either "gaming laws" or "non-gaming laws." The MVCAB acknowledge that matters "integral" to gaming are within IGRA's preemptive scope, MVCAB at 9, but provides no

analysis explaining why matters within the MVC's alleged jurisdiction are not integral to the Tribe's rights to exercise its full rights under IGRA. The MVC's unsupported assertions simply repeat, without analysis, the verbiage of the failed Gaming Laws/General Regulatory Laws paradigm newly-established by the District Court and advocated by the Town. The MCVAB fails to address even the Tribe's extensive analysis (ATOB at 16-39 and Tribe's Response/Reply Brief at 18-37) that matters of construction, occupancy and operation are integral and expressly within the sophisticated comprehensive regulatory scheme established by IGRA.

What are the outer limits of the Town's (and the MVC's) authority? Without ever making an express admission that it opposes any gaming on the Tribe's Indian lands, can the MVC restrict the number of parking places such that the gaming operation is rendered unprofitable? Or require the Tribe to provide on-site housing for every employee, or even patrons? Or insist that the design of the Tribe's project is incompatible with the MVC's "scenic values" or Martha's Vineyard's "character" or "identity", or otherwise determine that the Tribe's project is just not consistent with the "land development objectives of the MVC"? The MVC (wrongfully) insists that it has the absolute and exclusive right to supplant the Tribe's decisions on those matters with its own determinations. The Tribe establishes, and the MVC does not dispute, that if allowed to make those determinations, the MVC may do so with impunity. However, would not such

overreaching and burdensome determinations by the MVC interfere with or obstruct the very purpose of IGRA, which is promoting Tribal economic development, self-sufficiency, and strong Tribal governments, 25 U.S.C. §2701(1)? Clearly, they would, and so are properly preempted by the "extraordinary preemptive power" of IGRA. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 545 (8th Cir. 1996) (The intent of Congress was that IGRA would have extraordinary preemptive power, both because of its broad language and because it demonstrates that Congress foresaw that it would be federal courts which made determinations about gaming).

The ATOB at 16-37, and the Tribe's Response/Reply Brief at 18-36, establish that the dispositive legal issue on appeal is whether the District Court properly concluded that the Tribe's Class II gaming facility is subject to the Commonwealth's and Town's (and MVC's) "General Regulatory Laws," including all local regulations regarding "construction, occupancy and operation," despite IGRA's preemption of the Massachusetts Indian Land Claims Settlement Act, formerly codified at 25 U.S.C. §§ 1771-1771i ("MILCSA(Aquinnah))"[4]. The Tribe establishes that Commonwealth, Town and local (including MVC) laws and regulations regarding the construction,

[4] This Court's Opinion in *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618 (1st Cir. 2017), *cert. denied,* 138 S. Ct. 139 (2018) ("2017 Opinion") refers to MILCSA(Aquinnah) as the "Federal Act."

occupancy and operation of the Tribe's Class II gaming facility are repugnant to IGRA's comprehensive and sophisticated regulatory scheme. This Court's decision in *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994), which decision was reaffirmed by this Court's 2017 Opinion, established the proper paradigm for determining whether a state or local law or regulation regarding environmental, public health and safety matters, including construction, occupancy or operation of the Tribe's Class II gaming facility, survives IGRA's preemptive scope. The TAFJ contravenes this Court's guidance in numerous material respects. The TAFJ, if allowed to stand, will deprive the Tribe of those rights and privileges which IGRA affords other Indian tribes, and will destabilize the jurisdictional structure of Indian gaming throughout the United States. Moreover, allowing the decision to stand will violate the United States' jurisdiction over the land it holds in trust for the Tribe, by requiring the United States to be subordinate to state and local laws, including even the broad and unbridled discretionary authority of the MVC. This Court should conclude that Commonwealth, Town (and MVC) and local laws and regulations that interfere with or impede IGRA's comprehensive regulatory scheme, including those regarding the "construction, occupancy and operation" of the Tribe's Class II gaming facility, fall within IGRA's preemptive scope.

The MVCAB does not defeat the correctness of the Tribe's analysis in any material aspect. Rather, it evidences the Tribe's concern that the Town (and the

MVC) will use their perceived authority to control the construction, occupancy and operation of the Tribe's Class II gaming facility; to deny the Tribe of the rights and benefits Congress intended in the passage of IGRA, the express purpose of which is the promotion of tribal economic development, self-sufficiency, and strong tribal governments, 25 U.S.C.§ 2701(1); and to deny the NIGC of its role of consistent oversight over all Indian gaming on Indian lands under IGRA.

Date: May 26, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Response in Opposition Brief complies with the Word Limit of 6,500 containing 3,882 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) , as ordered by the Court.

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 this document has been prepared in a proportionally spaced typeface using Times New Microsoft Word 2019 in 14 point Times New Roman.

Dated: May 26, 2020

s/ *Scott D. Crowell*
SCOTT CROWELL

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2020, I electronically filed the foregoing documents 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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