No. 17-216

IN THE

Supreme Court of the United States

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

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS TOWN OF AQUINNAH AND AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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The Tribe's opposition confirms the need for this Court's review. The Tribe does not meaningfully dispute that the First and Fifth Circuits have reached opposite conclusions on the question whether IGRA impliedly repeals tribe-specific acts subjecting Indian tribes to state and local restrictions on gaming. Instead, the Tribe points to the Department of the Interior's disagreement with the Fifth Circuit's decision in the ongoing litigation in Texas, which only underscores

the need for this Court to resolve this important and recurring issue.

This Court's intervention is also warranted because the implied repeal analysis employed by the First Circuit below conflicts with this Court's longstanding precedent, effectively holding that a later-enacted law will always prevail over a competing statute unless the earlier-enacted statute contains an express savings clause. That rule weakens the presumption against implied repeal beyond recognition and violates the separation-of-powers principles underlying the doctrine. To the limited extent the Tribe attempts to defend the decision below, it does so in reliance on a theory of congressional intent with no foundation in the statutory text, legislative history, or record. This is in striking contrast to the overwhelming evidence supporting the contrary conclusion: Congress intended the Settlement Act to survive IGRA.

I. THE QUESTION PRESENTED IS IMPORTANT

A. This Issue Is Recurring And Requires This Court's Guidance

In opposing the petition, the Tribe confirms that the question presented—whether IGRA displaced federal statutes subjecting Indian tribes to state gaming laws—is a recurring issue that warrants this Court's review. Not only has the issue been presented in multiple prior petitions, *see* Opp. 10 & n.3, but it is directly implicated in ongoing federal litigation in Texas, *see id.* at 17-18. As the petition explained (at 28-30), the Fifth Circuit held in 1994 that IGRA did *not* impliedly repeal the Restoration Act, and therefore the Ysleta del Sur Pueblo Tribe could not engage in gaming activities prohibited by state law. *Ysleta del Sur Pueblo* v. *Texas*, 36

F.3d 1325, 1335 (5th Cir. 1994). Yet, as the Tribe points out (at 17-18), twenty years later, the Department of the Interior ("DOI") is taking the opposite position, arguing that IGRA governs the tribe's gaming activities, notwithstanding the Fifth Circuit's decision.

The inconsistent positions taken by federal agencies on the continued relevance of the Settlement Act further underscore the confusion this issue has caused. The Tribe's opposition references (at 5, 7) a 1997 DOI letter in which the agency concluded that the Tribe would be eligible to conduct gaming on lands in Fall River, Massachusetts, if those lands were taken into trust by the federal government for the Tribe's benefit. But in that same letter, DOI indicated that the Settlement Act's gaming provisions *continued to apply* to the lands at issue here—the Tribe's Aquinnah lands. *See* Sept. 5, 1997 Letter from Michael J. Anderson, Acting Asst. Sec'y of Indian Affairs, DOI, to Patricia A. Marks, Dist. Ct. Dkt. 107-7 at 2 (explaining that 25 U.S.C. § 1771g "only appl[ies] to lands within the Town of [Aquinnah], Massachusetts"); *see also id.* at 4-5. Similarly, the following year, the National Indian Gaming Commission ("NIGC") expressly argued to the D.C. Circuit that the Tribe was *exempted* from IGRA because of the Settlement Act. *See* NIGC Br. 19, *Narragansett Indian Tribe* v. *NIGC*, No. 97-5290 (D.C. Cir. June 23, 1998) ("Congress and the courts have deemed it appropriate to *exclude* such tribes from IGRA and to subject their gaming activities to state law" (emphasis added) (citing Settlement Act, 25 U.S.C. § 1771g)). Thus, well after IGRA's enactment, federal agencies twice indicated that the Settlement Act controlled, notwithstanding IGRA. Yet they now take the contrary position, arguing that the Settlement Act had been

long-repealed at the time they previously said it continued to apply to the Tribe's Aquinnah lands.

Moreover, contrary to the Tribe's suggestion (at 18), the Court can definitively resolve the question presented. *Brand X* allows an agency to take a position contrary to a court's *only* where the agency's interpretation would "otherwise [be] entitled to *Chevron* deference." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). The court's interpretation of a statute "remains binding law" whenever "*Chevron* is inapplicable." *Id.* at 983 That is the case here; the question whether Congress intended IGRA to repeal settlement acts is wholly outside DOI's expertise. *See, e.g.*, *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 686 (1975) ("[T]he determination of whether implied repeal of the antitrust laws is necessary to make the Exchange Act provisions work is a matter for the courts."); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 149 (2d Cir. 2003) ("Although some deference may be accorded to an agency's view on a matter within its particular expertise, the decision as to whether, in a given set of circumstances, one statutory scheme supersedes the other is, 'in the end,' to be made by the courts.").

The Court should grant review to bring an end to the ongoing and longstanding confusion this issue has generated. *See, e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170 (1994) (certiorari granted "to resolve continuing confusion").

B. The Question Presented Raises An Important Issue Of Statutory Interpretation

This Court's review is also warranted to realign the First Circuit's implied repeal jurisprudence with this Court's precedent. The Tribe does not dispute the important separation-of-powers principles underlying the presumption against implied repeal. As the petition explained, the presumption honors Congress's lawmaking authority by preventing courts from picking and choosing among federal statutes. Pet. 19. Instead, courts must make every effort to reconcile overlapping statutes. *Id.* at 18-20.

The First Circuit, however, employed an implied repeal framework that entirely dilutes the presumption. As the Tribe concedes (at 25), the First Circuit gave dispositive weight to the *absence* of an express savings clause in the Settlement Act. In so doing, the First Circuit effectively held that the *only* circumstance in which an earlier-enacted statute can prevail is where that statute contains a savings clause that enables the two overlapping statutes to coexist on their face. That analysis is fundamentally incorrect and contravenes this Court's precedent. Pet. 27-28.

To downplay that radical departure from this Court's precedent, the Tribe argues (at 25-26) that the First Circuit's opinion "says nothing" about how the absence of a savings clause would affect the implied repeal analysis in other areas of law. But the First Circuit did not limit its analysis to statutes related to Indian tribes; instead, it cited a variety of statutes with savings clauses in contexts as disparate as sentencing, immigration, and banking. Pet. App. 18a n.9. Thus, the Tribe's attempt to cabin the First Circuit's newly de-

veloped approach to implied repeal to the Indian gaming context is counterfactual and wholly unpersuasive.

C. The Question Presented Has Great Practical Significance

As the petition explained, the First Circuit's decision eviscerates a cornerstone of the settlement agreement signed by the Tribe, the Commonwealth, the Town, and the AGHCA: In exchange for relinquishing lands to the Tribe, the parties bargained for and received a guarantee that those lands would be subject to the same laws and regulations that applied elsewhere in the Town and the Commonwealth. Pet. 5-11.[1] The AGHCA conditioned its acceptance of the settlement on this provision because it was necessary to ensure that "gambling [and] other presently prohibited activities" would not jeopardize the safety and security of the Town. *Id.* at 9-10. The Town likewise bargained for this provision because its infrastructure and municipal services were too limited to support significant gaming activity; indeed, there is only a single two-lane road leading to the Town and minimal emergency services. Today, as then, a gaming facility "tucked away in the remote western corner" (Opp. 13) of the Town would severely burden these limited resources.

Furthermore, although the Tribe now attempts (at 6) to portray its proposed gaming facility as a "modest" undertaking, it has consistently argued the opposite, and in fact suggested below that it expects the facility

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[1] As explained in the petition (at 6-7, 31-32), the settlement agreement resolved a longstanding dispute over aboriginal title and provided the Tribe with a "viable land base"—subject to strict land use regulations—that helped ensure it could survive as an Indian community. Pet. App. 86a, 106a-107a.

to generate nearly $5 million per year in revenue.[2] That level of activity will inevitably strain the Town's roads, law enforcement, fire protection, and emergency services. *Cf.* Pet. App. 49a (discussing the "law enforcement, public safety, and emergency services that are necessary to serve an influx in traffic and activity and to guard against criminal infiltration and corruption" at a new gaming facility).

What is more, the Tribe continues to claim that, under IGRA, it is exempt not just from the gaming restrictions of state and local law, but also from any laws or regulations that "*touch on* its right to game." Opp. 22 (emphasis added). The boundaries of that category are far from clear; indeed, as the petition noted (and the Tribe did not deny), the Tribe has already refused to comply with local building code requirements applicable to its gaming facility. Pet. 33 & n.9. That uncertainty is precisely what the parties (and Congress) sought to avoid when they agreed in unambiguous terms that the Tribe would be subject to state and local laws.

The Tribe also suggests (at 10) that the issue is unworthy of this Court's review because it concerns a "single tribe in Massachusetts." But the impact of the First Circuit's decision is not so circumscribed, and its logic applies equally to other federal statutes that subject Indian tribes to state and local restrictions on gaming. Pet. 33-34. The Tribe's argument in response relies on rank speculation that the Florida tribes, for example, have no "interest" in gaming on their settlement lands. *See* Opp. 14. That unsubstantiated assertion

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[2] *See* Tribe Opp. to Mot. to Stay Issuance of Mandate 7, C.A. Dkt. 00117156478 (May 18, 2017).

does nothing to minimize the broad significance of the question presented.

In any event, even if the impact of the First Circuit's decision is ultimately limited in the way the Tribe suggests, that is not a reason for the Court to deny review. As the Tribe notes (at 28), Congress frequently passes legislation specific to individual tribes. These laws address important and often divisive issues like trust lands, water rights, or, as here, land claims. A lower court's interpretation of one of these statutes is not immune from this Court's review merely because the statute happens to be narrow in scope. *See, e.g.*, *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1078 (2016) (granting certiorari to determine whether a specific reservation was diminished).

II. THE DECISION BELOW ENTRENCHES A CIRCUIT SPLIT

It is beyond dispute that the Fifth Circuit in *Ysleta* concluded that IGRA did not impliedly repeal the Restoration Act's prohibition on a Texas tribe's gaming activities, whereas the First Circuit here concluded that IGRA did impliedly repeal the Settlement Act's restriction on the Tribe's ability to game. *See* Opp. 15, 19-20. The Tribe's efforts to minimize this clear circuit split are unavailing.

First, the Tribe emphasizes minor differences between the Settlement Act and the Restoration Act, *see* Opp. 16-17, while simultaneously ignoring the substantial similarities between the two statutes and omitting key portions of the Fifth Circuit's reasoning. As explained in the petition (at 29), the Restoration Act and the Settlement Act were passed on the same day, by the same Congress, approximately one year before IGRA, and both contain provisions subjecting the

tribes to state gaming restrictions. In concluding that IGRA did not impliedly repeal the Restoration Act, the Fifth Circuit referenced the proximity between the Restoration Act's and IGRA's enactment. *See Ysleta*, 36 F.3d at 1335. It also reasoned that the "the Restoration Act is clearly a specific statute, whereas IGRA is a general one" because the Restoration Act "applies to two specifically named Indian tribes located in one particular state, and the latter applies to all tribes nationwide." *Id.* The Fifth Circuit's reasoning is equally applicable to the Settlement Act here, highlighting the conflict in the decisions the First and Fifth Circuits reached. *See Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 364 (2002) (granting certiorari where circuits' decisions on "similar provision[s]" of Illinois and Texas law conflicted).

Second, the DOI developments related to the Texas tribes do not detract from the circuit split—rather, they highlight the importance of resolving it. The pertinent inquiry in deciding whether to grant certiorari is whether the courts of appeals have reached decisions that "conflict … on the same important matter." S. Ct. R. 10(a). Irrespective of any subsequent agency action, the First and Fifth Circuit's decisions reached different results on the same important legal issue.

Finally, the D.C. Circuit's decision in *Narragansett Indian Tribe* v. *National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998), further underscores the disagreement among the circuits. In rejecting the Narragansett Tribe's equal protection claim, the D.C. Circuit reasoned that the Settlement Act here "specifically provide[s] for *exclusive state control over gambling*." *Id.* at 1341 (emphasis added) (citing 25 U.S.C. § 1771g). The D.C. Circuit's treatment of the Settlement Act is

entirely at odds with the First Circuit's, on precisely the statutory provision at issue here.

III. THE DECISION BELOW IS WRONG

The Tribe's opposition spends little time defending the merits of the First Circuit's decision, and concedes that the court merely looked to its own (erroneous) decision in *Narragansett* rather than "directly applying" this Court's implied repeal precedent. Opp. 19. That departure from this Court's well-established guidance on an important question of federal Indian law provides yet another reason to grant review.

The Tribe asserts with little argument (at 21) that the "clash" between the Settlement Act and IGRA justifies a finding of implied repeal. That simplistic analysis, however, ignores this Court's guidance that "[i]t is *not enough* to show that the two statutes produce differing results when applied to the same factual situation." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (emphasis added). To be irreconcilable, a court must find that repealing the earlier statute is *necessary* to make the later-enacted statute work. *Id.* That is not the case here, as the Settlement Act can simply be read as a specific exception to IGRA's general provisions. Pet. 23. Tellingly, the Tribe offers no response to this obvious way to reconcile the two competing statutes.

Nor does the Tribe even attempt to refute the legislative history demonstrating that Congress intended settlement acts like this one to survive IGRA's enactment. Pet. 23-24. The Tribe halfheartedly argues (at 27) that one of the Senate reports explicitly stating that Congress intended state settlement acts to remain in force, S. Rep. No. 100-446 (1988), is irrelevant because

the bill at the time included a provision that ensured Rhode Island would retain jurisdiction over gaming, notwithstanding IGRA. But the other report, S. Rep. No. 99-493 (1986), discussed a bill that did *not* contain the Rhode Island exemption, and that report, too, made clear that "nothing in [IGRA] will supersede" any federal statutes subjecting tribes to state restrictions on gaming. *Id.* at 15. The contention that these aspects of the Senate reports were tied to the Rhode Island exemption is misleading at best.

Rather than contending with any of the concrete evidence of congressional intent, the Tribe relies on a theory created from whole cloth. It argues, citing only the government's amicus brief below, that the reason Congress included gaming-specific language in the Settlement Act was to "address gaming rights *on a temporary basis*" while IGRA remained pending. Opp. 3 (emphasis added). The First Circuit relied on the same unsupported assertion that the language served as a stopgap measure during the post-*Cabazon*, pre-IGRA period. Pet. App. 17a. But there is nothing in the statutory text or history to suggest that Congress intended state and local gaming laws to apply temporarily. Congress knows how to write a sunset clause when it wishes to limit the duration of a statutory provision. *See* Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 18(a)(3)(A), 125 Stat. 284, 330 (2011) (providing that subsection is "repealed effective upon the expiration of the 8-year period" from when regulations take effect); *see also* Gersen, *Temporary Legislation*, 74 U. Chi. L. Rev. 247, 255-256 (2007) (collecting examples). It did not do so here. On the contrary, Congress drew no distinction between gaming laws and other state and local laws and regulations, which the Tribe concedes remain applicable. *E.g.*, Opp. 11.

The Tribe also urges the Court (at 26) to resort to the canon that "ambiguous" statutory provisions should be "construed liberally in favor of the Indians." But even assuming the interplay between these statutes creates such an ambiguity, that canon would not control. As this Court has recognized, the pro-Indian canon is not "inevitably stronger" than other indicia of congressional intent. *Chickasaw Nation* v. *United States*, 534 U.S. 84, 95 (2001). Here, Congress determined that the Tribe's lands in the Town should be subject to state and local gaming laws. Applying the canon is therefore inappropriate, because it "produce[s] an interpretation that … conflict[s]" with that considered judgment. *Id.* at 94.

In the end, the Tribe is left with the argument that Congress is "well-positioned" to address "any lingering concerns" about the First Circuit's decision. Opp. 28. But this Court does not and cannot "'expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation.'" *United States* v. *Welden*, 377 U.S. 95, 102 n.12 (1964). It should not wait for Congress to fix the First Circuit's mistakes, particularly because the First Circuit's decision implicates not only these parties but also the proper mode of analysis that governs *any* question of implied repeal. *See supra* pp. 5-6.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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