UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

C.A. No. 03-2647

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island,
STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
and TOWN OF CHARLESTOWN, RHODE ISLAND

Plaintiffs-Appellants

v.

GALE A. NORTON, in her capacity as Secretary of the Department of the Interior,
United States of America, and FRANKLIN KEEL, in his capacity as Eastern Area Director
of the Bureau of Indian Affairs

Defendants-Appellees

On Appeal from a Judgment of the United States
District Court for the District of Rhode Island

APPELLANTS' PETITION FOR REHEARING EN BANC

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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 sovereignty and its concomitant ability to apply its civil and criminal laws and jurisdiction to all land within its borders hang in the balance.

En banc reconsideration of the Panel's September 13, 2005 Opinion is necessary because the Opinion conflicts with decisions of the United States Supreme Court, this Court and sister circuits. The Opinion wrongly applies the IRA to the Narragansetts and fails to preserve the State's laws and jurisdiction on land within its borders

notwithstanding the guarantees of the Settlement Act. 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,* 423 F.3d 45, 54 (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. Moreover, subsequent briefing requested by the full Court shows that the Panel Opinion relies on a demonstrated falsehood; namely, that all Secretaries have consistently interpreted the IRA to contain no temporal limitation and that any other reading would effect scores of trust acquisitions. Two different briefs to the Court by the State Appellants powerfully demonstrated that this notion is popular mythology. En banc review must be granted to prevent the myth from infecting IRA jurisprudence.

2. 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 ousts state jurisdiction over territory outside the Settlement Lands and, for the first time in the State's history, places control over that territory in the hands of the federal government and the Tribe. In a tiny and densely populated state like Rhode Island, the implications of such an ouster are enormous. Before the State loses jurisdiction over the Parcel and, potentially, over other land converted to trust, the entire Court should hear and determine this case.[1]

3. 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

[1] En banc reconsideration is vital given the composition of the Panel and the split among judges of this Court on the issue of jurisdiction. The Panel was composed of two sitting First Circuit judges – Torruella and Howard – and Judge DiClerico of the New Hampshire District Court, sitting by designation. Judge Torruella authored the Panel Opinion joined by Judge DiClerico with Judge Howard filing a dissenting opinion on the issue of jurisdiction. Thus, the two permanent judges of this Court who heard the case are evenly divided on the critical issue of the State's jurisdiction over the Parcel.

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). Moreover, the Panel failed to recognize that aboriginal title is both a possessory and sovereignty interest in land. While all concede that the Settlement Act's extinguishment of aboriginal title precludes the Tribe from making uniquely Indian possessory claims to land in Rhode Island, it also precludes the Tribe from reasserting Indian sovereignty over that land. The Panel's failure to recognize that aboriginal title includes the ability to exercise territorial sovereignty puts it at odds with a recent decision of the United States Supreme Court in *Sherrill v. Oneida Indian Nation,* 125 S.Ct. 1478 (2005).

4. 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. 423 F.3d at 62. 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.

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." 423 F.3d at 63. 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 of the United States Supreme Court and the Ninth Circuit on the effect of aboriginal title. *Sherrill v. Oneida Indian Nation,* 125 S. Ct. 1478 (2005); *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).

Because of the importance of an ouster of state jurisdiction from land in Rhode Island, because of the unstable situation caused by checkerboard jurisdiction in such a small state, 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 divided 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. 423 F.3d at 54.

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." 423 F.3d at 55. (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.[2] Crucially, *the "Indian blood" test that was dispositive*

[2] 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.

in John *has nothing to do with this case.*[3] 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,"[4] 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.[5]

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.[6] It is true that the "Indian blood" test is "distinctly different" (in the words of the Panel Opinion) from the

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[3] 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.

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

[5] The trust application at issue here is based upon the Tribe's federal recognition in 1983.

[6] 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).

"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*.[7]

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).[8]

The United States District Court for the District of Hawaii and the Ninth Circuit recently agreed that the "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*

[7] 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 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.

[8] 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." 423 F.3d at 55. 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.

> *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).

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.[9]

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

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

IRA benefits to all federally recognized tribes, regardless of their acknowledgment status on the date of the IRA's enactment." 423 F.3d at 56.

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.

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.[10]

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

[10] 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.

election." It deals with a tribe's ability to constitute a government for its "common welfare" and to "adopt an appropriate constitution and bylaws."[11] 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 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.

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[11] 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 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.

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." 423 F.3d at 54. 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").

More importantly, in legal memoranda responding to papers filed by the Federal Appellees and Indian Amici to support their assertion, the State Appellants show that the contention was invented whole cloth.[12] Not only is there no administrative regulation supporting such a practice, for the first 45 years after enactment of the IRA, all trust acquisitions by the Secretary were exclusively for IRA tribes. For the next 35 years, with a spot exception or two at most, Secretaries have continued to adhere to the temporal limitation firmly in place since 1934. For later recognized tribes, Congress itself expressly authorized trust. As such, the temporal limitation can not and does not impact "scores of trusts created for the benefit of Indians over the last 70 years." 423 F.3d at 54. Even beyond the position of the federal government that the 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), there are not scores (or even a few)

[12] State Appellants' Reply to Secretary's Response to Petition Rehearing En Banc (Dated July 11, 2005) at 2 – 12; State Appellants' Response to Amici Curiae (Dated August 23, 2005) at 1– 14.

nonauthorized trusts in existence. En banc review is necessary to prevent sister circuits from relying on an important recitation of Department history that simply is not true.

2. **The Preservation of Rhode Island's Civil and Criminal Laws and Jurisdiction on Land Within its Borders is of Exceptional Importance**

The importance of determining whose law applies to the Parcel (and indeed, to all future territory converted to trust) 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, law enforcement, land use and, of course, casino gaming within its borders hang in the balance.

The conversion of land to trust for Indians has profound and permanent impact on states, local communities and the public. Its impact is particularly significant in a tiny and densely populated state like Rhode Island. From a central location, 95% of Rhode Island's population of just over 1 million people is within a half hour's drive. Potentially tax-free sales from that single location could seriously undermine State tax revenues that fund schools, roads and other critical infrastructure. Likewise, land taken into trust may ultimately be used for gaming purposes. Indian gaming from any location within Rhode Island would seriously jeopardize another of the State's significant sources of revenue – its state-operated video lottery terminals at Newport and Lincoln.

Given the importance to Rhode Island of preserving its laws and jurisdiction within its borders, this case is particularly appropriate for determination by the full Court. Indeed, the Panel's Opinion on the jurisdictional fate of the Parcel reflects a split opinion

of the two permanent judges of this Court (Judge Torruella holding that the law sanctions a jurisdiction-stripping trust and Judge Howard disagreeing).[13] In the dissent's view, the Parcel could only be taken into trust consistent with the Settlement Act if the State's civil and criminal laws and jurisdiction were preserved. Due to the even split on the Court on the critical question of jurisdiction, this case seems a particularly appropriate one for the full Court to determine.

3. 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*

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[13] The Panel's third member was a judge from the District of New Hampshire, sitting by designation who sided with Judge Torruella.

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.

First, sections 1705(a)(2) and 1712(a)(2) extinguish tribal 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.

A recent decision of the United States Supreme Court bears this out. In *Sherrill v. Oneida Indian Nation,* 125 S. Ct. 1478, 1498 (2005), the Oneida attempted to effect an ouster of New York's sovereignty over land by purchasing fee title to two parcels within what had once been the Oneida's historic reservation. Relying on prior recognition of the Oneida's aboriginal title to that historic reservation, the United States and the Oneida argued – just as the State Appellants do here – that the unification of fee title and aboriginal title permitted the exercise of tribal "sovereign dominion" over the parcels.

Crucially, the Oneida were not using aboriginal title as a means of gaining physical possession of land owned by others. Indeed, the Oneida had purchased the parcels and owned them in fee. Instead, the *sole* reason for the assertion of aboriginal title was to extend tribal sovereignty over the parcels by removing them from state jurisdiction (and its concomitant taxing power). If aboriginal title were nothing more than a possessory interest in land lacking jurisdictional import, as the Panel Opinion held, the Supreme Court would have simply ended the case by holding that aboriginal title cannot effect an ouster of state laws.

The *Sherrill* Court instead agreed with the Oneida's core position (and that of the State Appellants) that the perfection of aboriginal title over land ousts state and local jurisdiction there – in *Sherrill* local property taxes. The Oneida lost only because the doctrine of laches barred its assertion of territorial sovereignty.

Sherrill thus accepts a central tenet of the State's argument in this case: that the exercise of territorial sovereignty, to the exclusion of state laws, is an inherent attribute of aboriginal title. The State Appellants have long maintained that the Settlement Act's complete extinguishment of aboriginal title forecloses any assertion of tribal territorial sovereignty in Rhode Island. The Supreme Court recent decision in *Sherrill* directly supports that proposition.[14]

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[14] The Supreme Court also agreed with the State Appellants that the effect of an unrestricted trust conversion under section 465 of the IRA is to " . . . reestablish [tribal] sovereign authority over territory . . . " 125 S. Ct. at 1494. Such a trust conversion – with its attendant ouster of State jurisdiction – is completely at odds with provisions of the Settlement Act preserving Rhode Island's laws and jurisdiction within its borders, including, as *Sherrill* necessarily implies, the Settlement Act's wall-to-wall extinguishment of aboriginal title.

But even if, as the Panel held (423 F.3d at 64), 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. Indeed, the breadth of this second extinguishment prong was recognized by Judge Howard in his dissent: "This 'all claims' language is broad enough to include sovereignty or aboriginal title based claims contesting the applicability of Rhode Island law." 423 F.3d at 73.

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,[15] the Secretary has no further duties or liabilities to the Tribe concerning *land* in Rhode Island. 25 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 discussing Connecticut ex rel. Blumenthal v. United States Dep't of the Interior, 228 F. 3d 82 (2nd Cir. 2000).

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. This Court must 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.

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

4. 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 and the conversion of the Settlement Lands to trust. *Narragansett Indian Tribe v. National Indian Gaming Comm'n,* 158 F.3d 1335, 1341 (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*," (emphasis added)

refused to enforce that jurisdictional allocation in light of the Tribe's subsequent federal recognition. 423 F.3d at 62. 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.[16] 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.

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.[17] The Panel Opinion rejected the State's assertions that the conversion of the Parcel to trust was barred by the terms of the 1976

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[16] Judge Howard makes this same observation in his dissent, pointing out that subsequent federal recognition and fee to trust conversion did nothing to change the jurisdictional framework of the Settlement Lands. They remain governed by the civil and criminal laws and jurisdiction of Rhode Island. 423 F.3d at 72.

[17] 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, 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.

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." 423 F.3d at 63.

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. 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.[18] The settlement entered into by the ward now 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

[18] 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 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.").

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" (423 F.3d at 63) is wrong as a matter of law and conflicts with cases holding that aboriginal title carries with it territorial sovereignty. *See, e.g., Sherrill v. Oneida Indian Nation,* 125 S.Ct. 1286, 1478, 1492-93 (2005); *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.[19] 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." 423 F.3d at 62. 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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[19] 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.

* * *

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,* 423 F.3d 790 (8th Cir. 2005) (South Dakota's request for rehearing en banc pending). 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: October 28, 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, Department of Justice, P.O. Box 237954, 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 28th day of October, 2005.

Rachel Gul-