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'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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Appellants/Defendants [1] Counterclaimants Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Wampanoag Gaming Corporation ("AWGC")(collectively "Tribe") submit this response in opposition to the Motion by the Martha's Vineyard Commission for Leave to File Brief Amicus Curiae ("MVC Motion").

I. INTRODUCTION.

The Tribe opposes amicus involvement by the Martha's Vineyard Commission ("MVC") because the proposed brief has nothing uniquely helpful or informative to add to this appeal. The MVC Motion and proposed brief fail to meet the federal courts' criteria for a proper amicus brief. Applying the criteria, there are four major and independent reasons to deny MVC amicus status. Independently and collectively, they provide compelling grounds to deny the MVC Motion. First, in contravention of this Circuit's rules, the MVC spends nearly the entirety of its proposed amicus brief repeating the same arguments the Town of Aquinnah ("Town") already thoroughly briefed. Second, the MVC is comprised of and influenced by the Town in all material respects. Third, the proposed amicus brief further exacerbates the Town's abuse of the page limits and briefing limits in this appeal. Fourth, the proposed amicus brief makes false and/or unsubstantiated

[1] The Wampanoag Tribal Council of Gay Head, Inc., which was named as a party defendant, was an entity created under the laws of the Commonwealth of Massachusetts prior to federal recognition of the Tribe, and no longer exists.

assertions of the law not established in this litigation below, regarding the MVC's jurisdiction over the Tribe's proposed gaming facility. In short, although the MVC repeatedly stresses its desire to share its "uniquely situated" perspective with the Court, its proposed amicus brief is neither useful nor necessary to the resolution of this appeal. Accordingly, the Court should deny the MVC Motion.

II. THE CRITERIA FOR SUBMISSION OF AN AMICUS BRIEF TO THIS COURT.

"Whether to permit a nonparty to submit a brief, as amicus curiae, is, with immaterial exceptions, a matter of judicial grace." *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000). It is a "privilege within the sound discretion of the courts" and "depend[s] upon a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice." *N. Sec. Co. v. United States*, 191 U.S. 555 (1903); *United States v. State of Mich.*, 940 F.2d 143, 165 (6th Cir. 1991). It is appropriate to deny a motion for leave to submit an amicus brief when it fails to meet the criteria required of Rule 29. *Chiara v. Dizoglio*, 6 Fed.Appx. 20, 21 (1st Cir. 2001). Declining to consider an amicus brief is "particularly" appropriate where "the applicant's only concern is the manner in which this Court will interpret the law." *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999). "This is true notwithstanding the fact that [one of] the parties . . . do[es] not object" to the amicus' involvement. *Id*. As the Seventh Circuit has explained, "[t]he term 'amicus curiae' means friend of the court,

not friend of a party. . . We are not helped by an amicus curiae's expression of a 'strongly held view' about the weight of the evidence or how the law should be interpreted." *Ryan v. Commodity Futures Trading Comm.*, 125 F.3d 1062, 1063-64 (7th Cir. 1997). Other federal Circuits have rules which expressly admonish against such repetition, *See, e.g.*, 9TH CIR. R. 29-1, Advisory Committee's Note: "amici briefs should not repeat arguments or factual statements made by the parties." Accordingly, it is appropriate to deny leave where, as here, the proposed amicus "raise[s] the same points already raised in [a party's] briefs." *Kinnard v. Rogers Trucking*, 176 F. Appx. 829, 830 (9th Cir. 2006). Indeed, the Seventh Circuit has described amicus briefs that "duplicate the arguments made in the litigants' briefs" as "an abuse," because they "in effect merely extend the length of the litigant's brief." *Ryan*, 125 F.3d at 1063. Applying these standards to the MVC Motion, amicus status should be denied.

III. THE MVC'S MOTION AND PROPOSED BRIEF FAIL TO MEET THE CRITERIA REQUIRED BY THIS COURT.

After the Town and the Aquinnah Gay Head Community Association ("AGHCA") filed their Principal and Response Brief, the MVC moved for leave to file an amicus curiae brief. The MVC falsely claims it is "uniquely situated to provide this Court with information concerning the purpose, function and procedures of the MVC, as well as its historical treatment of the Tribe in connection with the review of projects of a certain magnitude."(MVC Motion at 4; Proposed MVC

Amicus Brief at 7). That is a false narrative. The Tribe opposes the MVC Motion for several reasons.

First, the Tribe opposes amicus involvement by the MVC because the proposed brief has nothing uniquely helpful or informative to add to this appeal. In contravention of the criteria for submitting an amicus brief, the MVC spends nearly the entirety of its proposed amicus brief rehashing (with the inevitable lawyerly spin) the underlying facts and procedural history, and repeating the same arguments the Town already thoroughly briefed. The Town discusses at length the role and involvement of the MVC (Town Principal And Response Brief at 7, 18 n.6, 38 n.11, 43 and 50-51), and the argument as to what is considered "integral" to gaming (Town Principal And Response Brief at 20-21, 40-49). Amicus status should be denied for this reason alone.

Second, the Tribe opposes amicus involvement by the MVC because it is comprised of, and influenced by the Town in material part. The MVC concedes that the Town of Aquinnah is one of only six towns which contribute money and provide representatives to serve on the MVC (MVC Motion at 3, n.2). Notably, the Tribe, being a federally recognized Indian community, does not have a seat on the Commission or a comparable position/relationship with the MVC. The Town's Attorney, Ronald Rappaport, heavily involved in the dispute since it began, also represents five of the six towns that control the MVC (*see* rkklaw.net). In the MVC's

effort to assert that its's proposed amicus complies with this Court's requirement that the MVC certify that no legal counsel for any party authored, and no party contributed money to fund the preparation of, the brief, the MVC concedes that the Town's money may be used for MVC legal expenses, but certifies that the Town did not directly contribute. That too, is a false narrative – simply redirecting Town funds away from paying for the brief to free-up otherwise unavailable or restricted funds to pay for the brief fails to satisfy the required certification that the Town has not contributed funds for the preparation of the brief. The Town and the MVC are interchangeable for purposes of interest in and advocacy of the arguments in this appeal. Amicus status should be denied for this reason alone.

Third, the Tribe opposes MVC amicus status because the proposed amicus brief further exacerbates the Town's abuse of the page limits and briefing limits in this appeal. Underscoring this point is the fact that the Town has already conceded in one paragraph, at the very end of its Principal and Response Brief, that it:

> ". . . noticed a cross-appeal for the sole purpose of preserving for potential further review their argument – as briefed in the prior appeal- that IGRA did not repeal the Settlement Act's grant of gaming jurisdiction. The Town and AGHCA understand that the Court's decision in the prior appeal forecloses this argument at the panel stage. The appropriate disposition for the panel is therefore to affirm.

Town's Principal and Response Brief at 51. The Tribe, in its Opening Brief, raised an objection to the cross-appeals (Tribe's Opening Brief at 3 - 4). The improper cross-appeals provide the Town the means to exceed the page limit and briefing

requirements of this Appeal, with the added benefit of having the last word prior to and during oral argument. The scrawny, one-paragraph "Principal" briefing only reinforces the correctness of an order striking any further briefing by the Town. The Town concedes that this panel must affirm, suggesting that it is preserving the issue for reconsideration *en banc*, but nothing in the rules prohibits the Town in an *en banc* proceeding from challenging prior precedent of this Appeals Court. Indeed, it is in the context of rehearing *en banc* that prior precedents are properly challenged. Fed.R.Civ.P 35; *United States v. Maytubby*, 272 Fed. Appx. 749, 750 (10th Cir. 2008). Hence, the Town's explanation for the cross-appeal is disingenuous. The improper maneuver already presumptively allows the Town five additional pages, or 2,300 additional words, in its "Principal and Response" Brief, and will allow fifteen additional pages, or 6,500 additional words, in the Town's "Reply." *See* Fed.R.App.P. 28. To afford an additional thirteen pages, or as many as 6,500 words, of advocacy through the guise of an MVC amicus brief, on top of the twenty additional pages and 8,800 words already improperly secured by the improper cross-appeal, should not be allowed.

Fourth, the Tribe opposes MVC amicus status because the proposed brief makes false and/or unsubstantiated assertions of the law regarding MVC's jurisdiction over the Tribe's proposed gaming facility. In its Opening Brief, the Tribe provided the following footnote:

> Additionally, the 1983 MOU, at ¶ 16, requires the Tribe's consent to changes to zoning laws that change the Land Use Plan then in effect. The District of Critical Planning Concern, upon which both the Town and MVC rely, was not in place in 1983. The MVC, established prior to the Tribe's federal recognition, was expressly divested with jurisdiction over those federal lands on the island at the time. Accordingly, the Tribe reserves the right to challenge the Town's or MVC's attempts to base any decision regarding the construction, occupancy and operation of the gaming facility on changes to its zoning laws subsequent to 1983.

Tribe's Opening Brief at 36, n.12. The MVC makes unsupported assertions that it has jurisdiction over the proposed gaming facility (MVC Motion at 3; Proposed MVC Amicus Brief at 7-9).[2] Moreover, the MVC was not a party to the 1983 MOU, which MOU is the alleged basis for the Tribe's waiver of tribal sovereign immunity in disputes with the Town and the Commonwealth, not with the MVC. The MVC's interest is premised on its jurisdiction over the gaming facility, which has not been established and is improperly interjected into this appeal. What is germane to this appeal is that the Town, in large part, is basing its inability to issue the permits which

[2] The MVC's assertion of jurisdiction completely undermines MVC's argument that it attempted to reach a government-to-government agreement without regard to the issue of jurisdiction (Proposed MVC Amicus Brief at 15-17). In its false narrative, the MVC fails to inform this Court that the Town's July 10, 2019 filing in the District Court asserting Town and MVC jurisdiction rendered the Tribe unable to continue talks with the Town on a government-to-government basis (Tribe's Opening Brief at 11). The very premise of the government-to-government dialogue was to reach agreement without being subjected to the jurisdiction of either party. Moreover, while the MVC (Proposed MVC Amicus Brief at 11) and the Town (Principal and Response Brief at 38, n.13) note that the Tribe has twice in the past worked with the MVC, such cooperative action on the part of the Tribe does nothing to address the legal question of MVC's jurisdiction over federal Indian lands on Martha's Vineyard.

it asserts the Tribe must secure in order to proceed with construction, on the MVC's directive to the Town not to issue such permits. With the exception of an inadvertent application for a power-related permit, which was denied, the Tribe has not applied to the Town or the MVC for any permits or approvals regarding the gaming facility. The Town referred a non-existent application to the MVC creating the bureaucratic platform for the MVC to direct the Town not to issue permits related to the gaming facility. While providing platitudes that the MVC does not oppose the Tribe's gaming facility, the MVC's Amicus Brief advocates the position that it exercises "broad discretion" to impose conditions on the Tribe's gaming facility with respect to a very long (and still incomplete) list of matters (Proposed MVC Amicus Brief at 13-14). Such a position as set out in the MVC's Amicus Brief only reinforces the arguments proffered by the Tribe that such authority on the part of the MVC would enable the MVC, or the Town via the MVC, to stop the Tribe's gaming facility project for essentially any reason (Tribe's Opening Brief at 18–20). The Town's intent is to deprive the Tribe of exercising the Tribe's gaming rights by exercising the Town's (and the MVC's) perceived and asserted authority over what the Town and the MVC contend are non-gaming matters. The MVC makes unsupported assertions of fact that its actions would not in any way be related to gaming (Proposed MVC Amicus Brief at 9-11 and 16). Yet, the MVC concedes that it issued a directive to the Town not to approve any permits for the Tribe's Class II gaming

facility, which directive was made in the context of the MVC's denial of an "application" that in fact, does not exist (MVC Amicus Brief at 15, 17). Amicus status should be denied for these reasons alone.

IV. CONCLUSION.

For these reasons, independently and in the aggregate, this Court should exercise its broad discretion to deny leave to the MVC to file its proposed amicus brief. Alternatively, if this Court allows leave, the Tribe respectfully requests permission to file a response addressing the MVC's arguments.

Date: April 6, 2020

Respectfully submitted,

s/ *Scott Crowell*
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CERTIFICATE OF COMPLIANCE

This Motion complies with the World Limit of 5,200, containing 2,270 words, pursuant to Fed. R. App. P 27(d)(2), excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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 Microsoft Word 2019 in a 14-point Times New Roman.

Dated: April 6, 2020

s/ *Scott Crowell*
SCOTT CROWELL

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 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 they will be served by the CM/ECF system:

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Dated: April 6, 2020

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