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I. INTRODUCTION

Few cases seeking review by the full Court present governmental issues as fundamental and far reaching as this case. This is an extraordinarily important case both for the State of Rhode Island and for the administration of Indian law nationwide. At issue is whether the Secretary can erode, through administrative action, the power of Congress to treat Indian tribes differently. The case pits one act of Congress – the Rhode Island Indian Claims Settlement Act – negotiated by and directed to Rhode Island and the Narragansett Indian Tribe, against the BIA's "one size fits all" administration of another general statute relating to Indians, the Indian Reorganization Act (the "IRA"). In Rhode Island, Congress decreed a unique allocation of jurisdiction among the Tribe, the State and the United States. That jurisdictional allocation, set forth in the 1978 Settlement Act, is fundamentally at odds with the allocation of jurisdiction imposed by the trust provisions of the 1934 IRA (assuming the IRA even applies to the Tribe).

This case will determine whether the State's laws and jurisdiction continue to remain intact within its borders or whether, for the first time, portions of Rhode Island will be subject to tribal law under the superintendence of the federal government. The State's constitutional sovereignty and its concomitant ability to apply its civil and criminal laws and jurisdiction to all land within its borders hang in the balance.

Reconsideration of the Panel's February 9, 2005 Opinion is necessary because the Opinion conflicts with prior decisions of the United States Supreme Court, this Court and sister circuits. The Opinion wrongly applies the IRA to the Narragansetts and fails to resolve what this suit was about in the first place – the preservation of state laws and jurisdiction throughout Rhode Island. The case warrants en banc reconsideration for the following specific reasons:

1. The Panel Opinion held that the IRA applies to the Tribe, even though it correctly found that the Tribe was neither federally recognized nor under federal jurisdiction as of 1934. *Carcieri v. Norton,* 398 F.3d 22, 30 (1st Cir. 2005). In declining to apply the IRA's clear temporal limitations, the Panel Opinion conflicts with a United States Supreme Court decision, *United States v. John*, 437 U.S. 634 (1978), and with the decisions of two sister circuits, *United States v. Tax Comm'n,* 505 F.2d 633 (5th Cir. 1974) and *Kahawaiolaa v. Norton,* 386 F.3d 1271 (9th Cir. 2004). All cases hold that the IRA, on its face, does not apply to Indians or tribes who were not both federally recognized and under federal jurisdiction as of 1934, unless there were Indians of one-half or more Indian blood applying for inclusion. The Panel Opinion places this Circuit squarely at odds with these courts on the application of the IRA to post-1934 tribes. Whether the IRA applies to tribes that were not both federally recognized and under federal jurisdiction as of 1934 is an important national issue.

2. The IRA of 1934 and the Rhode Island Indian Claims Act of 1978 contain provisions governing the allocation of state and tribal jurisdiction that are fundamentally at odds. Assuming that the IRA even applies to the Tribe, principles of statutory construction dictate that these two acts of Congress be read in harmony if possible and, if not, that the more recent or specific statute prevails over the older or more general one. In declining to apply these principles to enforce the later-enacted Settlement Act's specific jurisdictional allocation, the Panel's Opinion conflicts with numerous decisions of the Supreme Court and this Circuit, including *Morton v. Mancari,* 417 U.S. 535 (1974) and *United States v. Lara,* 181 F.3d 183 (1st Cir. 1999).

3. While confirming that Congress ensured that the State's "laws and jurisdiction would remain in force throughout the state at the time of the JMOU and enactment of the Settlement Act," the Panel declined to apply the State's laws and jurisdiction to the Parcel in light of the Tribe's subsequent federal recognition. 398 F.3d at 37. As such, the Panel Opinion directly conflicts with *Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 694-95 (1st Cir. 1994), which held that the Settlement Act's special jurisdictional allocation *survives* federal recognition.

4. The Panel's failure to enforce the Settlement Act's guarantee that the State's civil and criminal laws and jurisdiction apply on the Parcel is a matter of exceptional and pressing importance for the State. To date, the State has relied on settled precedent holding that even on the Settlement Lands (that are in federal trust) – the heart of the Tribe's ancestral home and the locus of its retained sovereignty – state civil and criminal laws and jurisdiction apply. Now, the Panel Opinion puts into question, for the first time in the State's history, the applicability of State civil and criminal law and jurisdiction to land within its borders. It simultaneously affirms that the effect of the Settlement Act was to ensure that Rhode Island's laws and jurisdiction would be preserved throughout the State *and* permits the conversion of the Parcel to trust – a conversion that, unless restricted, has the defining characteristic of ousting the State's jurisdiction. The Parcel's jurisdictional fate has always been the central and defining issue of this case. Sidestepping that issue leaves the case unresolved and the jurisdictional chaos resulting from the Panel's Opinion will likely result in a dangerous and unstable situation on the Parcel.

5. Finally, the Panel Opinion rejected the State Appellants' assertions that the trust conversion was barred by the terms of settlement of the 1976 Indian land claims Lawsuits

because 1) the United States was not a party to those suits and 2) because "the fee to trust acquisition by the Secretary, and the consequences thereof, are different issues than the claims of aboriginal right which were litigated in the 1976 lawsuits and resolved by the JMOU and the Settlement Act." 398 F.3d at 39. The Panel's rejection of the identity of parties (federal and tribal) conflicts with this Court's decision in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* which held that with respect to Nonintercourse Act claims – the same claims made in the 1976 Lawsuits – the United States acts as guardian for and fiduciary of Indian tribes. 528 F.2d 370, 379 (1st Cir. 1975). Moreover, the Panel's refusal to recognize that the consequences of unrestricted trust – an ouster of state jurisdiction in favor of tribal and federal jurisdiction – are the same as those raised by the 1976 Lawsuits, places the Panel Opinion in tension with decisions by the Ninth Circuit on the effect of aboriginal title. *See, e.g., Alaska v. Native Village of Venetie Tribal Gov't,* 101 F.3d 1286, 1303 (9th Cir. 1996) (Fernandez, J. concurring) *rev'd on other grounds by* 522 U.S. at 526 (citing Fernandez, J. with approval).

The Panel Opinion correctly held that the Parcel's jurisdictional fate is a matter of statutory construction at whose heart lies the following question: "[d]oes the Settlement Act prohibit the Secretary from removing lands not included in the Settlement Lands from under the laws and jurisdiction of the State of Rhode Island?" 398 F.3d at 36. The Panel then declined to answer this defining issue. This case has never been about federal trust – for all parties to this litigation (as well as for the Narragansetts), this case is about one issue: jurisdiction. Unrestricted federal trust is nothing more than the vehicle to obtain federal-tribal jurisdiction over the Parcel. The issue of jurisdiction and the effect of trust on it was elaborately and painstaking briefed both in this Court and below.

Because of the importance of whose laws apply on the Parcel, because of the unstable situation caused by competing jurisdictional claims over the Parcel, because resolution of this conflict can be achieved through statutory construction and because of the obvious inter-circuit and intra-circuit conflicts presented by the Panel Opinion, the State Appellants respectfully urge the full Court to rehear and decide this case.

II. ARGUMENT

1. The Panel's Application of the IRA to a Tribe Not Both Federally Recognized and Under Federal Jurisdiction in 1934 Conflicts With Decisions of the Supreme Court and Two Sister Circuits

The Panel Opinion is in direct conflict with the United States Supreme Court and both the Fifth and Ninth Circuit Court of Appeals on the issue of whether the IRA applies to Indian tribes that were not both under federal jurisdiction and federally recognized in 1934. All courts to review the language of the IRA at issue have correctly limited its application temporally to 1934, the date of passage. Unless rehearing en banc is granted, this Circuit will be the only one to take the remarkable position that when Congress passed the IRA in June of 1934 and limited its application to "any recognized Indian tribe now under federal jurisdiction," 25 U.S.C. § 479, that "now" really meant "whenever." This despite the fact that in the very same sentence, along with "now" Congress used the date "June 1, 1934" and in a nearby section when Congress wished not to limit temporally the application of that section it used "now or hereafter," 25 U.S.C. § 479.

The authority to take land into trust is limited to "Indians" as carefully defined in the IRA. Section 465 authorizes the Secretary "to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. As the Panel Opinion noted, for the purpose of section 465:

> [t]he term Indian . . . shall include all persons of Indian descent who are members of *any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were on June 1, 1934, residing within

> the present boundaries of any Indian reservation, and shall further include all of the persons of one-half or more Indian blood. . . . The term "tribe" whenever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. . . .

25 U.S.C. § 479 (emphasis added).

The State Appellants, consistent with the case law, explained that where the tribe seeking to take advantage of the IRA did *not* have members "of one-half or more Indian blood," Congress established a two-prong test. A tribe must both be 1) federally recognized and 2) under federal jurisdiction. The Panel agreed with the legal fact that the Narragansetts met neither prong of the two-part test in 1934. 398 F.3d at 31.

Where the Panel Opinion differed with the State Appellants is its holding that "now" in section 465 of the IRA means "whenever" and not the date of passage of the IRA. The Panel based this novel interpretation on an understandable, but clearly erroneous, reading of the Supreme Court decision in *United States v. John*, 437 U.S. 634, 650 (1978).

The Supreme Court held that the Choctaws were within the IRA's purview. The Panel Opinion faithfully quoted "[t]he Supreme Court's reasoning [] as follows:"

> The Court of Appeals and the Mississippi Supreme Court held, and the State now argues, that the 1944 proclamation had no effect because the Indian Reorganization Act of 1934 was not intended to apply to the Mississippi Choctaws. Assuming for the moment that authority for the proclamation can be found only in the 1934 Act, we find this argument unpersuasive. The 1934 Act defined 'Indians' not only as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under federal jurisdiction, and their descendants who then were residing on any Indian reservation, but also as 'all other persons of one-half or more Indian blood.' 48 Stat. 988, 25 U.S.C. § 479 (1976 ed.). There is no doubt that persons of this description lived in Mississippi, and were recognized as such by Congress and the Department of the Interior at the time the Act was passed. . . . The references to the Mississippi Choctaws in the legislative history of the Act . . . confirm our view that the Mississippi Choctaws were not to be excepted from the general operation of the 1934 Act.

Id. (quoting *John,* 437 U.S. at 649-50 (parenthetical in original)).

The Panel Opinion concludes that this language shows that the Supreme Court "disagreed with the State's proffered two part test for IRA applicability" because the Supreme Court's test is "distinctly different from the State's two-part test, which would require that an Indian *tribe* be both (1) recognized and (2) under federal jurisdiction at the time of the Act's passage." 398 F.3d at 31. (emphasis in original).

On the contrary, the quoted language from the Supreme Court's opinion *confirmed* the State's temporal limitation of the Act to 1934 and affirmed the Fifth Circuit's same reading of the Act, which was recently followed by the Ninth Circuit. Here is why.

First, the Panel Opinion fails to recognize that there are *two* separate and distinct ways for an Indian tribe or its members to come under the IRA as "Indians." As set forth by the Supreme Court:

1) "all persons of Indian descent who are members of any recognized [in 1934] tribe now under federal jurisdiction," or

2) "all other persons of one-half or more Indian blood."

437 U.S. at 649.

As the Panel Opinion's block quote from *John* shows, the Supreme Court held that the Choctaws came within the IRA under the "Indian blood" test and *not* under the "recognized [in 1934] tribe" test.[1] Crucially, *the "Indian blood" test that was dispositive in* John *has nothing to*

[1] Referring to "all other persons of one-half or more Indian blood," the Supreme Court stated that "[t]here is no doubt that persons of *this description* lived in Mississippi, and were recognized as such by Congress and by the Department of the Interior *at the time the Act was passed*." 437 U.S. at 650 (emphasis added). The Court then cited a report noting "that approximately 85 percent of this group are full bloods," *Id.* at n.19. The Court also noted that the federal government recommended that the trust deeds be written designating the grantee as "[t]he United States in trust for such Choctaw Indians of one-half or more Indian blood . . . until organized as an Indian tribe . . ." *Id.* at n.20.

do with this case.[2] The State Appellants have never contested the legal conclusion that even if a tribe was not both federally recognized and under federal jurisdiction in 1934, it could nonetheless come under the IRA *if* members of the Tribe possessed "one half or more Indian blood." The Parcel is proposed to be taken into trust "for the use and benefit of the Narragansett Tribe of Indians of Rhode Island,"[3] and not individual Indians. The Narragansetts have never claimed, nor could they claim, that tribal members meet the IRA's "one-half or more Indian blood" test.

It is thus crystal clear that the Supreme Court did not "disagree" in any way with the State Appellants' two part "recognized [in 1934] tribe" test. It simply held that the Choctaws were under the IRA's alternative "Indian blood" test.[4] It is true that the "Indian blood" test is "distinctly different" (in the words of the Panel Opinion) from the "recognized [in 1934] tribe" test, but that is *not* because the State Appellants' test is wrong; rather, it is because the "recognized [in 1934] tribe" test is *different.*[5]

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[2] Additionally, the Court noted that the Mississippi Choctaws voted before the IRA was passed to support it (with their vote reported to Congress), voted within one year after the IRA was passed to participate in it, and were referenced in the legislative history of the IRA. 437 U.S. at 645, 650. None of these factors are present here.

[3] BIA letter dated March 6, 1998, contained in Appendix before Panel.

[4] The dean of Indian law, then Assistant Solicitor Felix S. Cohen recognized the IRA's statutory distinction in a memorandum to Bureau of Indian Affairs Commissioner Collier: "Clearly, this group [Siouan Indians of North Carolina] is not a 'recognized Indian tribe now under federal jurisdiction' within the language of section [479]. Neither are the members of this group residents of an Indian reservation (as of June 1, 1934). These Indians, therefore, like many other Eastern groups, can participate in the benefits of the [IRA] only in so far as individual members may be one-half or more Indian blood." Brownell, *Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U.Mich. J.L. Reform 275, 287 (2001) (citing article quoting unpublished memorandum from Cohen to Collier dated April 8, 1935).

[5] Two crucial conclusions flow from the *John* decision: first, if "now" meant "whenever," the Supreme Court would have held that the IRA applies to the Choctaw under the "federally recognized," test instead of or in addition to relying on the "Indian blood" test – it did not; second, if the Narragansetts, instead of

Indeed, the Supreme Court in *John* held that the "recognized [in 1934] tribe" test is temporally limited to "all persons of Indian descent who are members of any recognized [in 1934] tribe now under federal jurisdiction, and their descendants who then were residing on any Indian reservation." 437 U.S. at 650. As such, the Court *concurred* with the Fifth Circuit's conclusion that: "The language of [25 U.S.C. § 479] positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words *'any recognized Indian tribe now under Federal jurisdiction'* and the additional language to like effect." (emphasis in original). *United States v. Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974).[6]

The United States District Court for the District of Hawaii and the Ninth Circuit recently agreed that "recognized [in 1934] tribe" test contained a temporal limitation. The district court held that:

> [T]he definition of "Indian" within the IRA states that it "include[s] all persons of Indian descent *who are members of any federally recognized Indian tribe* ***now*** *under* ***Federal jurisdiction*** *and all persons who are descendants of such members who were, on June 1, 1934 . . . and shall further include all other persons of one-half or more Indian blood.* 25 U.S.C. § 479 [emphasis by court]. This definition was intended to preserve the status quo with respect to who should be considered an Indian.

Kahawaiolaa v. Norton, 222 F. Supp.2d 1213, 1221 n.10 (D.Haw. 2002) (emphasis in original).

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the Choctaws, were the tribe before the Supreme Court, the Court would have held that the Narragansetts were *not* included in the IRA since they do not meet either IRA inclusion test.

[6] The Panel Opinion states that "the Supreme Court disagreed with the Fifth Circuit and held in . . . *John* that the IRA of 1934 does apply to the Mississippi Choctaws." 398 F.3d at 31. While it certainly is true that Supreme Court held that the Choctaws were within the IRA, it is equally true that they did so under the "Indian blood" test – not because of any disagreement with the Fifth Circuit on the temporal limitation of the "recognized [in 1934] tribe" test. Indeed, the Supreme Court confirmed the Fifth Circuit's temporal limitation.

The court then noted the comments of the Senator Edgar Howard who cosponsored the IRA with Senator Burton Wheeler "regarding who should be classed as an 'Indian' under the Act."

> For purposes of this act, [the definitional section] defines the persons who shall be classed as Indian. In essence, it recognizes the *status quo* of the *present reservation Indians* and further includes all other persons of one-fourth Indian blood.[7]

Id. (quoting Congressional Debate on the Wheeler-Howard Bill (1934) *in* The American Indian and the United States, Vol. III. Random House 1973) (emphasis modified).

On appeal, the Ninth Circuit affirmed the IRA's temporal limitation, holding that "by its terms, the Indian Reorganization Act did not include any Native Hawaiian group. *There were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934*, nor were there any reservations in Hawaii." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1281 (9th Cir. 2004) (emphasis added).

En banc consideration is warranted because of the conflict between the Panel Opinion and the Supreme Court, the Fifth and Ninth Circuits over the question of whether the subject "recognized [in 1934] tribe" test can nonetheless be read to "extend IRA benefits to all federally recognized tribes, regardless of their acknowledgment status on the date of the IRA's enactment." 398 F.3d at 31.

The Panel Opinion also holds that the "Federally Recognized Indian Tribe List Act," Pub L. 103-454, 25 U.S.C. § 479a (1994) (the "List Act") and a 1994 amendment to Section 476 erased the temporal limitation contained in Section 479. To do so they would have to effect an implied repeal of the express limitation. Neither do.

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[7] The one-quarter blood requirement was subsequently increased in the statute to a one-half blood requirement in the final version of the bill.

By its express terms, the List Act provides a definition of "Indian tribe" only "[f]or purposes of this title," which is expressly limited to "25 U.S.C. § 479a and note and 479a-1" and no other section. The List Act does nothing more than require the Secretary to publish annually a list of all then-federally recognized Indian tribes. The List Act disavows any pretense of changing the definition of Indian or tribe contained in Section 479. That definition, governing who is included in the IRA, has remained unchanged since 1934.[8]

Section 476(f) and section 476(g) likewise do not repeal the temporal limitation contained in section 479 as held in the Panel Opinion. First, new sections (f) and (g) amend 476 of the IRA and *not* section 479. Sections 476(f) and (g) make no change whatsoever to the temporal limitation in section 479. Section 476 is entitled: "Organization of Indian tribes; constitution and bylaws and amendment thereof; special election." It deals with a tribe's ability to constitute a government for its "common welfare" and to "adopt an appropriate constitution and bylaws."[9] 25 U.S.C. § 476(a). Sections 476 (f) and (g) do not apply to any legislation treating tribes differently; rather, they prohibit the executive branch from promulgating

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[8] On numerous occasions since 1934, twice in this Circuit, Congress has passed specific acts expressly including additional tribes within the scope of the IRA's trust provisions. *See, e.g.,* Maine Indian Claims Settlement Act, 25 U.S.C. § 1724(d); Wampanoag Indian Claims Settlement Act, 25 U.S.C. § 1771d(f) ("Any right, title or interest to lands acquired by the Secretary under this section . . . shall be held in trust."); *Hoopa-Yurok Settlement Act*, 100-580 (1988) ("The Indian Reorganization Act of June 18,1934, as amended, is hereby made applicable to the Yurok Tribe and the tribe . . . "). The addition by Congress of certain specific tribes to the scope of the 1934 Act decades after its passage is entirely inconsistent with the notion that all tribes, regardless of the date of recognition, are automatically included in the IRA whenever they become federally recognized. Although Congress passed two laws specific to the Narragansetts (in 1978 and 1996), unlike these tribes, it has never added them to the scope of the IRA.

[9] Section 476 also allows tribes to organize their tribal government "outside the parameters of the Act." The sponsor of this bill, Sen. John McCain, found that "the Department of the Interior has interpreted Section 16 [of the IRA, 25 U.S.C. § 476] to authorize the Secretary to categorize or classify Indian tribes as being either created or historic. According to the Department, created tribes are only authorized to exercise such powers of self-governance as the Secretary may confer on them." 140 Cong. Rec. S 6144-03, S 6146 (May 19, 1994). The comments of Sen. McCain reflect the sole purpose of the amendment: to ensure that the Secretary did not exercise discretion to provide different tribes with

regulations or making any decision "with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to other federally recognized Indian tribes by virtue of their status as Indian tribes." 25 U.S.C. §§ 476(f), (g). It is not the executive branch that established the temporal limitation in section 479; it was Congress, which often provides different tribes with different legal rights. Moreover, the amendment applies only to executive branch discretion "by virtue of their status as Indian tribes." It says nothing concerning whether the entity *is* a tribe under Section 479 of the IRA. Properly understood, the 1994 amendments can in no way effect an implied repeal of Section 479.

The amendments to the 1934 Act are important not for what they did do; but rather for what they did not. If Congress wished to remove the temporal limitation contained in section 479, it knew exactly how. It could simply delete the word "now" or (as it did in section 472) add the words "or hereafter" following "now." That it has not done so in over 70 years, confirms that Congress meant what it said in 1934.

Finally, the Panel Opinion claims that the Department of the Interior has a "longstanding interpretation of the term 'now' in the statute that should be accorded particular deference." 398 F.3d at 30. It is axiomatic, however, that no administrative regulation or practice can overrule the clear language of a statute. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (where Congress has plainly expressed its intent "the court, as well as the agency, must give effect to th[at] unambiguously expressed intent."); *see also INS v. Cardoza-Fonseca*, 480 U.S. 321, 447-48 (1987) (courts "must reject administrative constructions which are contrary to clear congressional intent").

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different governmental authority. *See also* Remarks of Rep. Richardson 140 Cong. Rec. E 663-03, (April 14, 1994). This is a far cry from amending section 479 of the IRA.

Equally important is the total lack of evidence in the record that there is any such "longstanding interpretation" by the Secretary or that the temporal limitation "would impact scores of trusts created for the benefit of Indians over the last 70 years." 398 F.3d at 31. In fact, it would impact none. First, there is no administrative regulation supports any interpretation. Second, the Secretary alleged no such practice in any brief. Third, there is no evidence in the record which suggests that the Secretary has even taken land into trust for tribes or Indians that did not meet either the "recognized [in 1934] tribe" test or the "Indian blood" test or the land in trust was not a result of a specific congressional action for a particular tribe post-1934. Most important, with respect to any Indian land previously taken into trust, the Secretary takes the position that the federal Quiet Title Act prevents the undoing of any trust conversion that has already taken place. *See Department of the Interior v. South Dakota,* 519 U.S. 919, 920 (1996).

In addition to addressing the Supreme Court's decision in *John*, en banc review is necessary to safeguard against inter-circuit conflicts on the interpretation of section 479 of the IRA.

2. The Panel's Failure to Apply Settled Principles of Statutory Construction to the Interface Between the IRA and the Settlement Act Conflicts with Numerous Decisions of This and Other Courts

In a long string of cases, both this Court and the United States Supreme Court have held that principles of statutory construction dictate that statutes relating to the same subject matter should be construed harmoniously if possible, and if not, that more recent or specific statutes should prevail over older or more general ones. *See, e.g., Morton v. Mancari,* 417 U.S. 535, 550-51 (1974); *United States v. Lara,* 181 F.3d 183, 198 (1st Cir. 1999). The Panel Opinion's failure to apply these principles to opposing jurisdictional provisions of the IRA and the Settlement Act conflict with well-settled law on the construction of antithetical statutes.

Both the IRA and the Settlement Act set forth a jurisdictional allocation between tribes and their host states. Section 465 of the 1934 IRA generally authorizes the Secretary to take land into trust for Indians with a resulting ouster of the state's jurisdiction over that land in favor of tribal and federal jurisdiction. *Connecticut ex rel. Blumenthal v. United States Dep't of Interior,* 228 F.3d 82, 90 (2d Cir. 2000); *see also Narragansett Indian Tribe v. Narragansett Electric Co.,* 89 F.3d 908, 920 (1st Cir. 1996) (holding, in dicta, that if the Parcel had been taken into (unrestricted) trust under section 465 of the IRA, it would be "Indian country").

The later-enacted Settlement Act, on the other hand, positively dictates that there will be no such ouster of State jurisdiction in Rhode Island. It contains several provisions that ensure that the State will not be stripped of its jurisdiction over land within its borders. The Panel Opinion recognized this but went no further. First, sections 1705(a)(2) and 1712(a)(2) extinguish the Tribe's aboriginal title to land throughout the State. As discussed in the State's Opening and Reply Briefs, this specialized extinguishment is an express limitation on the reach of tribal territorial sovereignty. It prohibits Indian tribes from making uniquely Indian claims to land in Rhode Island: historically-based claims to occupy and exercise sovereign dominion over land. By extinguishing this unique form of title, the Settlement Act ensured that Indian land claims could never be used to wrest fee simple ownership from individuals *and* that Indian land claims could not be used to strip jurisdiction on that land from the State. St. Br. at 34-36; St. Reply at 37-39.

But even if, as the United States contends, the extinguishment of aboriginal title merely terminated a tribal right to possess land, a second, far broader extinguishment slams the door shut on any argument that any tribe may claim territorial sovereignty in Rhode Island. Sections 1705(a)(3) and 1712(a)(3) of the Settlement Act extinguish any claims by any tribe based upon

any "interests in" or "rights involving" land in Rhode Island. Under this second prong, Indian tribes are precluded from making claims that tribal law, rather than State law, applies on tribal land anywhere in the State because such assertions are claims of right (sovereignty) involving land in Rhode Island.

Third, the bar against claiming territorial sovereignty in Rhode Island applies not just to Indian tribes. The Settlement Act also independently bars any "successor in interest" from claiming "interests in" or "rights involving" land in Rhode Island on behalf of Indian tribes. 25 U.S.C. § 1705(a)(3); 1712(a)(3). When the Secretary takes land into trust for a tribe under section 465 of the IRA, she becomes the tribe's "successor in [fee title] interest" and is, therefore, confronted with precisely the same bar faced by Indian tribes themselves. This section separately prevents the United States from doing indirectly what Congress, through the Settlement Act's broad extinguishment provisions, prohibits any Indian tribe from doing directly: effecting an ouster of the State's jurisdiction over land in Rhode Island. In order to prevent such an ouster, the Act places a prospective limitation on the federal government's ability to divest state sovereignty by converting land into trust for the Indians. The Secretary can no more assert a claim that the Parcel is Indian country than the Tribe can.

Finally, the Settlement Act bars the United States from any "further duties or liabilities" under the Settlement Act with respect to the Tribe. Since the Settlement Act is a congressional implementation of a settlement of Indian *land* claims, this provision – to mean anything at all – must mean that upon the discharge of the Secretary's duties specified in sections 1704-1707,[10] the Secretary has no further duties or liabilities to the Tribe concerning *land* in Rhode Island. 25

[10] Each of these provisions deals with the Secretary's duties in connection with the acquisition and transfer of land pursuant to the Settlement Act.

U.S.C. § 1707(c). Indeed, the Second Circuit has held a similar provision in the Mashantucket Settlement Act to mean exactly that. *See* St. Brief at 50-51.

It is impossible to reconcile the exercise of federal and tribal dominion over land that is the hallmark of section 465 of the IRA with the Settlement Act's guarantee that State law will apply throughout the State, just as it applies on the Settlement Lands, the heart of the Tribe's ancestral home. The Panel Opinion's solution to the conflict was to avoid the issue all together. The Court cannot decline to apply well-settled principles of statutory construction to the interface of two antithetical statutes. Under conventional rules of statutory construction, the Panel either had to apply the specific later-enacted jurisdictional framework of the Settlement Act or harmonize it with the jurisdictional provisions of the IRA. It did neither.

3. This Court and the D.C. Circuit have Concluded that the Settlement Act's Jurisdictional Framework Survives Trust and Federal Recognition

The Panel Opinion's failure to enforce the Settlement Act's guarantee that State laws and jurisdiction would continue to apply throughout the State even after the Tribe's federal recognition and the Parcel's conversion to trust directly conflicts with prior decisions of this Court and the United States Court of Appeals for the District of Columbia.

In 1994, this Court considered arguments that the Tribe's federal recognition and the conversion of its land to federal trust altered the jurisdictional framework of the Settlement Act. This Court expressly rejected those arguments. Instead, this Court held that neither federal recognition nor the conversion of Indian land to federal trust – both administrative actions taken pursuant to the IRA – invalidate or alter the jurisdictional framework established by the Settlement Act. *Rhode Island v. Narragansett Indian Tribe,* 19 F.3d at 694-95. ("Tribal sovereignty (and hence, jurisdiction) may be neither augmented nor diminished except through congressional enactment.").

In 1998, the District of Columbia Circuit, faced with the same argument, came to precisely the same conclusion. It likewise held that the grants of state jurisdiction contained in the JMOU and the Settlement Act survived the Narragansett's federal recognition. *Narragansett Indian Tribe v. National Indian Gaming Comm'n,* 158 F.3d 1335, 1341-42 (D.C. Cir. 1998).

By contrast, the Panel Opinion, while correctly holding that the Settlement Act ensured that the "laws and jurisdiction of the State would remain in force throughout the state at the time of the JMOU and enactment of the Settlement Act," refused to enforce that jurisdictional allocation in light of the Tribe's subsequent federal recognition. 398 F.3d at 37. If, as the Panel Opinion holds, the Settlement Act required the application of state law to all lands within the State (including on the Parcel), then it is inconsistent with both *Rhode Island v. Narragansett Indian Tribe* and *Narragansett Indian Tribe v. National Indian Gaming Commission* to refuse to enforce that regime because of administrative actions by the Secretary, including the Tribe's federal recognition or the conversion of the Parcel to trust. This Court should grant the State Appellants' rehearing en banc to ensure a consistent interpretation both within this Circuit and without, of the Settlement Act's jurisdictional framework, post-recognition.

4. Enforcing the Settlement Act's Jurisdictional Framework is Exceptionally Important to Rhode Island

The importance of determining whose law applies to the Parcel is self-evident. Indeed, in *Narragansett Indian Tribe v. Narragansett Electric Co.,* this Court identified the issue of whether the Tribe may possess territory in Rhode Island over which it exercises sovereignty as one of "manifest" importance. 89 F.3d 908, 914 (1st Cir. 1996). The State's own sovereignty and its ability to control taxation, environmental protection, land use and, of course, casino gaming within its borders hang in the balance.

By permitting the fee to unrestricted trust conversion – a transfer whose very purpose and intended effect is to remove land from state jurisdiction – but specifically leaving open whether that conversion removes the State's civil and criminal laws from the Parcel, the Panel sidestepped what it recognized as the central issue of the case: whether the Settlement Act prohibits the Secretary from removing lands from the under the laws and jurisdiction of the State.

By separating trust from jurisdiction, the Panel creates a dangerous jurisdictional no-man's land. The United States and the Tribe have jumped into the breach. Notwithstanding the Panel Opinion, the United States has opined and the Tribe has taken the public position that once converted to trust, the Parcel becomes "Indian country" and is, therefore, by definition, subject to tribal and federal law to the exclusion of the State. The State and Town disagree.

Given the obvious importance of determining whose laws and jurisdiction apply to the Parcel, the undisputed connection between trust and jurisdiction, the Panel's own conclusion that the trust and jurisdiction questions are matters of statutory construction (398 F.3d at 36) and the already significant expenditure of judicial, state and federal resources on this case, it is judicially unsound to leave the case unresolved by declining to address its central question.

5. The Panel Opinion Conflicts with a Prior Decision of This Circuit That the United States and Tribe are a Legal Unity With Respect to Claims Made in the 1976 Lawsuits

The State argued both before the Panel and below that the Parcel's jurisdictional fate was sealed in 1978 when the Tribe settled its Nonintercourse lawsuits (the "1976 Lawsuits") against the State and other parties.[11] The Panel Opinion rejected the State's assertions that the

[11] The Tribe's 1976 Lawsuits against the State, the Town and private property owners were based on its claim of aboriginal title to 3,200 acres of land in Rhode Island. The Parcel was among the land claimed by the Tribe in the Lawsuits. Winning the lawsuits would have given the Tribe fee title to the 3,200 acres good against all but the United States as well as the right to apply its laws, to the exclusion of State law, on those acres. Had it won the Lawsuits, the Tribe would have had 3,200 acres of Tribal sovereign territory in Rhode Island and its territorial sovereignty would have extended over the Parcel. The Tribe,

conversion of the Parcel to trust was barred by the terms of the 1976 Indian land claim lawsuits settlement because 1) the United States was not a party to those suits and 2) "the fee to trust acquisition by the Secretary, and the consequences thereof, are different issues than the claims of aboriginal right which were litigated in the 1976 lawsuits and resolved by the JMOU and the Settlement Act." 398 F.3d at 39.

The first part of the Panel Opinion's holding – that the United States and the Tribe were not a legal unity with respect to the claims made in the 1976 Lawsuits – is at odds with this Court's decision in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton.* That case held that whenever an Indian tribe asserts a claim under the Nonintercourse Act, the United States acts as a guardian for and fiduciary of that tribe. 528 F.2d 370, 379 (1st Cir. 1975).

The Panel Opinion correctly recognized that claims made by the Narragansetts in the 1976 Lawsuits were brought pursuant to the Nonintercourse Act. 398 F.3d at 26. ("[In the Lawsuits] [t]he Tribe asserted that its aboriginal title to the land had not been extinguished because each of the defendants traced his title back to an unlawful alienation of tribal land in violation of the Trade and Intercourse Act of 1790, 25 U.S.C. § 177, due to lack of congressional approval of the sale."). What the Panel failed to recognize, however, was the legal relationship between the Tribe and the United States with respect to those claims. As set forth in *Passamaquoddy,* the United States is deemed guardian and the Tribe its ward with respect to the claims raised by the Tribe in the 1976 Lawsuits.[12] The settlement entered into by the ward now

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however, did not win the lawsuits. It dismissed them with prejudice as part of a comprehensive settlement of the claims therein. The State asserts that the terms of that settlement (the JMOU) govern the allocation of Tribal and State jurisdiction on land within the disputed 3,200 acres, including on the Parcel. St. Br. at 54-56.

[12] Precisely the same legal unity finding was made by Judge Pettine in the 1976 Lawsuits themselves. *Narragansett Indian Tribe v. Southern R.I. Land Dev. Corp.,* 418 F. Supp. 798, 803 (D.R.I. 1976) ("It is

binds its guardian. The two are a legal unity for the purposes of binding the United States to the terms of the Tribe's settlement of those Lawsuits.

The second part of the Panel Opinion – that the United States is not bound by the terms of the settlements because "the fee to trust acquisition by the Secretary, and the consequences thereof, are different issues than the claims of aboriginal right which were litigated in the 1976 lawsuits and resolved by the JMOU and the Settlement Act" is wrong as a matter of law and conflicts with cases holding that aboriginal title carries with it territorial sovereignty. *See, e.g., Alaska v. Native Village of Venetie Tribal Gov't,* 101 F.3d 1286, 1303 (9th Cir. 1996) (Fernandez, J. concurring) *rev'd on other grounds by* 522 U.S. at 526 (*citing* Fernandez, J. with approval).

Had the Tribe prevailed in its 1976 Lawsuits, the resulting jurisdictional arrangement would have placed the ownership of the Parcel in the Tribe with its attendant sovereignty over it. That is precisely the jurisdictional framework contemplated by the Secretary's fee to trust acquisition here.[13] Thus, this fee to trust acquisition imposes the same jurisdictional consequences raised by the 1976 Lawsuits and resolved by the JMOU and the Settlement Act.

As the Panel Opinion points out, the 1976 settlement of the Lawsuits mandates that "the laws and jurisdiction of the State would remain in full force and effect throughout the State at the time of the JMOU and the enactment of the Settlement Act." 398 F.3d at 37. Prior decisions of this Court as well as basic principles governing the trust acquisition compel the conclusion that the United States – as the Tribe's guardian and fiduciary – is bound by the terms under which the Tribe settled the 1976 Lawsuits as set forth in the JMOU and the Settlement Act.

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beyond debate that the United States, if it chooses to do so, could bring an action under the [Nonintercourse] Act as trustee for the Tribe.").

[13] Indeed, in *Narragansett Indian Tribe v. Narragansett Electric Co.,* this Court held, in *dicta*, that the effect of converting the Parcel to trust would be to exercise a "degree of congressional and executive control" "so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area." 89 F.3d at 920.

6. The State Exhaustively Briefed the Settlement Act's Preservation of State Jurisdiction on the Parcel Necessitating the Denial or Restriction of Trust

Even though the Panel recognized the central issue of the case – whether the Settlement Act prohibits the Secretary from removing the Parcel from State jurisdiction – it refused to decide whether any trust conversion would have that effect because, in its view, the State failed to sufficiently raise the issue. 398 F.3d at 39. Appellants respectfully believe that the Panel misunderstood the logical basis of the State's arguments about the Settlement Act's jurisdictional guarantee.

As the State Appellants stated in the first sentence of their Opening Brief, this case is about only one thing: jurisdiction. Trust is simply a mechanism for reallocating jurisdiction among the United States, a state and its resident Indian tribe. The State's assertion that any trust conversion must be restricted to preserve its civil and criminal laws and jurisdiction is nothing more than one of two legal *conclusions* that could flow from the argument that the Settlement Act guarantees that State laws and jurisdiction cannot be stripped from the Parcel: 1) the Parcel may not be taken into trust or 2) the Parcel may only be taken into trust subject to the continuing applicability of State civil and criminal laws and jurisdiction. As such, the extensive arguments[14] made by the State in its briefs, both here and below, as to why land in Rhode Island may not be converted to trust apply with equal force to the alternative *conclusion* that if allowed to be taken into trust, any such land must preserve the State's laws and jurisdiction – a concept called

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[14] The State devoted extraordinary time, attention, resources and over 30 pages in its Opening Brief to the argument that the Settlement Act preserves its jurisdiction over the Parcel notwithstanding any administrative action (including trust or federal recognition) taken under the IRA. St. Br. at 14-20, 29-57. Indeed, this argument occupied more space than the Federal Rules of Appellate Procedure permit for an entire brief and special dispensation had to be obtained from this Court to exceed conventional page limitations to make that argument. Likewise, in the State's Reply Brief, more than 27 pages were dedicated to this argument. St. Reply Br. at 30-57. Given the tighter page limitations at the District Court, an equally comprehensive treatment was given to the issue below. Plaintiffs' Joint Motion for Summary Judgment at 4-15.

restrictive trust. Such a trust exists now on the Settlement Lands across the street from the Parcel. The issue of why the Settlement Act either prevents the Parcel from going into trust or if trust is allowed, requires the trust to be restricted, was extensively briefed.

* * *

The significance of the State sovereignty issues presented by this petition is underscored by the important and far-reaching constitutional challenges briefed to the Panel, including violations of the non-delegation doctrine, the Tenth Amendment, the Enclave Clause and Article IV, section 3 of the United States Constitution. Indeed, the non-delegation issue is currently pending before the United States Court of Appeals for the Eighth Circuit. *South Dakota v. United States Dep't of Interior,* 314 F. Supp.2d 935 (D.S.D. 2004) (on appeal). Rather than repeat these arguments here, the State Appellants rely on the constitutional arguments made in their Opening and Reply Briefs. St. Br. At 58-76; St. Reply Br. At 54-68.

III. CONCLUSION

For the foregoing reasons, the State Appellants respectfully request that this Court grant their Petition for Reconsideration En Banc.

Respectfully Submitted,

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Dated: March 25, 2005

CERTIFICATION

I hereby certify that I mailed a true and accurate copy of the within Petition for Rehearing via regular mail, postage prepaid to Elizabeth Ann Peterson, Appellate Section Environment & Natural Resources, Division, Room 8930, Department of Justice, P.O. Box 23795, L'Enfant Station, Washington, DC 20026; Thomas L. Sansonetti, Assistant Attorney General, Department of Justice, 950 Penn. Ave., NW, Room 2141, Washington, DC, 20530; Anthony C. DiGioia, Esq., Assistant United States Attorney, 800 Fleet Center, Providence, RI, 02903 on the 25th day of March, 2005.