No. 07- .

In the

Supreme Court of the United States.

Aroostook Band of Micmacs ,

Petitioner,

-v-

Patricia E. Ryan, as Executive Director of the of the Human Rights Commission for the State of Maine; Warren C. Kessler, Paul K. Vestal, Jr., James Varner, Jadine R. O'Brien, and Kristin L. Aiello, in their official capacities as members of the Human Rights Commission for the State of Maine; and Lisa Gardiner, Tammy Condon and Beverly Ayoob,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

1. Does denying the Aroostook Band of Micmacs the inherent sovereign right to govern their internal tribal affairs because of language in the 1980 Maine Indian Claims Settlement Act, a statute which Congress did not intend to apply to the Band, ignore federal common law establishing their sovereign rights, disregard this Court's decisions to the same effect and usurp the very tribal rights which Congress acknowledged when it passed the Federal Micmac Act in1991?

2. Where Congress has not expressly provided otherwise and following the logic of this Court's decision in *Montana v. United States*, 450 U.S. 544(1981), is the Micmac tribal government instead of a State administrative agency the proper forum to determine a workplace discrimination claim against the tribe by its nonmember employees arising from their consensual employment on tribal lands?

3. Is the ruling below at odds with those courts of appeals which recognize that a federally recognized tribe like the Micmacs retains the inherent tribal right of self government and the right to decide workplace discrimination claims by nonmember employees arising from their consensual employment on tribal lands?

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Citations of Opinions and Orders.

The published decision of the United States Court of Appeals for the First Circuit in the case of *Aroostook Band of Micmacs v. Patricia E. Ryan et al.,* Docket Nos. 06-1127 & 06-1358, reported at 484 F.3rd 41, 2007 U.S. App. LEXIS 8710, and filed April 17, 2007, reversing a decision by the U.S. Magistrate which enjoined the Maine Human Rights Commission from acting on discrimination complaints brought against the tribe by its former employees, is set forth in the Appendix hereto(App.1-69).

The published decision of the U.S. Magistrate for the District Court of Maine in the case of *Aroostook Band of Micmacs v. Ryan et al.,* C.A. 03-24-B-K, reported at 402 F. Supp.2d 114, 2005 U.S. Dist. LEXIS 31173, and filed on December 5, 2005, enjoining the Maine Human Rights Commission from acting on discrimination complaints brought against the tribe by its former employees, is set forth in the Appendix hereto(App.70-115).

The unpublished decision of the United States Court of Appeals for the First Circuit in *Aroostook Band of Micmacs v. Patricia E. Ryan et al.,* Docket Nos. 06-1127 & 06-1358, dated May 21, 2007, denying the Micmacs' petition for rehearing or for rehearing *en banc* is set forth in the Appendix hereto(App.116-117).

Basis for Jurisdiction in this Court.

The decision of the United States Court of Appeals for the First Circuit reversing a decision by the U.S. Magistrate which enjoined the Maine Human Rights Commission from acting on discrimination complaints brought against the tribe by its former employees, was entered on April 17, 2007; on or about June 20, 2007, the petitioner timely applied to Justice Souter of this Court for an extension of time to file its petition for certiorari(Docket No. 06A1166). On July 12, 2007, Justice Souter of this Court granted the petitioner's motion, extending the time to file this petition for certiorari until October 18, 2007.

This petition for writ of certiorari is filed within the time limits prescribed by Justice Souter's order in Docket No. 06A1166, allowing the petitioner's application for an extension of time to file this petition.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

Constitutional, Statutory and Rule Provisions Implicated by This Petition.

United States Constitution, Article I, § 8:

> The Congress shall have Power...
> ...
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes....

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

25 U.S.C. § 1721(b)(4) (The Maine Indian Claims Settlement Act):

> **(b) Purposes**
> It is the purpose of this subchapter—
> ....
> (4) to confirm that all other Indians [besides the Passamaquoddy Tribe and the Penobscot Nation] Indian nations and tribes and bands of Indians now or hereafter existing or recognized in the State of Maine are and shall be subject to all laws of the State of Maine, as provided herein.

25 U.S.C. § 1724(d)(4):

> The Secretary [of the Interior] is authorized to...participate in negotiations between the State of Maine and the Houlton Band of the Maliseet Indians for the purpose of assisting in securing agreement as to the land or natural resources to be acquired by the United States to be held in trust for the benefit of the Houlton Band....

25 U.S.C. § 1725(a); (b)(1); (d)(1); (e)(2); (f); (g) and (i):

> **(a) Civil and criminal jurisdiction of the State and the courts of the State; laws of the State**
>
> Except as provided in section 1727(e) and 1724(d)(4) of this title, all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.
> ....
>
> **(b) Jurisdiction of State of Maine and utilization of local share of funds pursuant to the Maine Implementing Act; Federal laws or regulations governing services or benefits unaffected unless expressly so provided; report to Congress of comparative Federal and State funding for Maine and other States.**

(1) The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act [30 MRSA §§ 6201-6214] and that Act is hereby approved, ratified and confirmed.

....

(d) Capacity to sue and be sued in the State of Maine and Federal Courts; section 1362 of Title 28 applicable to civil actions; immunity from suits provided in Maine Implementing Act; assignment of quarterly income payments from settlement fund to judgment creditors for satisfaction of judgments.

(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, and all members thereof, and all other Indians, Indian nations, or tribes or bands of Indians in the State of Maine may sue and be sued in the courts of the State of Maine and the United States to the same extent as any other entity or person residing in the State of Maine may sue and be sued in those courts; section 1362 of Title 28 shall be applicable to civil actions brought by the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians: *Provided, however*, That the Passamaquoddy Tribe, the Penobscot Nation, and their officers and employees shall be immune from suit to the extent provided in the Maine Implementing Act.

(e) Federal consent for amendment of Maine Implementing Act; nature and scope of amendments; agreement respecting State jurisdiction over Houlton Band lands.

....

(2) ...the State of Maine and the Houlton Band of Maliseet Indians are authorized to execute agreements regarding the jurisdiction of the State Maine over lands owned by or held in trust for the benefit of the band or its members.

(f) Indian jurisdiction separate and distinct from State civil criminal jurisdiction.

The Passamaquoddy Tribe and the Penobscot Nation are hereby authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the Maine Implementing Act, and any subsequent amendments thereto.

(g) Full faith and credit.

The Passamaquoddy Tribe, The Penobscot Nation and the State of Maine shall give full faith and credit to the judicial proceedings of each other.

(i) Eligibility for Federal special programs and services regardless of reservation status.

As federally recognized Indian tribes, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations, or tribes or bands of Indians to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations or tribes or bands of Indians....The Houlton Band of Maliseet Indians shall be treated in the same manner as other federally recognized tribes for the purposes of Federal taxation....

25 U.S.C. § 1726(a):

(a) Appropriate instrument in writing; filing of organic governing doucment.

The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians may each organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the tribe, nation, or band when each is acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this subchapter and any amendments thereto....

25 U.S.C. § 1727(e):

(e) Indian tribe within section 1903(8) of this title; State jurisdiction over child welfare unaffected.

For the purposes of this section, the Houlton Band of Maliseet Indians is an "Indian tribe" within section 4(8) of the Act [25 U.S.C. **§** 1903(8)], provided, that nothing in this subsection shall alter or affect the jurisdiction of the State of Maine over child welfare matters provided in section 1725(e)(2) of this title.

25 U.S.C. § 1735(a):

(a) Law governing; special legislation.

In the event of a conflict of interpretation between the provisions of the Maine Implementing Act and this Act should emerge, the provisions of this subchapter shall govern.

25 U.S.C. § 1721, note, § 2(b)(1) & (4) [The Federal Micmac Act of 1991] :

(b) Purpose. It is the purpose of this Act to–
(1) provide Federal recognition of the Band;
.....
(4) ratify the [State] Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs;

25 U.S.C. § 1721, note, § 6(a) & (b):

(a) Federal Recognition.— Federal recognition is hereby extended to the Aroostook Band of Micmacs. The Band shall be eligible to receive all the financial benefits which the United States provides to Indians and Indian tribes to the same extent, and subject to the same eligibility criteria, generally applicable to other federally recognized Indians and Indian tribes.
(b) Application of Federal Law.— For the purposes of application of Federal law, the Band and its lands shall have the same status as other tribes and their lands accorded Federal recognition under the terms of the Maine Indian Claims Settlement Act of 1980 (25 U.S.C. §§ 1721 *et seq*.).

25 U.S.C. § 1721, note, § 7(a):

TRIBAL ORGANIZATION
(a) In General.— The Band may organize for its common welfare and adopt an appropriate instrument in writing to govern the the affairs of the Band when acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this Act. The Band shall file with the Secretary a copy of its organic governing document and amendments thereto.

30 MRSA § 6202 [The Maine State Implementing Act]:

Legislative findings and declaration of policy

The Legislature finds and declares the following:
....
...the Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in

this Act. The Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State of Maine.

30 MRSA § 6204:

Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State to the same extent as any other person or lands or other natural resources therein.

30 MRSA § 6206.1:

General Powers.

...[I]nternal tribal matters [of the Passamaquoddy Tribe and the Penobscot Nation], including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.

30 MRSA § 7203[The Micmac Settlement Act]:

Laws of the State to apply to Indian Lands
Section added pending receipt of certification of agreement by Council of Aroostook Band of Micmacs.
Except as otherwise provided in this Act, the Aroostook Band of Micmacs and all members of the Aroostook Band of Micmacs in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

30 MRSA § 7205:

Powers of the Aroostook Band of Micmacs
Section added pending receipt of certification of agreement by Council of Aroostook Band of Micmacs.
The Aroostook Band of Micmacs shall not exercise nor enjoy the powers, privileges and immunities of a municipality nor exercise civil or criminal jurisdiction within their lands prior to the enactment of additional legislation specifically authorizing the exercise of those governmental powers.

Statement of the Case.

Until 1819, Maine was a district of Massachusetts and as a result of agreements between the Commonwealth of Massachusetts and the Maine Indian tribes as well as the outright appropriation of tribal lands by settlers, much of the aboriginal land of these Maine tribes was lost. Since 1820, the State of Maine provided various services to the tribes living within its borders, including the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of the Maliseet Indians and the petitioner Aroostook Band of Micmacs ("the petitioner," "the Micmacs" or "the Band"). The federal government, however, refused to provide any services, denying that it had any jurisdiction over these tribes. See 25 U.S.C. §1721(a)(9). Until the 1970's, the State of Maine and its courts considered the Indian tribes located there to be "as completely subject to...state [law] as any other inhabitants can be." *State v. Newell*, 24 A. 943, 944(Me.1892).

In the early1970's, however, the Passamaquoddy Tribe filed suit in federal court claiming much of the land in Maine, arguing that its earlier agreements with Massachusetts ceding its territory were invalid because they were never approved by Congress. After it was found that the federal government was obligated to represent the tribe in its land claim against Maine in *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379-380(1st Cir. 1975), and after the federal authorities interceded, the Passamaquoddy Tribe and the Penobscot Nation in 1979 entered into settlement negotiations with Maine in order to resolve their land claims. The State refused to acknowledge or bargain with the "so-called tribe" of the Houlton Band of the Maliseet Indians.

The result of negotiations between the State and these two tribes was the Maine Indian Claims Settlement Act, 30 MRSA §§ 6201-6214, enacted in 1980("the State Implementing Act"). Under the Act, the two tribes withdrew their land claims in return for a cash payment, the State's grant of certain land in trust reserved for their benefit, their eligibility for State financial assistance and an acknowledgment by the State that while subject to State law, these two tribes could still exercise the right of tribal self government, i.e., the power to decide in their own tribal fora the rights and duties of tribe members arising from conduct on tribal lands.

As to the State's recognition of the right to tribal self-government, 30 MRSA § 6206.1 provides that:

> ...internal tribal matters [of the Passamaquoddy Tribe and the Penobscot Nation], including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.

Even though the State refused to acknowledge or even bargain with the Maliseet over the terms of the settlement or the language of the State Implementing Act , it nonetheless unilaterally included the Maliseet within the Act's terms. Thus it was provided that while "the Passamaquoddy Tribe and the Penobscot Nation...agreed to adopt the laws of the State as their own to the extent provided in this Act[,] the Houlton Band of Maliseet Indians and its lands *will be wholly subject to the laws of the State of Maine*." *Id*. at § 6202(emphasis supplied).

In addition, 30 MRSA § 6204 provides that

> [e]xcept as otherwise provided in this Act, *all* Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State to the same extent as any other person or lands or other natural resources therein.(emphasis supplied).

After negotiations over the terms of this settlement ended, the Maliseet entered into an agreement with the Passamaquoddy and the Penobscot to be included within the anticipated federal legislation ratifying the State Implementing Act, necessary legislation since Congress has the plenary power to limit the sovereign rights of Indians, Indian tribes or Indian bands.

Soon after the State Implementing Act became law in 1980, Congress enacted in the same year the Maine Indian Claims Settlement Act , 25 U.S.C. §§ 1721-1735("the 1980 Federal Act"). One of its purposes was to ratify the state Act and to "confirm that all other Indians, Indian nations and tribes and bands of Indians [besides the Passamaquoddy Tribe and the Penobscot Nation] now or hereafter existing or recognized in the State of Maine are and shall be subject to all laws of the State of Maine, as provided herein." 25 U.S.C. §§ 1721(b)(3)-(4);1725(b)(1).

Moreover, the 1980 Federal Act made clear that all Indians, Indian tribes and bands of Indians other than the members of the Passamaquoddy Tribe or the Penobscot Nation

> shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

25 U.S.C. § 1725(a). The tribal courts of the Passamaquoddy Tribe and the Penobscot Nation were given the same jurisdiction to hear civil and criminal matters involving tribal members as given them by the State Implementing Act. 25 U.S.C. § 1725(b)(1). See 30 MRSA §§ 6209-A;6209-B.

There were no provisions in the 1980 Federal Act addressing the jurisdiction of the Maliseet Indians to hear and decide civil or criminal matters involving tribal members. However, the 1980 Federal Act explicitly recognizes the Houlton Band of Maliseet Indians as a sovereign political entity entitled to all of the rights appurtenant thereto and acknowledged that, contrary to prior law when these three Indian groups were "as completely subject to...state [law] as any other inhabitants can be," *State v. Newell*, 24 A. at 944, they now have the right to govern and decide their internal tribal matters by resort to their own tribal fora:

> The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians may each organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the tribe, nation, or band when each is acting in its governmental capacity. Such instrument...must be consistent with the terms of this subchapter and any amendments thereto....

25 U.S.C. § 1726(a). Finally, if there was a conflict between the 1980 Federal Act and the State Implementing Act, the 1980 Federal Act governs. 25 U.S.C. § 1735.

The legislative history of the 1980 Federal Act shows that the Act is a compromise "in which state authority is extended over Indian territory to the extent provided in the [State] Implementing Act[;] the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs...[and] that rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs,... the settlement strengthens the sovereignty of the Maine tribes." S. Rep. No. 96-957 at 14; H.R. No. 96-1353 at 14-15, reproduced at 1980 U.S. Cong. & Adm. News at 3790.

The petitioner Aroostook Band of Micmacs, a group of Indians which has called northern Maine their home since at least the early 1600's, did not participate in these negotiations with the State in 1979 and 1980. Its members, although then not federally recognized as a Band, believed that they would be included within the settlement but were not. They eventually asserted their own land claims against the State of Maine in the 1980's and as a result of negotiations between the Band and the State, Maine enacted in 1989 the Micmac Settlement Act, 30 MRSA §§ 7201-7207("the State Micmac Act").

The State Micmac Act provided that it would become law only if the Tribal Council of the Band certified its agreement within 60 days of the legislature's adjournment and if analogous federal legislation ratifying the Act without modification was forthcoming from Congress. The Act provided that the Micmacs, like the Maliseet, would be subject to "the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person...," and that they could "not...exercise civil or criminal jurisdiction within their lands prior to the enactment of additional legislation specifically authorizing the exercise of those governmental powers." 30 MRSA §§ 7203;7205. The Tribal Council of the Micmacs, however, never certified its agreement with its provisions and the State Micmac Act *never* became law in the State of Maine.

Nevertheless, on November 21, 1991, Congress enacted the Aroostook Band of Micmacs Settlement Act ("the Federal Micmac Act"), set out as a note under 25 U.S.C. § 1721. Its provisions explained that the Micmacs had not been included in the earlier Federal Act due to lack of documentation, an omission now corrected; and that they now should be afforded the same settlement as the one provided the Maliseet in the earlier 1980 Federal Act. *Id.* at §2(a)(4);(5). On this basis, Congress formally recognized the Band as a federally protected Indian tribe and ratified the [State] Micmac Act. *Id*.

Section 7(a) of the Federal Micmac Act further provides for the Micmacs' self-government and despite its aspiration to treat the Micmacs like the Maliseet, the Act contains *no* provision subjecting the Micmacs to State law. Instead, § 6(b) of the Federal Micmac Act, entitled "Laws Applicable," subjects the Band only to *federal* law on the same terms as the other Maine tribes. Finally, § 11 of the Act makes its provisions govern any conflict between its terms and those in the State Implementing Act, the 1980 Federal Act or the State Micmac Act.

With this statutory law as background, the Micmacs in 2001 and 2002 fired three of their employees, the respondents Lisa Gardiner, Tammy Condon and Beverly Ayoob, all working for the tribal government(App.9-10). After unsuccessfully seeking relief from the Band's Tribal Council, Gardiner and Condon filed charges with the State's Human Rights Commission alleging unlawful employment discrimination by the Band in violation of the Maine Human Rights Act(MHRA), 5 MRSA §§ 4551-4634; and that they had been unlawfully retaliated against in violation of MHRA as well as the Maine Whistleblowers' Protection Act(MWPA), 26 MRSA §§ 831-840 (App.10). Ayoob brought directly to the Commission her allegations against the Band of sexual harassment and retaliation(*Id*.).

In all three cases, the State Commission filed charges with the U.S. Equal Employment Opportunity Commission(*Id*.).The Micmacs asked the State Commission to dismiss the complaints arguing that it had no jurisdiction over the Band on these internal tribal matters(*Id*.). When the Commission continued its investigation, the Band filed suit in federal district court for the District of Maine positing jurisdiction under 28 U.S.C. §1331, and seeking to enjoin the Commission's investigation(*Id*.). The Band claimed that its inherent tribal sovereignty and its sovereign immunity prohibited the Commission from enforcing the MHRA or MWPA against it(App. 10-11).

Upon cross motions for summary judgment, the magistrate judge in the district court agreed with the Band that the Federal Micmac Act and the Band's inherent sovereignty protects the Band's employment decisions from scrutiny under Maine law(App. 79-81). The magistrate ruled that the Tribal Council of the Micmacs never certified its agreement with the State Micmac Act, as required for it to become effective, and that the State Micmac Act *never* became State law(App. 79-81).

Without the State Micmac Act having become law, the magistrate judge ruled that while the State Implementing Act had in general terms subjected the Micmacs like all other Indians in the state to Maine law, this provision was effectively abrogated by three provisions of the Federal Micmac Act, i.e.,(1) the grant of federal recognition to the Band; (2) the authorization for the Band to organize its own government; and (3)the absence of any language subjecting the Band to suit in Maine(App. 85-89). As she concluded, all these provisions conflict with the State Implementing Act and the Federal Micmac Act provides that its own provisions will control such a conflict(App. 85-90). Thus, on its face, the Federal Micmac Act provides that the Micmacs will not be subject to the laws of the State of Maine(*Id*.).

Applying federal common law, the magistrate judge ruled that the Micmacs' unlimited right of self-government under the Federal Micmac Act carries with it the right to make their own employment decisions free of discrimination claims by the Commission(App. 90-96). Following the reasoning of several courts of appeals, she concluded:

> ...[T]he right to discharge employees is a right implicating a tribe's right to self-govern and...federal employment related claims cannot be maintained against (self-governing) tribes even when there is not express statutory exemption on par with Title VII....I can identify no reason why the same would not hold true for state employment discrimination claims when a tribe has a common law or equivalent

statutory right to self government.

(App. 95). She accordingly entered judgment in favor of the Micmacs and permanently enjoined the Commission from applying MHRA, MWPA or Title VII against them because "under 25 U.S.C. § 1721 note 7(a), the Band enjoys a statutory right of self-governance that prohibits the enforcement of state (or federal) employment discrimination laws against the Band"(App. 103-104).

Upon the respondents' appeal, a majority of the court of appeals reversed the magistrate judge's decision(App. 1-69). Without deciding whether the State Micmac Act had ever become law and conceding that the 1991 Federal Micmac Act contains *no* provision subjecting the Micmacs to State law, the majority nevertheless concluded that the 1980 Federal Act together with the Federal Micmac Act "displaced any federal common law that might otherwise bear on this dispute"(App. 13-14).

As the majority saw it, § 1725(a) of the 1980 Federal Act makes clear that *all* Indian groups except members of the Passamaquoddy Tribe or the Penobscot Nation are subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State of Maine to the same extent as any other person; and the Federal Micmac Act does not conflict with but rather reinforces the 1980 Federal Act on this point(App. 13-14). The majority thought that this "was enough" to justify the conclusion that State law including the MHRA and the MWPA applies to the Band's employment decisions(App. 23).

The majority rejected the Micmacs' argument that the 1980 Federal Act was not explicit enough to have State law override the Band's inherent authority to make its own decisions about its employees(App. 14- 23). The majority read the State Implementing Act as making the "internal tribal matters" of *only the Passamaquoddy Tribe and the Penobscot Nation* immune from state regulation, reinforcing its conclusion that under § 1725(a) of the 1980 Federal Act, the Band's decision to terminate its employees was not an "internal tribal matter" insulated from State law(App. 23-24).

The majority also rejected the Micmacs' further contention that under federal common law, the internal tribal matters of *all* Indian groups are insulated from state law because of their inherent tribal sovereignty unless explicitly qualified by Congress, and thus it was unnecessary for the 1980 Federal Act to state this principle explicitly in order for the Micmacs to have their internal tribal matters remain protected from regulation by the State(App. 23-25).The majority also refused to agree with the Micmacs that §§ 6(a) and 7(a) together with § 11 of the Federal Micmac Act codifies the tribe's inherent sovereignty as already recognized by federal common law or that those provisions impliedly repeal those provisions of the 1980 Federal Act to the contrary(App. 26-33).

Circuit Judge Lipez dissented from the majority opinion and would have affirmed the decision for the reasons identified in the magistrate judge's opinion(App. 40-69). The dissent concluded that the Federal Act

> no longer governs the relationship between the Band and the State. Instead, the [Federal Micmac Act] replaced [the 1980 Federal Act] in 1991 as the federal law governing the Band's status, including its relationship with the State of Maine....[The State Micmac Act] was never validly enacted, and the jurisdiction asserted by Maine

> and anticipated by Congress never took effect. Consequently, I conclude that the Band is not subject to the Maine employment discrimination laws at issue in this case.

(App. 41-42).

That the State Micmac Act never became law and therefore could not define the Band's relationship with the State was no reason for Judge Lipez to resurrect the "default provisions" of § 1725(a) pf the1980 Federal Act, as the majority did, in order to subject the Band to some level of state jurisdiction (App. 53). As he concluded,

> courts may not ignore established principles of statutory construction or the canons of Indian law to avoid uncomfortable outcomes. The failure of the [State Micmac Act] to take effect means that the Micmacs were were left with the sovereign rights they otherwise would hold as a recognized Indian tribe under [the Federal Micmac Act]....Although that outcome is not what Congress anticipated, it is nonetheless the inevitable result of the choice Congress made to explicitly rely on the [S]tate Micmac Act to frame the Maine-Micmac relationship.

(App. 53-54).

On May 21, 2007, the court of appeals denied the petitioner's timely filed petition for panel rehearing or for rehearing *en banc*(App. 116-117). On July 12, 2007, Justice Souter granted the petitioner's motion to extend the time to file this petition until October 18, 2007.

Argument Supporting Allowance of the Writ.

1. The Decision Below Usurps Congress's Intent To Preserve The Micmacs' Inherent Tribal Rights, Undermines The Decisions Of This Court Requiring Positive Statutory Language To Diminish The Tribe's Inherent Sovereignty And Nullifies The Sovereign Rights Congress Acknowledged In The Tribe To Govern Its Internal Affairs.

In *Morton v. Mancari*, 417 U.S. 535, 551-555 (1974), this Court held that an Indian tribe's strong interest in self-governance will prevent parties from asserting employment discrimination claims because of Indian preferences for jobs in the Bureau of Indian Affairs. *Id*. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64-67(1978), the Court held that in order to protect tribal self-government, Indian tribunals are the exclusive forum to determine discrimination claims under the Indian Civil Rights Act of 1968. Moreover, in furtherance of the inherent sovereign rights of Indian tribes, Congress has expressly exempted Indian tribes from the definition of "employer" under Title VII of the Civil Rights Act of 1964, nullifying state or federal regulation of workplace discrimination claims against tribes based upon race. See 42 U.S.C. §§ 2000e-(b) & e-(b)(2)(I).

These legal understandings have led most, if not all, courts of appeals to formulate a so-called Tribal Employment Rule: absent a "clear and plain" intent by Congress' otherwise, an Indian tribe's decision to discharge a tribal or reservation-based employee whose job is related to the tribe's self-governance or its administration is an "intramural" matter exempt from federal or state regulation.

Snyder v. Navaho Nation, 382 F.3d 892, 895-896 (9th Cir. 2004)(tribal law enforcement officer). *Gallegos v. Jicarrella Apache Nation*, 97 Fed. Appx. 806, 811(10th Cir. 2003)(same). *Taylor v. Alabama Intertribal Council Title IV*, 261 F.3d 1032, 1035-1036(11th Cir. 2001)(non-Indian employee). *Fond du Lac Heavy Equip. & Constr. Co., Inc.*, 986 F.2d 246, 249(8th Cir. 1993)(same). Any other result would undermine a tribe's strong interest in self-governance.

The court of appeals for the First Circuit adopted this employment rule in *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709-713(1st Cir. 1999), holding that the tribe there was not subject to a workplace discrimination claim under Maine law after discharging a non-Indian employee from the position of nurse in the tribe-run health center. *Id.* In reaching this result, the court reviewed the inherent sovereign rights retained by the tribe since the beginning of the republic, the nature and extent of Congress' statutory inroads into these retained tribal sovereign rights, and the special rules of statutory construction which attend a reading of the 1980 Federal Act authored by Congress. *Id*. See also *State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 694;701(1st Cir. 1994).

All three discharged employees here worked for the tribe's government, implicating the Band's strong interest in self-government, an interest explicitly furthered by Congress' recognition of the Band in the 1991 Federal Micmac Act as a sovereign political entity with a government-to-government relationship with the Federal government. Despite this, the majority abandoned its holding in *Fellencer*, rejecting any notion that the Micmacs have retained the inherent tribal rights to self government or to make its own employment decisions. It disregarded the Court's canons of statutory construction in reading the 1980 Federal Act or the 1991 Federal Micmac Act, canons which favor a recognition of the Band's inherent tribal rights, and concluded contrary to the federal common law developed by this Court that the1980 Federal Act, a statute which Congress did not intend to apply to the Micmacs, results in the *complete destruction of all the Band's inherent sovereign rights, including the right to make employment decisions free of federal or State regulation.* This ruling is at odds with the decisions of this Court on every score.

A. The Lower Court Wrongly Extinguished The Tribe's Inherent Sovereign Rights.

This Court has repeatedly made clear that Indian tribes occupy a unique status under our law. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851(1985).The various tribes "were once independent and sovereign nations," self-governing political communities which existed long before the coming of the Europeans or the formation of our Government. *United States v. Wheeler*, 435 U.S. 313, 322-323(1978). *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172-173 (1973). At one time, they exercised unlimited power over their members as well as those who were permitted to join their communities. *National Farmers Union Ins. Cos. v. Crow Tribe*, *supra*.

After Congress acted to protect the territorial and political rights of Indian tribes, this Court found that they no longer possessed the full attributes of sovereignty which they had previously exercised. *Wheeler*, 435 U.S. at 323 quoting *United States v. Kagama*, 118 U.S. 375, 381 (1886). However, this Court has consistently held that Indian tribes have not given up *all* their sovereign rights. Regardless of their incorporation as a society into the Nation, Indian tribes remain a "separate people, with the power of regulating their internal and social relations." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55(1978) quoting *Kagama*, 118 U.S. at 381-382. *Wheeler, supra*.

Until Congress provides otherwise, the tribes retain their right to self government, self sufficiency and economic development; and they possess the power to make their own substantive law concerning internal tribal matters, the very core of self government. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207(1987) ("retain[ed]... sovereignty"). *National Farmers Union Ins. Cos. v. Crow Tribe, supra*("retained...inherent powers"). *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-334(1983)("sovereignty retained by tribes").*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143(1980). *Wheeler*, 435 U.S. at 322-325("inherent powers of a limited sovereignty"). *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 172 n.8("residual Indian sovereignty"). Contrast *United States v. Lara*, 541 U.S. 193, 214-223(2004)(Thomas, J., concurring) (questioning the constitutional basis for co-existing, competing sovereign powers).

The majority below relied upon the1980 Federal Act to justify applying State law to the Band's discharge of its employees. But the only inherent right which Congress addressed in the 1980 Federal Act was the Band's sovereign immunity, restored to Band by the 1991 Federal Micmac Act. *Neither the 1980 Federal Act nor the 1991 Federal Micmac Act extinguish the Band's inherent tribal right of self-government*. In fact, in § 6(a) of the1991 Federal Micmac Act, Congress expressly recognized the Band as a sovereign political entity with all the rights appurtenant thereto. Section 7(a) of the Act expressly recognizes the Micmacs' right to organize and govern itself. This recognition by Congress of the Band's inherent tribal right of self-government is the "crucial 'backdrop'" against which any assertion of state authority over the Band must be assessed. *Mescalero*, 462 U.S. at 334. *Bracker, supra*. *Santa Clara Pueblo*, 436 U.S. at 60. *McClanahan, supra*. Yet the majority ignored this compelling precedent and applied an outdated general statute instead of a specific statute addressing the Micmacs' sovereign rights, destroying in the process the Band's inherent tribal rights to self government and to make its own employment decisions.

B. The Lower Court Refused To Apply the Canons of Construction In Interpreting the 1980 Federal Act Or the 1991 Federal Micmac Act.

Normal rules of construction do not apply when statutes involving Indians are in issue. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766(1985). *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 161-162(1973). Rooted in the unique trust relationship between the Federal Government and the Indians, the canons of construction provide that statutes addressing the extent of Indian rights are to be interpreted liberally in favor of the Indians with any ambiguities construed for their benefit, *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269(1992). *McClanahan*, 411 U.S. at 174. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631(1970). *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89(1918).

Furthermore, Congress' intent to extinguish inherent Indian tribal rights, especially those of self-government, must be explicit, plain and unambiguous and will not be lightly implied from the statutory provisions. *United States v. Dion***,** 476 U.S. 734, 738-739(1986).*County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-248 **(**1985). This is because Congress has consistently encouraged Indian self-government including its "overriding goal" of encouraging tribal self-sufficiency and economic development. *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 510-511(1991). *California v. Cabazon Band of Mission Indians*, 480 U.S. at 216-217 quoting *Mescalero*, 462 U.S. at 334-335 and citing *Bracker*, 448 U.S. at 143. "These are important federal

interests," *Cabazon*, 480 U.S. at 217, which the court of appeals was bound to accommodate in its construction of the 1980 Federal Act and the 1991 Micmac Act.

The lower court failed to do so. If it had properly applied this Court's canons of construction, it would have concluded that even if the 1980 Federal Act applies to the Band, its provisions do *not* explicitly or plainly divest the Micmacs of their inherent tribal sovereign right to govern their own internal affairs----including their own employment decisions----as required by the decisions of this Court. That the Passamaquoddy Tribe and the Penobscot Nation both bargained for and obtained from the State of Maine (and eventually from the federal authorities) express, specific legislation in both the 1980 Federal Act and the State Implementing Act giving them jurisdiction over their internal tribal affairs only restates what each of these tribes *already possessed under federal common law*. It was redundant legislation which restates the inherent tribal rights of these two tribes; it was not a stepping stone for the court below to conclude that this restatement meant that the Micmacs do *not* now retain under the federal common law their own inherent tribal rights to self government and to make their own employment decisions.

In addition, the 1980 Federal Act fails to reflect any specific intent by Congress to divest *any* Indian group, including the Micmacs, of their inherent tribal sovereign right of self government. Instead, there is only the general statement that all Indian groups will be subject to state law. However, consistent with this Court's canons, this is *not* enough to divest the Micmacs of their inherent tribal rights. As the Court has made clear, unless and until Congress explicitly carves out these inherent tribal rights in specific legislation and qualifies them----which the 1980 Federal Act has not done-----the Micmacs' inherent sovereign right to govern itself and to make its own employment decisions remains unhindered by the 1980 Federal Act.

Finally, if instead the 1991 Federal Micmac Act applies (the Micmacs submit that it does), there is no language whatsoever in this scheme from which to infer that Congress has divested the Micmacs of their inherent tribal authority to govern themselves or to make employment decisions. In fact, § 7(a) of the Act provides just the opposite: the Micmacs are given the opportunity to govern themselves, impliedly carrying with it the right to make their own employment decisions.

In this statutory analysis, the provisions of the State Implementing Act or the defunct State Micmac Act are ultimately immaterial for purposes of determining whether the Band's decision to discharge the tribe's employees is insulated from State regulations. State law cannot limit or qualify the tribe's inherent sovereignty to any greater extent than which Congress has already done through appropriate Federal legislation. *California v. Cabazon Band of Mission Indians*, 480 U.S. at 207. *Bracker*, 448 U.S. at 141-143. *Mescalero*, 462 U.S. at 334.*McClanahan*, 411 U.S. at 170-171. Thus State legislation, even if operative, could not possibly have divested the Micmacs of their inherent tribal authority to govern themselves *without Congress having already done so* in explicit legislation.

Since Congress has not done so, State law could not accomplish this result. As a matter of statutory law, employing all of the canons of construction attendant to legislation affecting Indians, the court below should have ruled that the Micmacs were not divested of their inherent tribal authority to govern their own affairs or to make their own employment decisions free of State

regulation. By ruling to the contrary, by wrongly resorting to the 1980 Federal Act to justify State regulation of the tribe's internal affairs, the court of appeals has substituted its will for the will of Congress and rendered two hundred years of Federal Indian jurisprudence a nullity.

Indeed, the court below continues to undercut Congress and this Court's decisions on the issue by again ruling that the 1980 Federal Act together with the State Implementing Act has stripped *all* Maine tribes of their inherent tribal rights rendering them fully subject to Maine law, except for the Passamaquoddy Tribe and the Penobscot Nation. See *State of Maine v. Johnson, et al.*, 2007 U.S. App. LEXIS 18761(1st Cir. 8/8/07).

C. As A Matter of Federal Common Law, Ignored By the Court Below, The Band Has The Inherent Right To Discharge Tribal Employees Arising From Consensual Employment Entirely On Tribal Lands.

In *Montana v. United States*, 450 U.S. 544, 564-567(1981), this Court held that Indian tribes have jurisdiction over nonmembers of the tribe for conduct on land not owned by the tribe but within its reservation boundaries when the nonmember has either entered into a consensual relationship with the tribe or when the nonmember has engaged in conduct which would harm tribal interests. *Id*. *Strate v. A-1 Contractors*, 520 U.S. 438, 446(1997). *A fortiori*, where as here the nonmembers work entirely on tribal land held in trust for the tribe, working only for the tribal government itself on issues solely affecting tribe members, the tribe has the inherent authority to make employment-related decisions about its employees including those discharging them for cause and determining the propriety of their workplace discrimination claims.

This inherent right has been repeatedly recognized in federal common law, is embodied in the Tribal Employment Rule and is founded on such inherent tribal authority as is necessary to protect tribal self-government and to control its internal affairs. The "consensual relationship" includes the employment here, one founded upon a contract where each of the employees through acceptance of the employment manual acceded to the remedies the tribe made available in the event of discharge or other work-related problem. Moreover, the employment took place entirely on tribal lands where "the federal interest in encouraging tribal self-government is at its strongest." *Bracker*, 448 U.S. at 144. *Williams v. Lee*, 358 U.S. 217, 223(1959). As a matter of federal common law developed by this Court and the lower federal courts, the majority erred in divesting the Band of the inherent tribal authority to decide the workplace discrimination claims of the respondents.

2. The Court of Appeals' Ruling Conflicts With The Predominant View Of Other Courts of Appeals That A Federally Recognized Indian Tribe, Unless Specifically Prohibited From Doing So By Congress, Possesses The Inherent Sovereign Right To Decide Workplace Discrimination Claims Brought Against It By Employees Arising From Their Consensual Employment On Tribal Lands.

As adverted to Part 1., *supra*, at least four courts of appeals have followed the Tribal Employment Rule: absent a "clear and plain" intent by Congress' otherwise, an Indian tribe's decision to discharge a tribal or reservation-based employee whose job is related to the tribe's self-

governance or its administration is an "intramural" matter exempt from federal or state regulation. *Snyder v. Navaho Nation, supra*. *Gallegos v. Jicarrella Apache Nation, supra*. *Taylor v. Alabama Intertribal Council Title IV, supra*. *Fond du Lac Heavy Equip. & Constr. Co., Inc., supra*.

The decision below rejects the Tribal Employment Rule, refuses to acknowledge any form of inherent tribal rights in the wake of the 1980 Federal Act and the State Implementing Act and has concluded that other than the Passamaquoddy Tribe and the Penobscot Nation, no other tribe in Maine has the inherent tribal sovereignty, the right of self government, to withstand regulation by the State of their internal tribal affairs. This is demonstrably wrong, exposes the various Maine tribes, including the Micmacs, to unjustified and meddlesome State intervention in internal tribal matters, invoking the jurisdiction of this Court to resolve this controversy in the Band's favor.

Conclusion.

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit, to vacate and reverse the judgment and remand the matter to the federal district court for the District of Maine with instructions that petitioner's cross motion for summary judgment be granted and that judgment enter enjoining the Commission from applying MHRA, MWPA or Title VII against the petitioner because under Federal Micmac Act or federal common law, the Band enjoys a statutory right of self-governance that prohibits the enforcement of State employment discrimination laws against the Micmacs; or provide the petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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