

No. 24-337

IN THE
Supreme Court of the United States

NANTUCKET RESIDENTS AGAINST TURBINES, *et al.*,

Petitioners,

v.

BUREAU OF OCEAN ENERGY MANAGEMENT, *et al.*,

Respondents.

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

**BRIEF OF WAMPANOAG TRIBE OF GAY HEAD
(AQUINNAH) AS *AMICUS CURIAE* IN SUPPORT
OF NANTUCKET RESIDENTS AGAINST
TURBINES AND VALLORIE OLIVER**

LAEL ECHO-HAWK
MTHIRTYSIX, PLLC
700 Pennsylvania Avenue SE
Washington, DC 20003

SCOTT CROWELL
Counsel of Record
CROWELL LAW OFFICE-TRIBAL
ADVOCACY GROUP
1487 West State Route 89A,
Suite 8
Sedona, AZ 86336
(425) 802-5369
scottcrowell@clotag.net

Counsel for Amici Curiae

October 25, 2024

120081



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

**STATEMENT OF INTEREST OF
THE *AMICUS CURIAE***

The Wampanoag Tribe of Gay Head (Aquinnah) (“Amicus Tribe”) is a federally recognized Indian Tribe. The challenges to the Endangered Species Act (“ESA”) in this litigation seek to diminish ESA’s protections and undermine the unique trust responsibility the United States owes to Indian Tribes, generally, and the Amicus Tribe, specifically. As discussed further below, in addition to all of the interests identified by Petitioners, the protection of North Atlantic Right Whales is fundamental to the preservation of the Amicus Tribe’s cultural heritage and protected resources.¹

Since the founding of the United States, the federal government has recognized and protected the sovereign status of Indian Tribes. This trust responsibility has also long extended to the protection of Indian religious freedoms and tribal cultural resources, including endangered species. The ESA is one of the most critical and effective tools to protect tribal interests. Protecting tribal interests at stake in this litigation is an additional and sufficient reason why this Court should grant Petitioners’ Petition.

1. No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than Amicus and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for Petitioners have no objection to its filing. The Tribe provided notice to counsel for Respondent, but notice was not within the ten day time frame. The Tribe has requested counsel for Respondent to waive any objection to timeliness. S.Ct.R. 37.2(a).

SUMMARY OF ARGUMENT

In addition to the arguments set forth in the Petition, all to which Amicus Tribe concurs, the Court should take into consideration Amicus Tribe's interests that are consistent with but distinct from the interests of Petitioners. Namely, as set forth below, Amicus Tribe is connected to the North Atlantic Right Whale in its customs and traditions that date back to time immemorial. The proper application and enforcement of the ESA is a critical tool in the federal government's fulfillment of its trust responsibility to the Tribe. Such tribal interests make the compelling national importance of the case even more important. Such tribal interests make the failure to fully assess the impact in the context of dozens of wind projects planned in the migratory path of the North Atlantic Right Whale all the more "unreasonable."

ARGUMENT

The Amicus Tribe concurs in the arguments set forth by Petitioners. The current 1,500-plus members of the Amicus Tribe are descendants of the original inhabitants of both Nantucket and Martha's Vineyard, and the southeastern shoreline of Massachusetts. As stated in the Petition at 1-2, the Vineyard Wind 1 Project is the first of a multitude of offshore wind projects that will form a wedge between the two islands and the mainland, directly impacting the migration of the North Atlantic Right Whale, a species of great significance to the Amicus Tribe. As stated in the Petition at 2, the number of this endangered species has dwindled down to 338. The Amicus Tribe concurs in the arguments set forth in the Petition, but will not impede this Court's time

by repeating the arguments herein. Rather, the Amicus Tribe asks this Court to also consider the Amicus Tribe's interests in addition to the important interests identified in the Petition.

The North Atlantic Right Whale is so important to the Amicus Tribe that not only are they part of Amicus Tribe's history, customs and culture, the Tribe, its members and Ancestors consider the North Atlantic Right Whales as their relations, their sisters and brothers. The North Atlantic Right Whale is so important to the Tribe that they are prominently represented in the official Tribal Seal. Since time immemorial, when the North Atlantic Right Whale was abundant, the Wampanoag people traditionally made use of its meat, fat, bones and baleen, making use of every aspect of whale. Whalebone has long been part of Wampanoag traditional usage, from using large vertebrae for chopping wood to using small bones for shaping materials. Other whalebone has traditionally been used for jewelry, frames, combs, sewing needles and even eating utensils. To date, the Amicus Tribe conducts ceremonies by burying the remaining skeletons of any whales that beach along the shores of Noepe - the traditional Wampanoag name for Martha's Vineyard. The connection between whales and the Wampanoag people stretches deep into the past. It figures prominently in the story of Moshup, a giant, who in oral history, led the Wampanoag. When the Wampanoag people came to live on Noepe, Moshup provided a place for them. In so doing, he shared the whales that he would hunt and catch with the people, thereby providing them with nourishment and sustenance. Moshup would gift the Wampanoag people with the North Atlantic Right Whale. The Amicus Tribe maintains this history of its intimate connection with the

North Atlantic Right Whale through its oral history from generation to generation. The Amicus Tribe’s connection with the North Atlantic Right Whale has also been documented in books and news stories. See, e.g., *Spirit of the New England Tribes: Indian History and Folklore 1620-1984*, William S. Simmons, University Press of New England, 1986; *Algonquian Spirit – Contemporary Translations of Algonquian Literatures of North America*, Brian Swann (editor), University of Nebraska Press, 2005; *Aquinnah Wampanoag Tribes Holds Whale Burial Ceremony*, Thomas Humphrey, Vineyard Gazette, February 8, 2024.

Despite the connection between the Wampanoag people and the North Atlantic Right Whale, when drafting its biological opinion – which was relied up on by the Bureau of Ocean Energy Management (BOEM) when making these unprecedented rapid decisions about offshore wind lease areas and the final project permit decision – the National Oceanic and Atmospheric Administration (NOAA) never consulted with the Amicus Tribe or the other impacted Tribes in violation of Executive Order 13175 and Section 106 of the National Historic Preservation Act. This fundamental and catastrophic failure to consult, in which NOAA and BOEM casually authorize hundreds of “harassments” that *will* result in whale deaths, stands in stark contrast with the over 29 years of bureaucratic red tape and litigation that the Makah Tribe was forced to endure² in order to receive permission to hunt just 25 whales over ten years as was promised in their Treaty of 1855. The contrast leads to the unmistakable conclusion

2. <https://www.fisheries.noaa.gov/west-coast/marine-mammal-protection/makah-tribal-whale-hunt-chronology>

that the expedited push to approve these off-shore wind projects is unreasonable and arbitrary and capricious on its face, signaling a predetermined outcome for approval.

CONCLUSION

It is within the above-stated context that the Amicus Tribe is compelled to submit this brief, albeit short, to ensure that the Court is aware of the tribal interests at stake. The notion that one small piece of a clear plan to establish a gauntlet of off-shore wind turbines squarely in the path of the migrating North Atlantic Right Whale can be isolated, evaluated and considered “reasonable” in the context of the ESA, is simply wrong. The lack of environmental justice for the Amicus Tribe cannot be overstated. The Vineyard Wind 1 Project is not isolated, but instead, is part of a much larger project, and all of the planned offshore wind projects within the Amicus Tribe’s ancestral lands need to be assessed and mitigated. The Amicus Tribe appreciates that Petitioners have brought this litigation, and finds the arguments for granting amicus to be compelling. The federal government’s failure to assess the cumulative impact on such an important resource and asset of the Amicus Tribe makes the Petition all that more compelling, and the issue of national importance at stake all that more important.

Respectfully submitted this 25th day of October.

LAEL ECHO-HAWK
MTHIRTYSIX, PLLC
700 Pennsylvania Avenue SE
Washington, DC 20003

SCOTT CROWELL
Counsel of Record
CROWELL LAW OFFICE-TRIBAL
ADVOCACY GROUP
1487 West State Route 89A,
Suite 8
Sedona, AZ 86336
(425) 802-5369
scotcrowell@clotag.net

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