Nos. 16-1424, 16-1435, 16-1474, 16-1482

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PENOBSCOT NATION; UNITED STATES, on its own behalf, and for the benefit of the Penobscot Nation,
Plaintiffs, Appellants

v.

JANET T. MILLS, Attorney General for the State of Maine; CHANDLER WOODCOCK, Commissioner for the Maine Department of Inland Fisheries and Wildlife; JOEL T. WILKINSON, Colonel for the Maine Warden Service; STATE OF MAINE; TOWN OF HOWLAND; TRUE TEXTILES, INC.; GUILFORD-SANGERVILLE SANITARY DISTRICT; CITY OF BREWER; TOWN OF MILLINOCKET; KRUGER ENERGY (USA) INC.; VEAZIE SEWER DISTRICT; TOWN OF EAST MILLINOCKET; TOWN OF LINCOLN; VERSO PAPER CORPORATION,
Defendants, Appellees

EXPERA OLD TOWN; TOWN OF BUCKSPORT; LINCOLN PAPER AND TISSUE LLC; GREAT NORTHERN PAPER COMPANY LLC,
Defendants, Appellees,

TOWN OF ORONO,
Defendant

PETITION FOR REHEARING EN BANC

Appeals from the United States District Court for the District of Maine

Brief of *Amici Curiae*
National Congress of American Indians and the United South & Eastern Tribes, Inc., Supporting Petitions for Rehearing/Rehearing En Banc

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September 21, 2017

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1, the undersigned certifies that *Amici* National Congress of American Indians ("NCAI") and the United South and Eastern Tribes, Inc. ("USET") are not publicly held corporations, nor subsidiaries or affiliates of any other corporation, and no publicly owned corporation owns more than 10% of their stock.

INTERESTS OF *AMICI CURIAE*

NCAI is the largest national organization addressing Indian interests, representing more than 250 American Indian Tribes and Alaska Native villages since 1944. Its mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal legislative and policy issues affecting tribal governments.

USET is a non-profit organization representing 26 federally recognized Tribal Nations in 12 states stretching from Texas to Maine. Established more than 40 years ago, USET educates federal, state, and local governments about the unique historic and political status of its member Tribes, and operates a number of programs for the benefit of its membership. Due to its members' locations in the South and Eastern United States, USET has particular expertise in the interpretation of Indian land claims settlement acts.

AUTHOR STATEMENT

In accordance with First Circuit R. 29(a)(4)(E), the undersigned certifies that the above-listed counsel for *Amici* authored the entirety of this brief.

ARGUMENT

Amici agree with Petitioners, the Penobscot Nation ("Nation") and the United States, that the Panel's decision conflicts with Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), and Maine v. Johnson, 498 F.3d 37 (1st Cir. 2007). The Petitions for Rehearing En Banc should be granted on that basis alone.

In addition, and of great concern to *Amici*, the Panel applied the incorrect legal standard to interpret the Maine Indian Claims Settlement Act ("MICSA"),[1] including provisions incorporating the Maine Implementing Act[2] (together, "Settlement Acts"). The Panel ignored general rules of statutory construction, and the particular rules for construing statutes enacted for the benefit of Indians. The Panel also ignored the longstanding Supreme Court and First Circuit rule that Congress must act clearly when it divests a Tribe of its existing rights, and that all rights not clearly abrogated remain with the Tribe.

Finally, this case involves a question of exceptional importance. Many of *Amici*'s members are subject to settlement acts or similar statutes, which often define an Indian reservation without separately addressing adjacent waters or submerged lands; the settled scope of those enactments would be thrust into question if the Panel's outlier mode of analysis were to stand. Thus, the Petitions

[1] Pub. L. No. 96-420, § 3(i), 94 Stat. 1785, 1786 (1980) (previously codified at 25 U.S.C. § 1721(i)).
[2] Me. Rev. Stat. Ann. tit. 30, § 6203(8).

for Rehearing En Banc should be granted.

I. The Panel Decision Conflicts with Decisions of the U.S. Supreme Court and the First Circuit Court of Appeals.

A. The Panel Decision Conflicts with U.S. Supreme Court and First Circuit Decisions Concerning Statutory Interpretation.

The Panel's determination that the terms "island" and "land" are unambiguous is inconsistent with Supreme Court decisions concerning statutory interpretation.

Although both words may have ordinary meanings in certain contexts, that fact alone does not resolve the matter when a court interprets even general statutes:

> Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.

Yates v. United States, 135 S. Ct. 1074, 1081-82 (2015) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (citing Deal v. United States, 508 U.S. 129, 132 (1993)) (alterations in Yates). Thus, the Panel's mechanical reliance on dictionary definitions conflicts with decisions of the Supreme Court, which mandate that courts look to the broader context. Here, that context must include that MICSA was enacted to settle claims arising from the Treaty of June 29, 1818, which is invoked three times in the Settlement Acts' definition of "Penobscot Indian Reservation."

In addition, in Indian law matters the Supreme Court looks to an additional set of principles to account for Tribes' status as sovereign political entities to which the United States owes a trust responsibility. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (Indian canons of construction "are rooted in the unique trust relationship between the United States and the Indians") (quoting County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 247 (1985)). Consequently, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted for their benefit." Id. at 766 (citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973); Choate v. Trapp, 224 U.S. 665, 675 (1912)).

One of the earliest articulations of these canons was in Alaska Pacific Fisheries, supra, which required the Court to answer a question remarkably similar to that presented in this case: Where a statute expressly reserved certain islands as making up an Indian Tribe's reservation, but made no reference to waters or submerged lands, did the reservation include the surrounding waters? Because the statute failed to address territorial waters explicitly, the Court looked to the circumstances surrounding its passage and construed the scope of the reservation in a manner consistent with the historical context and the parties' expectations. 248 U.S. at 86-89.

The First Circuit, in Rhode Island v. Narragansett Indian Tribe, embraced a

similar principle: "[w]hen a court interprets statutes that touch on Indian sovereignty, general rules of construction apply, but they must be visualized from a distinctive perspective." 19 F.3d 685, 691 (1st Cir. 1994). Thus, "[i]n all cases" when a court interprets a statute touching on tribal sovereignty, that court must look not only to "the face of the Act," but also to "the surrounding circumstances, and the legislative history." Id. (quoting Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586-87 (1977)).[3] Moreover, "doubtful expressions are to be resolved in favor of [Indians]." Id. (alteration in Narragansett).

Until now, this Circuit used this approach in interpreting MICSA. In Akins v. Penobscot Nation, 130 F.3d 482 (1st Cir. 1997), this Circuit was presented with the question of whether issuance of stumpage permits was an "internal tribal matter" over which the Tribe had exclusive jurisdiction under MICSA. Like the present case, Akins concerned "allocation of jurisdiction among different fora and allocation of substantive law," and "the language of the Implementing and

[3] In the context of Indian land claims settlement acts, where Congress ratifies by statute a Tribal-State agreement, consideration of historical context is consistent with Supreme Court practice interpreting statutes that ratify interstate compacts. See, e.g., Oklahoma v. New Mexico, 501 U.S. 221, 235 n.5 (1991) ("a congressionally approved compact is both a contract and a statute, and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous" (internal citations omitted)); Vermont v. New Hampshire, 289 U.S. 593, 605 (1933) ("in the interpretation of a treaty or grant between two states for the settlement of [a] boundary dispute the nature and history of the controversy must be considered") (citing Massachusetts v. New York, 271 U.S. 65, 87 (1926); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 411 (1842)).

Settlement Acts [did] not clearly dispose of the question." Id. at 487-88. Thus, the Circuit turned for guidance to "the legislative history" of MICSA. Id.[4]

Here, the Panel ignored this important tool in favor of an approach overly focused on dictionary definitions and devoid of the necessary context. The Panel's refusal to consider historical context and to use the Indian canons of construction, therefore, necessitates rehearing to insure uniformity with Supreme Court and First Circuit decisions.

B. The Panel Decision Conflicts with U.S. Supreme Court and First Circuit Decisions Dictating the Proper Legal Standard for Examining Whether Congress Divested a Tribe of its Existing Rights.

The Panel incorrectly asked whether MICSA granted the Nation territorial rights when the correct question is whether MICSA contained clear language divesting the Nation of its territorial rights. It is a longstanding principle of federal

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[4] Similarly, in Penobscot Indian Nation v. Key Bank of Maine, 112 F.3d 538 (1st Cir. 1997), in interpreting a statute concerning Indian trust property, upon finding that the statute did not address the issue at bar, this Circuit turned to "the relevant legislative history in an effort to give effect to the intentions of the statute's drafters," noting:

> This inquiry is particularly appropriate in the context of federal Indian law. The Supreme Court has made it clear that "Indian law[] cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [such law]." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978); see also Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 166 (1980) (explaining that courts must "interpret [certain federal statutes involving Indian tribes] . . . in light of the Congress that enacted them").

Id. at 548 (alterations in Penobscot Indian Nation).

Indian law that a Tribe retains its rights until it cedes those rights or Congress clearly abrogates them.

Indian Tribes possess inherent sovereignty as self-governing people predating the founding of the United States. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). A Tribe may cede aspects of its rights, and Congress may abrogate them, but a Tribe retains its rights unless ceded or abrogated. United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

When Congress diminishes a Tribe's rights, including rights to land and other resources, it must do so clearly. See, e.g., Nebraska v. Parker, 136 S. Ct. 1072, 1078-79 (2016) (requiring "clear" congressional intent to abrogate reservation rights); Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024, 2031-32 (2014) (requiring Congress to "unequivocally express" intent to abrogate sovereign immunity from suit); Solem v. Bartlett, 465 U.S. 463, 472 (1984) (requiring "substantial and compelling evidence of a congressional intention to diminish" reservation rights); Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968) (finding lack of "explicit statement" regarding congressional intent to abrogate hunting and fishing rights.

Until the Panel's decision, the First Circuit consistently applied this rule. In Narragansett, the Circuit employed this framework to examine whether the Rhode Island Indian Claims Settlement Act preserved the Narragansett Indian Tribe's

jurisdiction sufficient for the Indian Gaming Regulatory Act to apply. 19 F.3d at 701-02. The Settlement Act granted Rhode Island jurisdiction, but did not provide it "exclusive" jurisdiction or "expressly" strip Narraganset of jurisdiction. Id. at 702. The First Circuit correctly framed its analysis as asking whether Congress *divested* rights, stating, "tribes retain their sovereign powers in full measure unless and until Congress acts to circumscribe them." Id. at 701 (citing Wheeler, 435 U.S. at 323); see also id. at 702 ("[Narraganset] retain[s] that portion of jurisdiction they possess by virtue of their sovereign existence as a people."); Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1066 (1st Cir. 1979) ("[U]ntil Congress acts, the tribes retain their existing sovereign powers." (quoting Wheeler, 435 U.S. at 323)). It then looked for clear language showing Congress's intent to divest Narraganset of jurisdiction. Narragansett, 19 F.3d at 702 ("[W]e are of the view that acts diminishing the sovereign rights of Indian tribes should be strictly construed."). It concluded: "[s]ince the Settlement Act does not unequivocally articulate an intent to deprive the Tribe of jurisdiction, we hold that its grant of jurisdiction to the state is non-exclusive." Id. Earlier this year, the First Circuit reaffirmed application of this standard in construing the Massachusetts Indian Land Claims Settlement Act. Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah), 853 F.3d 618, 624-25 (1st Cir. 2017), petitions for cert. filed, Nos. 17-215, 17-216.

The First Circuit already has examined the Nation's rights under MICSA and applied the proper legal standard. Penobscot Nation v. Fellencer, 164 F.3d 706, 709 (1st Cir. 1999) (Nation's decision to terminate employment fell within "internal tribal matters" powers preserved by MICSA); *see also* Johnson, 498 F.3d at 47 (land and water resources allocated to Nation in MICSA were "retained" by Nation, not acquired for Nation by Secretary of Interior). The Circuit asked not whether MICSA grants certain rights, but whether it "preserves the Nation's sovereignty with respect to" the particular right at issue. Penobscot Nation, 164 F.3d at 709. And it looked for clear congressional language divesting the Nation of its rights, stating, "special rules of statutory construction obligate us to construe 'acts diminishing the rights of Indian tribes . . . strictly.'" Id. (quoting Narragansett, 19 F.3d at 702).

The Panel deviated from this Circuit's longstanding adherence to this standard, instead applying general rules of statutory construction inappropriate for examining whether Congress divested a Tribe of its existing rights. Rather than examining whether Congress clearly *divested* the Nation of its existing territorial rights, it looked for whether Congress clearly *granted* territorial rights, stating: "If the term 'island' . . . was meant to include all or any portion of the surrounding waters, the text would have said so." This turns on its head the applicable legal standard the Supreme Court and First Circuit have applied in these matters.

II. Whether the Panel Used the Incorrect Standards to Interpret a Statute Defining a Tribe's Territory is a Question of Exceptional Importance.

The potential for the Panel's interpretative approach to affect other Indian Tribes and their reservations both within and beyond the First Circuit makes this a question of exceptional importance. Although both "island" and "land" may have ordinary meanings outside the legal context, neither word's colloquial meaning resolves this case. The issue was not simply about the text of MICSA, but rather, what MICSA did not expressly address: the status of the Penobscot River and the submerged lands beneath it.

Whether the Panel employed the correct legal standard is a question of exceptional importance because of the frequency with which Congress identifies specific lands as constituting an Indian reservation without expressly addressing any tribal right in adjacent waters or submerged lands. Literally hundreds of treaties, statutes, and executive orders identify lands constituting Indian reservations. See Cohen's Handbook of Federal Indian Law §§ 15.04[3][a]-[b], 15.04[4]. Like MICSA, those statutes necessarily identify the lands that constitute the reservation; but not all of them address tribal rights in adjacent waters and/or submerged lands. See, e.g., Act of March 3, 1891, § 15, 26 Stat. 1095, 1101 (setting aside the Annette Islands in Alaska as a reservation for the Metlakatla Indian Community, without addressing tribal rights in water and/or submerged

lands).

Settlement act Tribes are those for whom Congress enacted legislation settling litigation between one or more Tribes and state governments or the federal government, usually regarding land or resource rights and often implicating questions of federal recognition and tribal status. Such legislation often incorporates many of the terms in the settlement agreement the parties themselves negotiated and executed. Negotiation of these settlement agreements constitutes an exercise of tribal sovereignty akin to negotiation of treaties, as Tribes selectively chose specific rights to cede in order to gain other benefits for their people. See Penobscot Nation, 164 F.3d at 707-08 (describing Nation's negotiated compromise and benefits it gained in exchange for certain rights it ceded). Settlement act Tribes are especially interested in ensuring courts employ the proper legal standard to determine whether a Tribe maintains resource rights associated with land that has been reserved through a negotiated settlement.

Because Tribes negotiate in light of the well-settled legal principle that what is not clearly divested by Congress in the settlement act is retained by the Tribe, see infra, the Panel's improper dictionary-based construction of MICSA's terms wrongfully disrupts the negotiating parties' expectations based on a longstanding body of case law.

CONCLUSION

For the reasons articulated above, this Court should grant the Petitions for Rehearing En Banc.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limit of Fed. R. App. Proc. 29(b)(4) because, excluding the parts of the document exempted by the Fed. R. App. Proc. 32(f), this brief contains 2,600 words. I further certify that this brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word in Microsoft Office Professional Plus 2010.

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CERTIFICATE OF SERVICE

I hereby certify that this document was today served via the Court's Electronic Case Filing (ECF) system on all counsel of record.

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