COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-11885

MARIA A. KITRAS, et al.,
Plaintiff - Appellants

v.

TOWN OF AQUINNAH, et al.,
Defendants - Appellees

ON APPEAL FROM A JUDGMENT OF THE LAND COURT

Brief for Amicus Curiae WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH)

Nicole Friederichs, BBO 658841
Professor Lorie Graham, BBO 635088
Professor Jeffrey Pokorak, BBO 600904
Indigenous Peoples Rights Clinic
Suffolk University Law School
120 Tremont Street
Boston, MA 0210
Tel. (617) 305-1682
nfriederichs@suffolk.edu
lgraham@suffolk.edu
jpokorak@suffolk.edu
Attorneys for Amicus Curiae

Date of Filing: November 23, 2015

Table of Contents

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

RELEVANT HISTORY OF *AMICUS CURIAE* 4

STATEMENT OF THE ISSUES 11

SUMMARY OF THE ARGUMENT 12

ARGUMENT 13

I. THE COURT SHOULD REFER QUESTIONS OF TRIBAL "CUSTOM AND PRACTICE" TO THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), AS IT CONSTITUTES THE CUSTOMARY LAW OF THE TRIBE. 13

A. The Court should Certify Issues to the Tribal Court 13

B. In the Alternative, This Court should Remand this Matter for the Lower Court to Ascertain the Appropriate Tribal Law Pursuant to Rule 44.1 22

II. THERE ARE SUFFICIENT REASONS FOR THIS COURT TO FIND THAT THE LOWER COURT DID NOT ADEQUATELY DETERMINE WHAT ACTUALLY CONSTITUTES TRIBAL "CUSTOM AND PRACTICE" AS IT CONSTITUTES THE CUSTOMARY LAW OF THE WAMPANOAG TRIBE OF AQUINNAH. 25

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

Allstate Ins. Co. v. Brown,
920 F.2d 664 (10th Cir. 1990).....17

Bryant ex rel. v. United States,
147 F. Supp. 2d 953 (D. Ariz. 2000).....17

Coletti v. Cudd Pressure Control,
165 F.3d 767, 775 (10th Cir. 1999).....17

Colonial Tavern, Inc. v. *Boston Licensing Bd.*,
384 Mass. 372 (1981).....20

Delorge v. Mashantucket Pequot Gaming Enter., No.
MPTC-CV-97-114, 1997.NAMP.0000038 (Aug. 21, 1997)...14

Elia-Warnken v. Elia, 463 Mass. 29, 31 (2012).....24

Empire Bank v. Dumond,
2014 U.S. Dist. LEXIS 93737 (2014).....17

Fisher v. District Court, 424 U.S. 382 (1976).....17

In re Estate of Apachee,
4 Nav. R. 178 (W.R. Dist. Ct. Oct. 11, 1983).....14

In re Marriage of Limpy, 195 Mont. 314 (1981).....17

Kitras v. Town of Aquinnah,
87 Mass. App. Ct. 10 (2015).....3, 4, 7, 12, 14, 25

Iowa Mutual Insurance Co., v. LaPlante,
480 U.S. 9 (1987)..... 24

National Farmers Union Insurance Companies v. Crow Tribe of Indians, 471 U.S. 845 (1985).....24

Oliveros v. Mitchell,
449 F.3d 1091(10th Cir. 2006)..... 17

Peabody Western Coal Company, Inc. v. Nez (In re Certified Question from the United States Dist. Court), 8 Nav. R. 132 (2001).....17

Treglia v. MacDonald, 430 Mass. 237 (1999).....20

Wampanoag Tribal Council of Gay Head v. Gay Head, No. 74-5826 (D. Mass, filed December 26, 1974).....5, 8

Constitution

Constitution of the Wampanoag Tribe of Gay Head (Aquinnah)
Preamble 9
Art. I.....9
Art. III.....1
Art. IV.....1, 9
Art. V.....1
Art. VI.....1
Art. XIII.....1, 10, 21

Statutes

1869 Mass. Acts 463.....5

1870 Mass. Acts 213.....5

25 U.S.C. §1771, et seq. 5, 8

Aquinnah Wampanoag Judiciary Establishment Ordinance.....10, 11, 21, 22

Conn. Gen. St., Title, 51, ch. 883, sec. 51b-199b...16

Hopi Tribal Code 1.2.7 (1992).....19

Md. Code Ann., Cts& Jud. Proc. secs. 12-601-12-613..16

Mille Lacs Band Stat. Ann. tit. 24, 3001 (1996).....19

Minn. Stat. § 480.065.....16

Mont. Code. Ann., Rule 15 (2015).....16

N.M. Stat., ch. 39, § § 39-7-1- 39-7-13.....16

Okla. Stat., Title 20, ch. 21, § 1601.2.....16

W. Va Code secs. 51-1A, 51-1A3.....16

Rules

Final Determination for Federal Acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc., 52 Fed. Reg. 4193 (February 10, 1987).....9

Navajo Nation, Rule 3 of the Navajo Rules for Declaratory Rulings on Questions of Navajo Law.....19

Mass. R. Civ Proc. Rule 44.1.....12, 22, 23

Wampanoag Tribe of Gay Head (Aquinnah); Rules of Evidence, §§ III, XV, XX.....21

Supreme Judicial Court, Rule 1:03, Uniform Certification of Questions of Law.....12, 19

Tohono O'odham, Rules of Appellate Procedure, Rule 4. Determining Tribal Law.....19

Uniform Certification of Questions of Law (Act) (Rule) of 1995.....15, 18, 20

Other Authorities

Ann Marie Plane & Gregory Button, *The Massachusetts Indian Enfranchisement Act: Ethnic Contest and Historical Context, 1849-1869,* 40 Ethnohistory 587 (1993) 5, 6, 8

Christine Zuni, *Strengthening What Remains*, 7 Kan. J.L. & Pub.Pol'y 17 (1997).....13

Cohen's *Handbook of Federal Indian Law* (2005)...14, 24

David J. Silverman, *Faith and Boundaries, Colonists, Christianity, and Community among the Wampanoag Indians of Martha's Vineyard, 1600-1871* (2005).....2, 5, 6, 7, 28

Julie A. Pace, *Enforcement of Tribal Law in Federal Court: Affirmation of Indian Sovereignty or A Step Backward Towards Assimilation?*, 24 Ariz. St. L.J. 435 (1992).....18

Kenneth Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership* 54 Vand. L. Rev. 1559 (2001).....26, 27

William Blackstone, 1 *Commentaries on The Law of England* 62.....14

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Wampanoag Tribe of Gay Head (Aquinnah) ("Tribe" or "Aquinnah Wampanoag") is a federally recognized Indian nation, located on its traditional lands on the island of Noepe (more commonly known as Martha's Vineyard). The Tribe is governed by a written constitution[1] which, *inter alia*, enumerates basic civil rights (Const., Art. III); the structure, composition and articulated powers of the Tribe's governing body (Art. IV-VI); and the establishment of other branches of government, including a Tribal Judiciary (Art. XIII).

The Aquinnah Wampanoag's ancestors have lived at Aquinnah and in the surrounding areas for over 10,000 years when the last North American glacier began its retreat, leaving behind the accumulation of boulders, sand, and clay that is now known as Martha's Vineyard. The Aquinnah Wampanoag's beliefs and rich history are imprinted in the colorful clay cliffs of Aquinnah.[2]

---

[1] Constitution if the Wampanoag Tribe of Gay Head (Aquinnah) ("Const.").

[2] Once part of the greater Wampanoag Nation, the Tribe and its ancestors claimed most of southeastern Massachusetts from Plymouth into Rhode Island. The estimated population of the Wampanoag Nation at the time of pre-contact was approximately 15,000,

The Tribe is comprised of 1,159 citizens with approximately one-third of its citizens living on the island. Much of the Tribe's lands are located on the southwest portion of the island, including some 499 acres of trust and fee lands.

The Supreme Judicial Court's July 2015 amicus announcement in the case of *Maria A. Kitras, trustee, & others vs. Town of Aquinnah & others* includes, in part, a statement on the Tribe's "ancient custom and practice:"

> Whether easements by necessity exist over certain property in the town of Aquinnah in order to provide access to the plaintiffs' landlocked lots, where the property was conveyed by the Legislature to the members of the Wampanoag Tribe of Gay Head, the plaintiffs are subsequent grantees in a chain of conveyances from the tribe members, *the tribe's ancient custom and practice was to permit common access across lands held or occupied by the tribe*, and nothing in the language or circumstances of the conveyances clearly indicates that the parties intended to deprive the property of access rights. . . . (*emphasis added*).

---

consisting of many bands under shared leadership. Contact with Europeans, however, devastated many of the communities, leading to the death of thousands of Wampanoag people from disease and war. *See generally*, Daniel Silverman, *Faith and Boundaries: Colonists, Christianity, and Community among the Wampanoag Indians of Martha's Vineyard* (Cambridge University Press, 2005) ("*Silverman*").

Amicus Announcement, SJC-11885 *Maria A. Kitras, trustee, & others vs. Town of Aquinnah & others*, available at http://www.mass.gov/courts/case-legal-res/case-information/amicus-announcements/amicus-announcements-sept-2014-aug-2015.html.

Additionally, in the opinion below, the Appeals Court states that "[i]t is *absolutely undisputed* that common access right by custom and practices existed among the Gay Head tribe members" *Kitras v. Town of Aquinnah*, 87 Mass. App. Ct. 10, 12 (2015) ("*Kitras*") (emphasis added). The Court further states that "the subsequent grantees ... in the links of this chain of conveyances from the Gay Head Tribe members to the present plaintiffs were not divested of these long-held access rights flowing from the long-standing tribal custom and practice." *Id. at 11.*

As the party best suited to articulate tribal law, including its "long-standing tribal custom and practice," the Tribe appears here as a friend of the Court.

RELEVANT HISTORY OF *AMICUS CURIAE*

In discussing the question of tribal land use and communal holding of land among members of the Tribe, the Court below referenced the "ancient origins of that common access - dating back before the late eighteenth century" and "the late nineteenth-century State statutory conveyance of large tracts of public common land . . . and subsequent judicial partitions." *Kitras*, 87 Mass. App. Ct. at 11. These statements fail to adequately convey the specifics relating to the historical periods that the Appeals Court deemed relevant to the case. This section seeks to provide the Court with additional information on the history of the Amicus Curiae, both prior to and after the partitioning of tribal lands.

A. Early History of the Tribe

Some 400 years ago, Europeans reached the island of Noepe and by the 1700's there were English settlements throughout the area. Their presence was quickly felt and between the dislocation from land dealings, and the influence of disease, the Aquinnah population on the island was reduced and its

territories constricted. By the 1800's three native communities on Martha's Vineyard remained, including the Wampanoag Aquinnah. The Aquinnah consistently worked to fight to maintain control over their ancestral lands, despite efforts by the Commonwealth of Massachusetts and various individuals to extinguish its landholdings through partition and allotment.[3]

The 19th century was a time of significant transition for the Wampanoag Aquinnah as the Commonwealth pursued an official policy of land allotment. The various legislative acts adopted by the General Court during the allotment period included the "Act to Enfranchise the Indians of the Commonwealth", 1869 Mass. Acts 463, ("Enfranchisement Act"), and the subsequent "Act to Incorporate the Town of Gay Head," 1870 Mass. Acts 213.[4]

---

[3] It is not possible in this amicus brief to adequately articulate the history or consequences surrounding the "conveyance" and "partition" of Wampanoag Aquinnah land. To better understand this history, we refer the Court to the following scholarship on allotment and "enfranchisement:" Silverman, *supra* note 2, and Ann Marie Plane & Gregory Button, *The Massachusetts Indian Enfranchisement Act: Ethnic Contest and Historical Context, 1849-1869*, 40 Ethno history 587(1993) ("*Plane & Button*").

[4] These acts formed part of the legal basis for the Tribe's 1974 land claim suit, *Wampanoag Tribal Council of Gay Head v. Gay Head*, No. 74-5826 (D. Mass, filed December 26, 1974) (alleging among other things,

Both acts paved the way for significant loss of tribal lands. The Enfranchisement Act, which removed all restrictions on the alienation of the Tribe's lands, "provided that lands would revert to individuals and their heirs in fee simple, opening the door to sales to non-Indians."[5] Additionally, the "Act to Incorporate the Town of Gay Head" terminated the Indian District of Gay Head and created the Town of Gay Head, transferring title of certain lands and fishing rights to the new Town.

While the "pro-suffrage lobby" supported these enfranchisement laws, *Silverman*, supra note 2, at 266, they were primarily fueled by the belief that "communal Indian landholding [was] fundamentally incompatible" with the ways of America. *Id.* at 279. As one historian explains:

> It was for this reason that Massachusetts made the Wampanoags forfeit their special Indian status and divide their...lands as the cost of citizenship. In the parlance of the era, Indians had to "become white" before they could become citizens, an idea

---

violations of the federal Non-intercourse Act, 25. U.S.C. 177, for failure to seek federal approval on alienation of Indian land). The case was settled through negotiation, culminating in the passage of the "Massachusetts Land Claim Settlement Act" 25 U.S.C. §1771, et seq., which is discussed later in this brief.

[5] *Plane & Button*, supra note 3, at 588.

> that was eventually writ large in the Dawes Allotment Act of 1887, which parceled out the lands of western Indian reservations.... The Wampanoags knew better. Reluctantly, they conceded to partition, but when outside attention finally drifted from them, they restored communal values to the center of their collective life. They have remained there to this day.

Id. at 279-280.

Tribal individuals and families, under the pressure of encroachment by outsiders, sought any means available to protect those lands, including in some cases the division of lands in severalty.[6] Significantly, the Tribe's leadership, which included all the newly created Town selectmen, objected to this action as "premature and unsafe, and, as we believe, must be attended with disastrous consequence to us, as a people." *Silverman,* supra note 2, at 269-270. This warning was prescient.

Once the restriction on alienation was removed and the lands partitioned, large portions of individual tribal landholdings were lost to individual non-Indian owners for a host of reasons, including

---

[6] Any "petition" for partition following the passage of the Enfranchisement Act should thus be understood in this historical context. *See Kitras,* 87 Mass. App. Ct. at 15 (where the Appeals Court cites to "petitions for partition").

fraud, graft, and the sale of land for payments of individual debt. *See* Plane & Button, *supra* note 3, at 588. Over time, more and more lands were lost as changes in the local economy forced tribal members to sell their lands, move to other parts of the island, or to leave the island altogether.

B. The Tribe in Contemporary Times

In 1974, the Tribe filed suit to recover almost 4,000 acres of lost land. *Wampanoag Tribal Council of Gay Head v. Gay Head*, No. 74-5826 (D. Mass filed December 26, 1974). The lawsuit resulted in the signing of a "Joint Memorandum of Understanding Concerning Settlement of the Gay Head Massachusetts Indian Land Claims" with the Commonwealth of Massachusetts and the passage of the "Massachusetts Land Claim Settlement Act" by Congress.[7] Although the Tribe had *de facto* been acknowledged by the British, Dutch, United States and Massachusetts governments for centuries, in 1987, the Tribe received formal federal

---

[7] In the Joint Memorandum the Commonwealth agreed to convey certain lands to the Tribe in exchange for the Tribe forgoing aboriginal title and claims. The memorandum was later ratified by the United States Congress in the "Massachusetts Land Claim Settlement Act", 25 U.S.C. §1771, et seq., which also reaffirmed the Tribe's government-to-government relationship with the United States.

acknowledgement from the United States Department of Interior. *Final Determination for Federal Acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc.*, 52 Fed. Reg. 4193 (February 10, 1987) (effective as of April 10, 1987).

The Preamble to the Constitution of the Wampanoag Tribe of Gay Head (Aquinnah) lays out the Tribe's current vision and purposes:

> We the native Wampanoag people of Aquinnah, in order to sustain and perfect our historic form of tribal government, do proclaim and establish this constitution. . . . Our tribal government shall be dedicated to the conservation and careful development of our tribal land and other resources, to promote the economic well-being of all tribal members, to provide education opportunities for ourselves and our posterity, and to promote the social and cultural well-being of our people.

The Tribe's major governing body is the Tribal Council.[8] Through its various administrative departments,[9] the Tribe is responsible for a full range of services to its citizens, including education,

---

[8] The Council is composed of a Chairperson, Vice-Chairperson, Secretary, Treasurer and seven Council Members. (Const., Art. IV, § 1).

[9] For more information on the Tribe's departments, see http://www.wampanoagtribe.net/Pages/Wampanoag_WebDocs/depts.

health and recreation, public safety and law enforcement, public utilities, natural resources management, economic development, and community assistance. The Tribe has entered into an inter-governmental agreement with the Town of Gay Head relating to police, fire, and medical personnel, and other related emergencies arising on Tribal Lands.

The Tribe's judiciary body operates in accordance with Article XIII of the Constitution and the Aquinnah Wampanoag Judiciary Establishment Ordinance ("Ordinance").[10] The Tribal Judiciary is charged with, among other things, "the interpretation of Wampanoag Tribal Law," which includes "laws, ordinances, resolutions, customs and traditions of the Wampanoag

---

[10] The Judiciary Ordinance provides for the establishment of the "Aquinnah Tribal Court" and the "Aquinnah Court of Appeals." Ordinance, § 1-3-1. In addition, tribal law provides for the establishment of a "Peacemaker Panel" to "mediate disputes among persons involved in the peacemaking process." § 1-7. The traditional Chief or Sôtyum, serves as the "Chief Peacemaker and the Chief [judicial] administrator for the Tribal Judiciary." Ordinance, § 1-6-1. The "peacemaker and judges of the Tribal Judiciary" have the power to "hear, mediate, and/or decide matters of a judicial nature and enter judgments and orders disposing of such matters. . . ." Ordinance, § 1-6-1.The Administration of the Judiciary includes a Tribal Court Administrator appointed pursuant to Tribal Ordinance, § 1-6-1.

Tribe of Gay Head (Aquinnah)." Ordinance, §§ 1-3-1(7), 1-3-3. The additional powers of the Judiciary as it relates to tribal "custom and practice" are articulated below.

Today, through these governing structures and processes, the Tribe is focused on maintaining and strengthening the values that are at the center of its collective life as a sovereign Indian tribe. In particular, the Tribe is committed to building community both within the Tribe and with its neighbors, as well as protecting, conserving and carefully attending to the stewardship of its lands.

STATEMENT OF THE ISSUES

The issues addressed by the amicus curiae are:
(1) Whether the questions of Wampanoag Aquinnah tribal law, including customary law as found in its "custom and practice," should be addressed, as a matter of comity, to the Tribe and its Judiciary?; and
(2)Whether the Appeals Court below sufficiently considered and properly ascertained the tribal customary laws at issue?

SUMMARY OF THE ARGUMENT

The Wampanoag Tribe of Aquinnah's customary law "may be determinative of the cause [] pending" before this Court, particularly in light of the fact that the Tribe's "long-standing custom and practice" was considered central to the decision of the Appeals Court below. *Kitras,* 87 Mass. App. Ct. at 11. Under these circumstances, the Court should seek the opinion of the Tribe regarding that customary law.

The Court has two well-understood avenues for discerning the appropriate customary law to apply in this case. In the current posture of this matter, should certify questions of "tribal custom and practice," to the judicial branch of the Wampanoag Tribe of Gay Head (Aquinnah).[11] In the alternative, this Court could remand this matter and direct the lower court(s) to apply the well-understood rules of civil procedure to ascertain the applicable customary tribal law by seeking the counsel and input of the Tribe.[12]

---

[11] *See generally,* Supreme Judicial Court, Rule 1:03, Uniform Certification of Questions of Law.
[12] *See generally, Massachusetts Rules of Civil Procedure 44.1: Determination of Foreign Law.*

ARGUMENT

I. THE COURT SHOULD REFER QUESTIONS OF TRIBAL "CUSTOM AND PRACTICE" TO THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), AS IT CONSTITUTES THE CUSTOMARY LAW OF THE TRIBE.

As this Court indicated in its Amicus Announcement, this case implicates the Tribal customary law of Amicus Aquinnah Wampanoag. In order to accurately ascertain the nature and scope of such custom and practice regarding Tribal lands, this Court should refer that question to the Tribe for determination and support. This Court has two avenues already defined in court rules and rules of procedure for discerning the customary law of the Tribe - certification and referral. Each of these paths is an appropriate method for settling one of the critical issues in this matter.

A. The Court should Certify Issues to the Tribal Court

By definition, "custom and practice" are "those usages or practices common to many peoples or to a particular place as well to the whole body of usages, practices or conventions that regulate social life."[13]

---

[13] Christine Zuni, *Strengthening What Remains*, 7 Kan. J.L. & Pub. Pol'y 17, 22-23 (1997) (defining customs,

For Indian tribes, they form an integral part of their "customary law," and are often grounded in the histories and oral traditions of a tribe.[14] As a foundation upon which many of its laws are built, a Tribe's own Judiciary is the most appropriate body to articulate what those customs and practices were from the "earliest time," *Kitras,* 87 Mass. App. Ct. at 11, to today. As noted in Cohen's *Handbook of Federal Indian Law,* the best mechanism for obtaining this information is through certification:

> When a state court . . . chooses to apply tribal law to adjudicate the parties' rights, it may take evidence from expert witnesses to determine what tribal law is. However, it is preferable to use any available procedures to certify questions of tribal law to the tribal courts to determine the content of tribal law.[15]

---

practices and customary law within the context of Native American tribal communities).

[14] *See id.; see generally Cohen's Handbook of Federal Indian Law* (2005), sec. 4.05[3], at 278 ("*Cohen's*") ("Tribal tradition and custom have always been vital sources of tribal law, both in the daily lived of tribal members and in more recognizable tribal legal forums, such as tribal councils and tribal courts."); *Delorge v. Mashantucket Pequot Gaming Enter.*, No. MPTC-CV-97-114, 1997.NAMP.0000038, ¶ 35 (Aug. 21, 1997) (VersusLaw); *In re Estate of Apachee*, 4 Nav. R. 178, 180 (W.R. Dist. Ct. Oct. 11, 1983), available at 1983.NANN.0000070, ¶ 27 (VersusLaw) citing William Blackstone, 1 *Commentaries On The Law Of England* 62.

[15] *Cohen's, supra* note 15, sec. 7.06[2], at 653-4.

Certification to the Tribe is consistent with the *Uniform Certification Questions of Law Act* ("*Uniform Act*"), which in the 1995 amendments "afforded States the option of permitting certification of a question of tribal law to a tribal court having the power to answer such questions."[16] Section 2 of the *Uniform Act*, Power to Certify, provides for the following process:

> The [Supreme Court] [or an intermediate appellate court] of this State, on the motion of a party to pending litigation or its own motion, may certify a question of law to the highest court of another State [or of a tribe] [or of Canada, a Canadian province or territory, Mexico, or a Mexican state] if:(1) the pending litigation involves a question to be decided under the law of the other jurisdiction;(2) the answer to the question may be determinative of an issue in the pending litigation; and(3) the question is one for which an answer is not provided by a controlling appellate decision, constitutional provision, or statute of the other jurisdiction.

Section 3 of the *Uniform Act* also provides for a process to answer any question of law certified to a state court by a tribe. One of the primary purposes of the 1995 amendment was to "expand[the] horizon of courts that may certify a question of law." Uniform

---

[16] Uniform Certification of Questions of Law (Act) (Rule) 95 § 2, Comment. (Tribe is defined in the Act as a "Native American tribe, band, or village recognized by federal law or formally acknowledged by this State.")

Law Commission, Certification of Questions of Law (1995).[17] According to the Uniform Law Commission which was responsible for drafting the *Uniform Act*, such expansion serves "a single fundamental principle that any jurisdiction's own courts should always rule upon a point of that jurisdiction's common law." *Id.*

The *Uniform Act* has been adopted by a number of states.[18] For example, the Connecticut legislature has granted that State's Supreme Court the authority to

> . . .certify a question of law to the highest court of another state or of a tribe if (1) [t]he pending cause involves a question to be decided under the law of the other jurisdiction; (2) [t]he answer to the question may be determinative of an issues in the pending cause; and (3) [t]the questions is once for which no answer is provided by a controlling appellate decision, constitutional provision or statutes of the other jurisdiction.

Conn. Gen. St., Title 51, ch. 883, sec. 51b-199b(c). The Connecticut Supreme Court may also receive

---

[17]Summary, found at: http://www.uniformlaws.org/ActSummary.aspx?title=Certification%20Of%20Questions%20of%20Law%20(1995).

[18]*See, e.g.*, Conn. Gen. St., Title, 51, ch. 883, sec. 51b-199b; Md. Code Ann., Cts. & Jud.Proc. secs.12-601-12-613; Minn. Stat. § 480.065; Mont. Code.Ann., Rule 15 (2015); N.M. Stat., ch. 39, § § 39-7-1- 39-7-13; Okla. Stat., Title 20, ch. 21, § 1601.2; W. Va. Code secs.51-1A, 51-1A3.

certifications of questions of law from tribal courts. *Id.* at sec. 51b-1999b(d).

Federal courts have the authority to exercise discretion[19] in certifying questions of law to tribal courts. For instance, in *Peabody Western Coal Company, Inc. v. Nez (In re Certified Question from the United States Dist. Court)*, 8 Nav. R. 132 (2001), the United District Court for the District of Arizona certified a question of tribal law to the Supreme Court of the Navajo Nation on compensation for injury occurring in the work place. The question was certified in accordance with Rule 3 of the Navajo Rules for Declaratory Rulings on Questions of Navajo Law.[20]

---

[19] *See, e.g., Empire Bank v. Dumond*, 2014 U.S. Dist. LEXIS 93737 (2014) ("The decision to certify a question of law… is within the discretion of a federal district court). *See Oliveros v. Mitchell*, 449 F.3d 1091, 1093 (10th Cir. 2006); *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 775 (10th Cir. 1999); *Allstate Ins. Co. v. Brown*, 920 F.2d 664, 667 (10th Cir. 1990).

[20] *See also Fisher v. District Court*, 424 U.S. 382, 384 (1976) (involved a state court certifying a question of jurisdiction regarding a tribal ordinance to the Appellate Court of the Northern Cheyenne Tribe); *Bryant ex rel. v. United States*, 147 F. Supp. 2d 953, 956-57 (D. Ariz. 2000) (considering request for certification of questions of Navajo law to the Navajo Supreme Court, but ultimately concluding that tribal law did not apply to the case); *In re Marriage of Limpy*, 195 Mont. 314, 318 (1981) *overruled on other grounds* (referencing an earlier Montana District Court which certified a question to the Northern Cheyenne Appellate Court).

Comity represents one of the primary foundations for such certifications:

> Federal courts abstain from cases involving state law until the state initially interprets the law or the federal court may certify interpretation of the law to the state's highest court. Federal courts do not interpret state laws in the first instance. Interpretation of tribal laws should be given the same deference that federal courts have shown towards the states. Deference is also warranted because tribal interpretations may differ significantly from a federal court's interpretation based on the influence of . . . traditions and customs on a tribal court. (citations omitted).[21]

The Uniform Law Commission, in discussing the purposes behind the 1995 amendments, also emphasized the fundamental importance of a court ruling on questions of its own jurisdiction's common law.[22]

As noted in the Uniform Act, "[t]ribal law determines whether the tribal court may certify a question to a state court or answer a question from a state court." *Uniform Act*, 95 § 1, Comment. A number of tribes have specific certification processes in

---

[21] Julie A. Pace, *Enforcement of Tribal Law in Federal Court: Affirmation of Indian Sovereignty or A Step Backward Towards Assimilation?*, 24 Ariz. St. L.J. 435, 461 (1992).

[22] Summary, found at: http://www.uniformlaws.org/ActSummary.aspx?title=Certification%20Of%20Questions%20of%20Law%20(1995).

place, some of which mirror the Uniform Act and others which are more general in scope.[23]

The Massachusetts Supreme Judicial Court's rules on the *Uniform Certification of Questions of Law* allow for certification of questions of law to other courts. Supreme Judicial Court Rule 1:03 provides:

> Section 8.Power to Certify.
> This court on its own motion or the motion of any party may order certification of questions of law to the highest court of any State when it appears to the certifying court that there are involved in any proceeding before the court questions of law of the receiving State which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving State.
>
> Section 9.Procedure on Certifying.
> The procedures for certification from this State to the receiving State shall be those provided in the laws of the receiving State.

This certification procedure was adopted by the Supreme Judicial Court in 1971,[24] before the adoption

---

[23] *See, e.g.*, Navajo Nation, Rule 3 of the Navajo Rules for Declaratory Rulings on Questions of Navajo Law; Tohono O'odham, Rules of Appellate Procedure, Rule 4. Determining Tribal Law; Determining Questions of Law Other than Tribal Law; Mille Lacs Band Stat. Ann. Tit.24, 3001 (1996); Hopi Tribal Code 1.2.7 (1992).

[24] S.J.C. Rule 1:03, as appearing in 382 Mass. 700 (1981) (originally enacted as S.J.C. Rule 3:21, as appearing in 359 Mass. 787 (1971)).

of the Uniform Law Commission's amended *Uniform Act* in 1995. Section 10 of the Supreme Judicial Court's Rule 1:03 addresses the "Uniformity of Interpretation," and states that the Court's rule should be "construed as to effectuate its general purpose to make uniform the laws of those states which adopt it; or enact a uniform certification statute." This section should be read to include the incorporation of the expanded *Uniform Act*, which allows for questions of tribal law to be heard by tribes willing to hear such questions. This Court has previously understood the need to exercise discretion in allowing a broad interpretation of Rule 1:03. For example, in *Treglia v. MacDonald*, 430 Mass. 237, 239-240 (1999),the Court permitted certification of a question from a federal bankruptcy appellate panel, even though that court was not expressly listed in Rule 1:03 as one from which the S.J.C. would normally accept certified questions.[25]

---

[25]*See also, Colonial Tavern, Inc.* v. *Boston Licensing Bd.*, 384 Mass. 372, 373 n.3 (1981) ("[A]lthough S.J.C. Rule 1:03 does not "expressly" authorize certification of questions from bankruptcy court, rule is "broad enough to include certification of questions from that court. We will answer the question.")

The Wampanoag Aquinnah's Tribal Judiciary[26] is empowered to "interpret[] Wampanoag Tribal Law and such other law as may properly come before the Tribal Judiciary." § 1-3-1. In accordance with the Judicial Ordinance, the "applicable law" of the Tribe includes the "laws, ordinances, resolutions, customs and traditions of the Wampanoag Tribe of Gay Head (Aquinnah)." Ordinance § 1-3-3. The Judiciary is similarly authorized to seek out the expertise of witnesses to give testimony on "technical or other specialized knowledge," which would include the historical and contemporary customs and practices of the tribe. See Aquinnah Wampanoag Judiciary Rules of Evidence, §§ XV(b)and XX. Additionally, the Judiciary has the power to take "judicial notice" of facts "generally known within the community." Rules of Evidence, § III. Any questions of tribal law should be directed to the Tribal Court Administrator of Wampanoag Tribe of Gay Head (Aquinnah) in the first instance. The Court Administrator will in turn refer

---

[26] As discussed in the Statement of the Interest, the Tribal Judiciary was created pursuant to Article XIII of the Constitution, which articulates the "judicial power of the courts" and the Aquinnah Wampanoag Judiciary Establishment Ordinance. *See, supra* note 11 and accompanying text.

the matter to the Chief of the Tribal Judiciary. Statement of Court Administrator, November 17, 2015.[27] The Chief is responsible for reviewing such requests and determining the most appropriate forum to address the question presented. The request should include the question of tribal law to be resolved, a statement of the facts relevant to the question presented, and any relevant supporting documents. *Id.*

B. In the Alternative, This Court should Remand this Matter for the Lower Court to Ascertain the Appropriate Tribal Law Pursuant to Rule 44.1

This Court has a second process available to determine the appropriate Tribal customary law applicable to this matter. If the Court chooses not to certify the question directly to the Wampanoag Aquinnah Tribal Court, it should remand the cause to the court below with instructions to ascertain the applicable Tribal law pursuant to the process delineated in *Mass Rules of Civil Procedure 44.1: Determination of Foreign Law*:

---

[27]The Court Administrator oversees the day-to-day administrative matters relating to the Judiciary. For a discussion of the Chief Administrator's powers, *see* Ordinance § 1-6-1 and note 10 of this brief.

> A party who intends to raise an issue concerning *the law of the United States or of any state, territory or dependency thereof* or of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining such law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law. (*emphasis added*).

Rule 44.1 plainly articulates a process by which courts should ascertain the laws of other jurisdictions, which certainly include the laws of a federally recognized Indian Nation such as Amicus, Wampanoag Tribe of Aquinnah. In accordance with Rule 44.1, when determining such law, the courts are instructed to allow appropriate proceedings to fully consider the source and nature of another jurisdiction's laws. It is apparent that the most relevant source of tribal law is the Tribe itself.

Seeking the Tribe's counsel and input on the use and scope of its customary law is consistent with this Court's pronouncement regarding the principle of comity:

> Comity refers to a State giving "respect and deference to the legislative enactments and public policy pronouncements of other jurisdictions". . . . It is not a "matter of absolute obligation," but is instead a "part

of the voluntary law of nations.

Elia-Warnken v. Elia, 463 Mass. 29, 31 (2012). The federal courts have similarly noted in the context of the doctrine of tribal exhaustion, that having tribal courts decide in the first instance important questions of law is consistent with Congress' "policy of supporting tribal self-government and self-determination." *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). This exhaustion doctrine, while not directly implicated in this case, is based on the same principles of comity, and the understanding that "tribal courts are best qualified to interpret and apply tribal law." *Iowa Mutual Insurance Co., v. LaPlante*, 480 U.S. 9, 16 (1987). Additionally, in situations of concurrent jurisdiction between tribal and state courts, some state courts have "adopted a rule of comity requiring exhaustion of tribal remedies" out of "respect for tribal sovereignty." *Cohen's, supra* note 14, 7.04[3], at 635.

The Massachusetts courts should therefore, for reasons of comity and accuracy, as well as a recognition of and respect for the Tribes expertise in such matters, seek the advice of the Tribe on the use

and scope of its customary laws through a certification process or lower court determination proceedings.

II. THERE ARE SUFFICIENT REASONS FOR THIS COURT TO FIND THAT THE LOWER COURT DID NOT ADEQUATELY DETERMINE WHAT ACTUALLY CONSTITUTES TRIBAL "CUSTOM AND PRACTICE" AS IT CONSTITUTES THE CUSTOMARY LAW OF THE WAMPANOAG TRIBE OF AQUINNAH.

Throughout its opinion the Appeals Court references the "custom and practice" of the "members of the Wampanoag Tribe of Gay Head (now known as Aquinnah)." *Kitras*, 87 Mass. App. Ct. at 11-13, 15, 18. The Appeals Court concluded, without citation, that "it is not disputed -- to the contrary it is definitely acknowledged on this record -- that the prevailing custom of the Gay Head Tribe was to allow its members access over the lands." *Id.* at 12. Additionally, the Appeals Court articulates its own judicial understanding of the "customs and practice" surrounding "the Gay Head Tribe's common ownership." *Id.* at 13. However, at no point in the proceedings was the Tribe, who has the expertise and understanding of their own customary laws, consulted on the use or scope of their customs and practices.

One important reason for seeking the Tribe's counsel is because the nuances of those customs and practices have often been misunderstood and misconstrued. This was especially true during the early years of allotment. Professor Kenneth Bobroff describes the general mythology this way:

> That Indians held their lands in common was an essential element of the [allotment] reformers' story. According to that story, tribal societies . . . recognize[ed] no private property rights in land. Indians, the story went, were crying out to be saved by the transformative power of private property. According to the reformers, civilization was impossible without the incentive to work that came only from individual ownership of a piece of property. Without the right to enjoy the exclusive fruits of their own labor on the land and to pass the improved land onto their heirs, Indians would have no incentive to . . . adopt the civilizing course of agriculture and home industry. . . .
>
> ... [H]istorical accounts, anthropological reports, and modern Indian property laws make clear that the story the reformers told about Indian property was wrong. Indians did not hold all their land in common. Indian societies have had myriad different property systems, varying widely by culture, resources, geography, and historical period.

Kenneth Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 Vand. L. Rev. 1559, 1567, 1571 (2001) ("*Bobroff*").

Several noted scholars have written specifically about the complex property structures that existed among New England tribes:

> In his study of the ecology of colonial New England, William Cronon writes, "the difference between Indians and Europeans was not that one had property and the other had none; rather, it was that they loved property differently." Southern New England Indian families had exclusive use of their cultivated fields (usually planted in corn) and the land their homes occupied. Maintenance of these property rights depended upon continued use of the land and was subject to periodic abandonment as intensive cultivation exhausted old fields and families cleared new land. Any member of the village could generally use non-agricultural lands, such as clam banks, fishing ponds, berry-picking areas, and hunting territories . . . but sites used for fishing nets and weirs or hunting snares and traps could be owned by an individual or family. Property rights in land could become quite complicated, since they might include an exclusive right to take certain scarce resources from a particular place at a particular time. . . . "Property rights," Cronon notes, "shifted with ecological use." Although Cronon prefers the term "usufruct" in describing New England Indians' property rights, the important observation is that their systems recognized exclusive rights in land, even if those rights required continued use, were rarely traded in a market, and were more finely "sliced" than the typical bundle of European property rights.

Bobroff, 1573-1574.

David Silverman in his book *Faith and Boundaries* similarly notes the varied rights to land that existed early on in Wampanoag territory:

> [U]ntil the English arrived, probably it never occurred to any of the Indians whether a sachem could permanently alienate large tracts of land to outsiders.... The relationship between sachems and their people over the land was more reciprocal than adversarial. The sachem controlled access to the . . . hunting grounds and determined how unused planting fields would be distributed. . . . Most families seem to have held their privileges for long stretches of time, even generations, without any interference. . . .

Silverman, supra note 2, 124.

The Wampanoag Aquinnah's customary land tenure system during the years preceding allotment included a complex system of both individual "use" rights and collective ownership.[28] Its territory consisted of different categories of landholdings, such as open lands which were available to be claimed and cleared by individual families, but until they were, members

---

[28] A full explanation of these intricate systems is beyond the scope of this brief. These systems are derived in part from the Tribe's history and traditions and are an integral part of its living culture. Therefore, such issues are best addressed through the established processes discussed above.

of the community had the right to take certain resources found on those lands. Once a portion of those open lands were identified, cleared, and in use by a family, they were considered claimed lands. Families could use those claim lands for their sole benefit until the land was no longer needed. If a family found that the amount of land that they held were no longer needed, the land returned to the status of open land and was then available for the use by another Wampanoag family. Pasture lands were another category of lands recognized by the Tribe, and leased to livestock owners, many of whom lived outside of the Gay Head Indian community. The Wampanoag Aquinnah also had common lands, which could not be claimed by individual families. All the resources found on those common lands were collective resources to be used for the benefit of the entire community.

These traditional concepts of property were impacted by allotment and partition. Much of the lands (open, claimed, pasture, etc.) were partitioned by the Commonwealth and held in severalty, with written deeds defining the metes and bounds of those parcels. The

major exception to this was the Tribe's common lands, which remained undivided during the allotment period and are part of the Tribe's land base today.

Tribal law, including customary law, applies to these tribal lands, which are held in trust and fee by the Wampanoag Tribe of Gay Head (Aquinnah). The Tribe continues to preserve its ancient ways within the borders of its tribal lands, in a manner that ensures the protection of its collective resources. Non-tribal members are allowed access to the Tribal lands only through the express permission of the Tribe.

A fuller explanation of the intricate systems of land use and ownership is beyond the scope of this brief. These systems are derived in part from the Tribe's history and traditions and are an integral part of its living culture. Such history, complexity, and specific land use by the Tribe was neither researched nor explored through a hearing or otherwise in the court below. Therefore, this Court can have no confidence in the results which are based on an inadequate and anecdotal version of what constitutes Wampanoag Aquinnah customary law and practice. Rather, such issues are best addressed through the established processes previously discussed.

CONCLUSION

Amicus Curiae Wampanoag Tribe of Gay Head (Aquinnah) urges this Court to uphold the fundamental principles of comity between sovereigns and hold that the entity most well suited to articulate the customary laws, traditions and practices of a sovereign, is that sovereign itself. Further, Amicus urges this Court to utilize the rules and procedures already adopted by this Court and Commonwealth for that purpose and either certify an appropriate question under Rule 103 or remand this case for further proceedings in the lower courts pursuant to Mass. Civ. Pro 44.1 to determine the applicable customary law of the Wampanoag Tribe of Gay Head (Aquinnah).

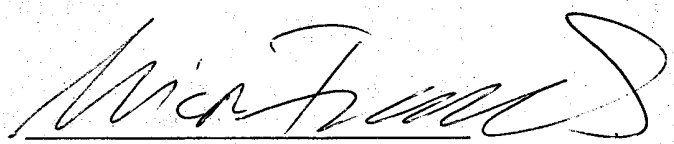
November 23, 2015

Respectfully submitted,

Nicole Friederichs
Professor Lorie Graham
Professor Jeffrey Pokorak
Indigenous Peoples Rights Clinic
Suffolk University Law School
120 Tremont Street
Boston, MA 02108
Tel. (617)305-1645

Mass. R. App. P. 16(k) CERTIFICATE

I hereby certify that to the best of my knowledge this brief complies with the rules of the court that pertain to the filing of the briefs, including but not limited to those rules listed in Mass. R. App. P. 16(k).



Nicole Friederichs, Esq.

CERTIFICATE OF MAILING AND SERVICE

I certify that I have today, November 23, 2015, which is within the time fixed for filing, delivered to the Clerk of this Court, one original and seventeen copies of the within and foregoing amicus brief, and two copies each to each of the following via first class U.S. Mail:

Jennifer H. Flynn, Esq.
Assistant Attorney General
1 Ashburton Place
Room 1813
Boston, MA 02108

Wendy Sibbison, Esq.
Sibbison&DeJuneas
26 Beech Street
Greenfield, MA 01301

Leslie Ann Morse, Esq.
477 Route 6A
Yarmouth Port, MA 02675

Ronald H. Rappaport, Esq.
Reynolds, Rappaport, Kaplan & Hackney, LLC
106 Cooke Street, P.O. Box 2540
Edgartown, MA 02539

Diane C. Tillotson, Esq.
Hemenway& Barnes
75 State Street, 16th Floor
Boston, MA 02109

Brian M. Hurley & Cara J. Daniels, Esqs.
Rackemann, Sawyer & Brewster
160 Federal Street
Boston, MA 02110

Jennifer S.D. Roberts, Esq.
LaTanzi, Spaulding &Landreth
8 Cardinal Lane, P.O. Box 2300
Orleans, MA 02653

Joanne Fruchtman& Jack Fruchtman, Jr.
1807 Kenway Road
Baltimore, MD 21209

Benjamin L. Hall, Jr., Esq.
45 Main Street, P.O. Box 5155
Edgartown, MA 02539

Kelley A. Jordan-Price, Esq.
Hinckley, Allen & Snyder
28 State Street, 30th Floor
Boston, MA 02109

Claire Specht, Felicia Ellsworth, Andrew Cohn, Esqs.
Wilmer, Cutler, Pickering, Hale and Dorr LLP
60 State Street
Boston, MA 02109

Michel Pill, Esq.
77 Pleasant Street, P.O. Box 210
Northampton, MA 01061

Lawrence H. Mirel, Pro HacVice Attorney
1445 Pennsylvania Avenue, Suite 400
Washington, D.C. 20004

Nicole Friederichs, BBO 658841
Indigenous Peoples Rights Clinic
Suffolk University Law School
120 Tremont Street
Boston, MA 0210
Tel. (617) 305-1682
nfriederichs@suffolk.edu