No. _______

IN THE

Supreme Court of the United States

NARRAGANSETT INDIAN TRIBE,
Petitioner,

v.

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS, *ET AL.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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September 21, 2006

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QUESTION PRESENTED

Whether, in direct conflict with precedents of this Court, other federal courts of appeals, and state supreme courts, the First Circuit erred in holding in a divided en banc opinion that a federal statute's conferral of "jurisdiction" over Indian lands, but not over the Tribe as sovereign, impliedly abrogates the tribal government's sovereign immunity and thus empowers a state judge to authorize state police to execute a search warrant against the Tribe, seize funds and property belonging to the tribal government, and arrest tribal officials acting in their official capacities.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all the parties appearing here and before the United States Court of Appeals for the First Circuit.

The petitioner here and plaintiff-appellant below is the Narragansett Indian Tribe, a federally recognized Indian Tribe.

The respondents here and defendants-appellees below are the State of Rhode Island and Providence Plantations; Donald L. Carcieri, in his official capacity as the Governor of Rhode Island; Patrick C. Lynch, in his official capacity as the Attorney General of Rhode Island; Colonel Steven M. Pare, in his official capacity as Superintendent of the Rhode Island State Police; Justices of the Rhode Island District and Superior Courts; the Town of Charlestown, Rhode Island; and the Charlestown Police Department.

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OPINIONS BELOW

The divided en banc opinion of the United States Court of Appeals for the First Circuit is reported at 449 F.3d 16 and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-53a. The First Circuit's panel opinion is reported at 407 F.3d 450 and is reprinted at Pet. App. 56a-84a. The District Court's opinion is reported at 296 F. Supp. 2d 153 and is reprinted at Pet. App. 85a-126a.

JURISDICTION

The Court of Appeals entered its judgment on May 24, 2006. Justice Souter extended the time to file this petition to September 21, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Rhode Island Indian Claims Settlement Act (the "Settlement Act"), Pub. L. No. 95-395, 92 Stat. 813 (1978), *codified as amended at* 25 U.S.C. §§ 1701-1716. Section 9 of the Act provides that the Narragansett Indian Tribe's "settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708(a). The entire Settlement Act is reproduced at Pet. App. 127a-138a.

STATEMENT OF THE CASE

The decision below arises out of the State of Rhode Island's unprecedented effort to resolve a tax dispute with the Narragansett Indian Tribe by executing a state search warrant to seize tribal property and funds from the Tribe's reservation and to arrest tribal leaders.

The Tribe and the State disagreed about whether a state tax applied to cigarettes sold by the tribal government at a tribal smoke shop on the Tribe's reservation. While other States and Tribes have resolved such disputes by adjudication or negotiated agreement, Rhode Island "chose the

confrontational alternative of a Rambo-like raid," Pet. App. 52a, sending 30 state troopers with a canine unit onto the Narragansetts' reservation to enforce a search warrant issued by a Rhode Island state court. In the ensuing altercation, the state troopers arrested eight individuals – including the Tribe's Chief Sachem, three Tribal Council members, and a federally deputized tribal law-enforcement officer – and confiscated property, documents, and funds belonging to the tribal government.

A panel of the First Circuit held unanimously that the Tribe's sovereign immunity and right to self-government precluded execution of the state court's search warrant against the Tribe and tribal government property. In a 4-to-2 decision, the First Circuit en banc reversed course, upholding the state seizure of tribal government property from the reservation. That en banc decision represents a sharp break with decisions of this Court and other courts of appeals construing federal statutory language that extends state civil and criminal laws and jurisdiction over Indian lands. This Court has definitively construed that language, which appears in numerous Indian-related statutes, as preserving, not eliminating, tribal sovereign immunity and thus as not authorizing the exercise of state jurisdiction over the Tribe itself. The First Circuit's unprecedented construction of ubiquitous statutory language will have an immediate and substantial destabilizing effect on tribal-state relations, inviting armed confrontation instead of negotiated agreements or orderly litigation to resolve jurisdictional disputes. Accordingly, the decision below warrants this Court's immediate review.

A. Factual Background

1. The Narragansett Indians descend from the original inhabitants of what is now Rhode Island and occupied an

aboriginal territory that included the lands near what is now Charlestown, Rhode Island. Pet. App. 3a, 93a & n.6.[1]

In 1880, after seeking for decades to force the Narragansetts to assimilate, the State passed An Act to Abolish the Tribal Authority and Tribal Relations of the Narragansett Tribe of Indians, R.I. Acts 1879-1880, c. 800. The Narragansetts, by then destitute, were forced to sell nearly all their remaining lands to the State for a fraction of their market value. Pet. App. 3a, 43a n.16, 93a. That sale violated the Nonintercourse Act, 25 U.S.C. § 177, because the State failed to secure the required federal approval. Pet. App. 3a, 43a n.16, 93a-94a & n.7.

Although nearly landless and officially "detribalized" by the State of Rhode Island, the Narragansetts maintained their traditional tribal government, with Sachems, Medicine Men and Women, a Tribal Council, Sub-Chiefs, Tribal Prophets, a War Chief, and Clan Mothers. And they began a century-long effort – ultimately successful – to regain part of their tribal lands.[2]

2. In 1975, the Tribe filed two suits in the U.S. District Court for the District of Rhode Island seeking the return of approximately 3,200 acres of land representing a small portion of the Tribe's aboriginal territory. Pet. App. 3a, 58a, 93a; *see also Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp.*, 418 F. Supp. 798 (D.R.I. 1976). Because the 1880 conveyance was void and the Indians' aboriginal title had never been lawfully extinguished, the Tribe held a claim of title superior to that of any landowner whose chain of title depended on the 1880 sale. Pet. App. 3a, 94a; *cf. Oneida Indian Nation of N.Y. v.*

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[1] *See* WILLIAM G. MCLOUGHLIN, RHODE ISLAND 3-49, 220-22 (1978).

[2] *See* Bureau of Indian Affairs, U.S. Dep't of the Interior, Memorandum re: Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgement of the Narragansett Indian Tribe of Rhode Island Pursuant to 25 C.F.R. § 83, at 4-18 (July 29, 1982).

County of Oneida, 414 U.S. 661 (1974). These lawsuits clouded the titles of hundreds of Charlestown landowners and depressed property values. Pet. App. 28a, 127a.

In February 1978, the State, the Town of Charlestown, the affected landowners, and the Tribe executed a "Settlement Agreement" (reproduced at Pet. App. 139a-144a), and both Congress and the Rhode Island General Assembly subsequently enacted the necessary enabling legislation. *See* Rhode Island Indian Claims Settlement Act (the "Settlement Act"), Pub. L. No. 95-395, 92 Stat. 813 (1978), *codified as amended at* 25 U.S.C. §§ 1701-1716, Pet. App. 127a-138a; Narragansett Indian Land Management Corporation Act, Pub. L. No. 1979, ch. 116, 1979 R.I. Pub. Laws 402, *codified as amended at* R.I. Gen. Laws §§ 37-18-1 to 37-18-15.

The principal object of the settlement was to resolve the Tribe's land claims and thereby clear title. Pet. App. 34a n.12. The settlement established 1,800 acres in and around Charlestown as the Tribe's "settlement lands." *Id.* at 4a, 58a-59a, 87a n.2, 139a-140a. It provided that the State would donate 900 acres (mostly swampland) to the Tribe and that another 900 acres would be purchased from private landowners with $3.5 million in federal funds. *Id.* at 95a, 129a, 135a, 139a-140a. In exchange, the Tribe relinquished its land claims and dismissed its lawsuits. *Id.* at 127a-144a.

The settlement also gave the State jurisdiction over the settlement lands. *Id.* at 135a-136a, 142a. In so doing, both the Settlement Act and the Settlement Agreement used language that this Court had construed as preserving the Tribe's right to self-government and its sovereign immunity from state judicial proceedings. *Id.* at 31a-34a, 135a, 142a. The Settlement Act thus provides that "the settlement lands shall be *subject to the civil and criminal laws and jurisdiction* of the State of Rhode Island." *Id.* at 135a (25 U.S.C. § 1708(a)) (emphasis added). And the Settlement

Agreement states that "all laws of the State of Rhode Island shall be *in full force and effect* on the Settlement Lands, including but not limited to state and local building, fire and safety codes." *Id*. at 142a (emphasis added).

These phrases echoed the virtually identical language in "Public Law 280," Pub. L. No. 83-280, §§ 2, 4, 67 Stat. 588, 588-90 (1953), *codified as amended at* 25 U.S.C. §§ 1321-1322, 28 U.S.C. § 1360, the landmark federal statute enacted in 1953 that authorizes certain States to exercise civil and criminal jurisdiction over specified Indian lands "to the same extent that such State has jurisdiction" elsewhere within the State, and provides that state civil and criminal laws "shall have the same force and effect" in Indian country as elsewhere in the State. 25 U.S.C. §§ 1321(a), 1322(a); 28 U.S.C. § 1360(a); *see* Pet. App. 31a-36a.

This Court had definitively interpreted Public Law 280 in 1976 – just two years before the Tribe executed the Settlement Agreement and Congress enacted the Settlement Act. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Court held that Public Law 280's grant of civil jurisdiction is limited to "jurisdiction over private civil litigation involving reservation Indians in state court," and that "there is notably absent [from Public Law 280] any conferral of state jurisdiction over the tribes themselves." *Id.* at 385, 389. The next year, in *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977), the Court reiterated the long-standing principle that "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe," and it refused to permit state court jurisdiction over a Tribe even in a case properly before the state court as to individual tribal members. *Id.* at 172-73. Soon thereafter, this Court reaffirmed the principle that a waiver of tribal sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citations omitted).

Neither the Settlement Act nor the Settlement Agreement, nor their legislative or negotiating histories, contained any suggestion of an intent to depart from this Court's teachings, nor did they even hint that the settlement would abrogate or waive the Tribe's immunity so as to allow a state court to exercise jurisdiction over the Tribe itself. *See id.* at 34a & n.13, 47a, 127a-144a.

3. Following the Settlement Act, the United States formally recognized the Tribe and took the settlement lands into trust for the Tribe, entitling the Tribe to the same "immunities and privileges" as other federally recognized Tribes and recognizing it as a self-governing Tribe with a duly elected tribal government. *See* 48 Fed. Reg. 6177-78 (1983); *see also* 25 C.F.R. § 83.2. Today, the Tribe has 2,400 enrolled members, most of whom live on or near the settlement lands. An elected nine-member Tribal Council serves as the Tribe's governing body, a Chief Sachem heads the Tribe's executive branch, and a non-elective Medicine Man serves as a spiritual advisor. The Tribe provides a full battery of local governmental services, including law enforcement by the Narragansett Tribal Police Department and medical care by the Narragansett Indian Health Center. *See generally* TILLER'S GUIDE TO INDIAN COUNTRY 911-12 (Veronica E. Velarde Tiller ed., 2005 ed.).

4. While many of its governmental programs depend at least in part on federal funding, the Tribe has sought to build its own revenue base and to become increasingly self-sufficient. Consistent with this effort, in 2003 the Narragansett tribal government passed a resolution establishing a tribal smoke shop – wholly owned and operated by the Tribe and situated on tribal lands – to sell cigarettes to members and nonmembers alike. Pet. App. 145a-146a, 156a.

After consulting with outside counsel, the tribal government concluded that the state cigarette tax did not

apply to cigarettes sold at the Tribe's smoke shop because the tax's legal incidence falls on the Tribe and is thus preempted by federal law. *Id.* at 60a-61a, 64a-68a. Although the state statute "conclusively presume[s]" that the cigarette tax is "a direct tax on the retail consumer," R.I. Gen. Laws § 44-20-53, long-standing Rhode Island precedent established that the legal incidence falls instead on the distributor or dealer (here, the Tribe). *See Daniels Tobacco Co. v. Norberg*, 335 A.2d 636, 638 (R.I. 1975). This Court has previously deemed conclusive a state supreme court's "own definitive determination as to [a state tax's] operating incidence." *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975).

5. The State adopted a contrary view of the tax's legal incidence, and it set out to enforce the tax against the Tribe. Pet. App. 61a. Although the Governor and the Attorney General had known for weeks that the Tribe was planning to sell cigarettes at its smoke shop without collecting the state tax, *id.* at 40a, the State chose not to resolve the dispute by any of the peaceable means at its disposal. *Cf. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) (outlining alternatives). Instead, the State brought to bear the full brunt of its criminal law-enforcement apparatus against the Tribe.[3]

6. On Saturday July 12, 2003, the day of the smoke shop's opening, a state-court judge issued a search warrant authorizing the state police to search the shop and to seize not only the Tribe's cigarettes, but also any "United States Currency, paperwork, items, computers [and] documents showing ownership or control of the premises." Pet. App. 151a-152a. The warrant listed as the "[n]ame of the store owner, or keeper," Matthew Thomas, the Tribe's Chief Sachem. *Id.* at 151a.

[3] Under Rhode Island law, selling untaxed cigarettes is a misdemeanor; the State is entitled to seize (and resell) such cigarettes as contraband. *See* R.I. Gen. Laws §§ 44-20-33 to 44-20-38; Pet. App. 146a.

On Monday afternoon, July 14, 2003, the state police executed the state warrant. *Id.* at 44a. No fewer than 30 state troopers marched in formation toward the smoke shop, where they were met by tribal policemen and officeholders vowing to resist what they saw as an entirely illegitimate assault on the Tribe's sovereignty. *Id.*

The result was a violent confrontation between the state troopers and the tribal officers and members that was captured on videotape and received widespread media coverage. By the end of the raid, the state police had arrested eight Narragansett tribal members – including Chief Sachem Thomas, three Tribal Councilmen, and a federally deputized tribal law-enforcement officer – and eight people required hospitalization for injuries. *Id.* at 147a. State police also confiscated the Tribe's cigarettes, as well as $900 from the shop's cash register and various tribal documents. *Id.* at 61a.[4] State criminal proceedings arising from the raid have been stayed pending resolution of this case.

B. District Court Proceedings

Shortly after the raid, the Tribe sued in the U.S. District Court for the District of Rhode Island, seeking a declaration first, that the legal incidence of the Rhode Island cigarette tax fell on the Tribe and that application of the tax to the Tribe

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[4] Members of Congress condemned the State's actions. Senator Ben Nighthorse Campbell, Chairman of the Senate Committee on Indian Affairs, stated that "[a]nyone who witnessed the episode in videotape – as I have – surely was sickened and profoundly disappointed at the tactics used by the state in its dispute with the tribe regarding sales of tobacco on the tribe's lands." Letter from Sen. Campbell to Att'y Gen. John Ashcroft (July 23, 2003); *see also* Letter from Richard W. Pombo, Chairman of the House Committee on Resources, to Att'y Gen. Ashcroft (July 17, 2003) (noting that the place to resolve the "serious, complex, and legitimate legal questions" implicated by the tax dispute "is in a court of law, not in an aggressive raid that risks violent confrontation on tribal land where tribal members, state and tribal law enforcement officers, and innocent bystanders are all put needlessly in harm's way").

was thus foreclosed by *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995), and second, that the Tribe's sovereign immunity precluded the State from executing a search warrant to seize tribal property on tribal lands. Pet. App. 89a. After submitting the case on stipulated facts, *id.* at 145a-148a, the parties cross-moved for summary judgment. *Id.* at 62a, 86a, 90a.

The District Court granted summary judgment to the State. *Id.* at 86a, 126a. Although recognizing that the Tribe had a good-faith argument based on the Rhode Island Supreme Court's decision in *Daniels*, the District Court held as a matter of federal preemption law that the legal incidence of the tax fell on the non-Indian consumer rather than on the Tribe. *Id.* at 98a-108a. The District Court then concluded that the Tribe's sovereign immunity did not bar the State from enforcing the cigarette tax, even against the Tribe itself. *Id.* at 108a-125a. In particular, the court held that the Settlement Act and the Settlement Agreement supplied authority for the state troopers to execute the state court's warrant to seize tribal property on tribal lands. *Id.* at 125a-126a.

C. First Circuit Proceedings

On appeal, a panel of the First Circuit affirmed in part and reversed in part. Pet. App. 84a. The panel accepted the District Court's determination – as does the Tribe for purposes of this petition – that the legal incidence of the tax falls on the consumer and that the Tribe therefore must comply with the State's tax scheme when selling cigarettes to non-Indian purchasers (though not to tribal members). *Id.* at 64a-72a. The panel disagreed, however, that the State could enforce the tax scheme by executing a search warrant against the Tribe. *Id.* at 72a-84a. In the panel's view, neither the Settlement Act nor the Settlement Agreement abrogated or waived the Tribe's sovereign immunity. *Id.* at 73a-75a.

The panel relied on this Court's opinion in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), which stated unambiguously that even where a State "may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid taxes. . . . There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Id.* at 755, *quoted in* Pet. App. 83a. The panel thus held that the tribal government's sovereign immunity barred Rhode Island from enforcing "the criminal provisions of its cigarette tax laws by executing a search warrant against the Tribal government's Smoke Shop, forcibly entering the Shop and seizing the Tribe's stock of [untaxed] cigarettes, and arresting tribal officials who were acting in their official capacity." Pet. App. 84a.

In response to the State's petition for rehearing, the First Circuit withdrew parts of the panel opinion and voted to rehear en banc "whether, to what extent, and in what manner Rhode Island may enforce its civil and criminal laws with respect to the operation of the Smoke Shop by the Narragansett Indian Tribe." *Id.* at 54a. In a 4-to-2 decision, the en banc court disagreed with the panel's conclusion on the enforcement questions and therefore affirmed the District Court's judgment in favor of the State. *Id.* at 2a, 26a.

The en banc majority focused on the language in the Settlement Act and the Settlement Agreement providing, respectively, that the settlement lands are "subject to the civil and criminal laws and jurisdiction of the State of Rhode Island," and that "all laws of the State of Rhode Island shall be in full force and effect on the settlement lands." In the majority's view, that language eliminated the Tribe's immunity, subjecting the Tribe to state-court jurisdiction. Pet. App. 9a-10a, 15a-18a. The majority acknowledged that this Court had squarely held – in *Bryan*, 426 U.S. at 389; *Puyallup Tribe*, 433 U.S. at 170-73; and *Three Affiliated*

Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 890-92 (1986) – that virtually identical language in Public Law 280 was *insufficient* to abrogate tribal sovereign immunity and did not confer jurisdiction over the Tribe. Pet. App. 19a-23a, 21a n.7. The majority believed, however, that "the historical context and purpose of Public Law 280 are so completely different from those of the Settlement Act that, despite some linguistic coincidences, the [Supreme] Court's interpretation of that law has no bearing on the issues before us." *Id.* at 19a.

The majority also rejected the argument in the panel opinion and the dissent that a sovereign such as the Tribe might be subject to state laws but still retain its immunity from state judicial proceedings to enforce those laws. Indeed, the majority expressly overruled First Circuit precedent that had – consistent with case law from this Court and other courts of appeals – adopted that precise distinction.

Judge Lipez and Judge Torruella dissented. In Judge Lipez's view, the majority's conclusion that the operative language of the Act and the Agreement eliminated tribal immunity from state-court jurisdiction was directly at odds with unambiguous precedent from this Court. *Id.* at 30a-36a. Judge Lipez underscored that "Congress has used this language for half a century to confer state jurisdiction over individual Indians on tribal lands" and that, both before and since the Narragansetts' 1978 settlement, "the Supreme Court consistently has held that such language – however categorically stated – does not waive or abrogate tribal sovereign immunity." *Id.* at 31a.

Judge Torruella joined Judge Lipez's dissent and also wrote separately to emphasize that the majority's approach "ignores Supreme Court precedent – some of which is 150 years old," *id.* at 42a – holding that "a waiver or abrogation of sovereign immunity must be unequivocal and explicit." *Id.* (citing *Santa Clara Pueblo*, 436 U.S. at 58).

REASONS FOR GRANTING THE PETITION

For more than half a century in a variety of settings, Congress has used virtually the same statutory language to confer state jurisdiction over civil and criminal matters on Indian lands. That language – allocating to a State civil or criminal "jurisdiction" and providing that state laws will have "force and effect" on the reservation – has been construed definitively by this Court to render state law generally applicable to tribal members on reservation lands but not to abrogate tribal sovereign immunity and thus not to subject the Tribe itself to state jurisdiction. In the splintered en banc decision below, a 4-to-2 majority of the First Circuit held that this same language when used by Congress and the parties in the Rhode Island Indian Claims Settlement Act and the Settlement Agreement impliedly subjected the Tribe in its sovereign capacity to state judicial process.

The decision below squarely conflicts with decisions of this Court, principally *Bryan v. Itasca County*, 426 U.S. 373 (1976), *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977), and *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986). Those cases establish that when Congress confers "jurisdiction" and provides for state laws to have "force and effect" on Indian lands, it allows the State to exercise jurisdiction over tribal members and others on those lands – for example to criminally prosecute (and in the process serve search warrants upon) individual tribal members on those lands – but does not subject the Tribe itself to state judicial process. The decision below also conflicts with countless decisions of the federal courts of appeals and state appellate courts – including the highest courts of Alaska, Florida, Iowa, and Minnesota – holding that a congressional grant of jurisdiction to a State over Indian lands does *not* abrogate tribal sovereign immunity and therefore does not authorize state courts to exercise jurisdiction over an Indian Tribe.

Indeed, to conclude otherwise, the majority was forced to reject the well-settled distinction between whether a tribe is subject to state substantive law and whether that law may be enforced against the Tribe through state judicial process. In so doing, the majority created a direct conflict with this Court's decisions in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), and with decisions of the Second and Eleventh Circuits, holding that subjecting a Tribe to state or federal substantive law does not abrogate tribal sovereign immunity. That same principle is equally fundamental in this Court's jurisprudence outside of Indian law. A sovereign can be subject to the substantive laws of another sovereign while maintaining its immunity from suit. *See Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001); *cf. United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992).

Review by this Court is of the utmost importance. The Rhode Island Settlement Act is seminal legislation that served as the model for almost every other land-claims settlement act and for other similar legislation – nearly a dozen federal statutes in all. *See, e.g.*, 25 U.S.C. §§ 1300b-11, 1300f(c), 1300g-4(f), 1741, 1755, 1771g, 1772, 1773, 1775d(a). The decision below is thus of extraordinary importance throughout Indian country. That is particularly so given the breadth of the First Circuit's holding that the Settlement Act abrogated the tribal government's immunity from suit, subjecting the Tribe to the State's "entire armamentarium of legal means for redressing noncompliance." Pet. App. 18a. The First Circuit has thus placed at risk Tribes' control over a broad range of tribal programs and leaves the Narragansetts and other Tribes subordinate to the States. This unprecedented result denies Indian governments the dignity to which they are entitled "[a]s separate sovereigns pre-existing the Constitution,"

Santa Clara Pueblo, 436 U.S. at 56, "unduly intru[ding] on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws," *Three Affiliated Tribes*, 476 U.S. at 891. Sovereign immunity is a "necessary corollary to Indian sovereignty and self-governance," *id*. at 890, and is as essential to the dignity of Indian Tribes, as it is to the States. *Cf. Federal Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.").

Moreover, even as to the precise facts of this case – state enforcement of a search warrant issued by a state court against a tribal government – the issues presented are critically important in Indian country, as the First Circuit's decision threatens to transform the rules governing tribal-state relations in areas of mutual concern. This Court itself recognized the importance of these issues when it granted certiorari in *Inyo County v. Paiute Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701 (2003), a case that likewise involved a tribal challenge to a State's efforts to enforce a search warrant against a Tribe and tribal government property.

The decision below also is wrong. While Congress has the power to abrogate tribal sovereign immunity, an abrogation will be found only if Congress has "'unequivocally' express[ed] that purpose." *C&L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe of Okla*., 532 U.S. 411, 418 (2001) (quoting *Santa Clara Pueblo*, 436 U.S. at 58). Nothing in the Settlement Act purports to abrogate the Tribe's sovereign immunity.

Nor was the First Circuit correct in its apparent belief that its result was necessary to give effect to the state tax laws at issue here. To the contrary, this Court repeatedly has denied that States have any right to the most convenient method for

enforcing a tax directly against a Tribe, and it has instead enumerated alternative remedies that provide "a mutually satisfactory regime for the collection of this sort of tax." *Citizen Band Potawatomi*, 498 U.S. at 514.

In short, this Court has set out a clear formula for conferring state jurisdiction over tribal members on tribal lands without subjecting the Tribe itself to state control or abrogating tribal sovereign immunity, and Congress in the Settlement Act followed that formula to the letter. The First Circuit's unprecedented decision to reinterpret that formula is indefensible. Moreover, by giving States unchecked power over tribal governments, the decision eviscerates tribal sovereignty and encourages confrontation rather than negotiation or litigation as the mechanism for resolving good-faith disputes between States and Tribes. Review by this Court is thus urgently needed.

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS HOLDING THAT A CONGRESSIONAL GRANT OF CIVIL OR CRIMINAL "JURISDICTION" OVER INDIAN LANDS DOES NOT ABROGATE A TRIBE'S SOVEREIGN IMMUNITY.

The extent of state jurisdiction over Indians and Indian lands is an issue Congress has addressed frequently over the past 50 years. Broadly speaking, the issue has arisen in three contexts. *First*, under "Public Law 280," Congress in 1953 gave several States extensive civil and criminal jurisdiction over Indian lands, and other States later assumed jurisdiction as permitted in the statute. *Second*, Congress has passed legislation approving land-claims settlements that set aside certain lands for a Tribe and conferring state jurisdiction over that land in return for the Tribe's relinquishment of its land claims. *Third*, Congress has resolved claims for tribal recognition by providing a Tribe with federal recognition and a reservation and conferring some level of jurisdiction upon

the State. In all three settings, the congressional purpose of the jurisdictional provisions is the same: to grant jurisdiction over Indian lands that the State would otherwise lack.[5]

The language that Congress has used to grant jurisdiction in these contexts has been remarkably constant: The State is given civil or criminal "jurisdiction" over Indian land, and often Congress provides that state laws will have "force and effect" on that land. The Rhode Island Settlement Act – which was the first of the land-claims settlement acts – is typical of the later ones and tracks the language of Public Law 280: 25 U.S.C. § 1708(a) provides that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island," and the Settlement Agreement between the State and the Tribe provides that "all laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands." Pet. App. 135a, 142a. The First Circuit's conclusion that this language abrogates tribal sovereign immunity and thus subjects the Tribe to state law conflicts directly with decisions of this Court, other federal courts of appeals, and state appellate courts.

A. The Decision Below Is at Odds with a Wealth of Decisions Construing Indistinguishable Language.

This Court has definitively construed the relevant statutory language in cases arising under Public Law 280, which grants certain States civil and criminal "jurisdiction" and provides that their laws will have the same "force and effect" on Indian lands as those laws have elsewhere. In

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[5] As this Court has often held, absent congressional authorization, States lack criminal jurisdiction over offenses committed by or against Indians on Indian lands, *see Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979); *Williams v. Lee*, 358 U.S. 217, 220 & n.5 (1959); *Williams v. United States*, 327 U.S. 711, 714 (1946), and generally lack civil jurisdiction over Indians on Indian lands, *see McClanahan v. Tax Comm'n of Arizona*, 411 U.S. 164, 171, 177-78 (1973); *Williams v. Lee*, 358 U.S. at 219-20.

Bryan v. Itasca County, a case decided just two years before Congress passed the Settlement Act, this Court expressly stated that Public Law 280's operative language did not confer state jurisdiction over Tribes themselves. *Bryan*, 426 U.S. at 389. Refusing to risk "the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations,'" the Court distinguished between jurisdiction over individual Indians on tribal lands and jurisdiction over the Tribe itself, concluding that "there is notably absent [in Public Law 280] any conferral of state jurisdiction over the tribes themselves." *Id*. at 388-89 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). *Bryan* contrasted Public Law 280 with other contemporaneously enacted statutes that had terminated the federal recognition of certain Tribes and in so doing had *expressly* extended state jurisdiction over the Tribes themselves, holding that these statutes demonstrated that if Congress had intended Public Law 280 to have such an effect "it would have expressly said so." *Id*. at 389-90.

The following year, in *Puyallup Tribe*, the Court considered whether a state-court action to enjoin violations of state law in connection with off-reservation fishing activities, "analogous to prosecution of individual Indians for crimes committed off reservation lands," could proceed against the Tribe as well as against individual tribal members. 433 U.S. at 171. The Court held that, "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over recognized Indian tribe," and that those portions of the state-court order that involved relief against the Tribe "must be vacated in order to honor the Tribe's valid claim of immunity." *Id.* at 172-73.

In *Three Affiliated Tribes*, the Court reaffirmed the core holding in *Bryan*, stating that "[w]e have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity, nor

found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance," confirming that "there is notably absent [in Public Law 280] any conferral of state jurisdiction over the tribes themselves." 476 U.S. at 892 (quoting *Bryan*, 426 U.S. at 389). Recognizing that tribal sovereign immunity is a "necessary corollary to Indian sovereignty and self-governance," the Court held that "in the absence of Federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." *Id.* at 890-91. The First Circuit's decision construing the indistinguishable language of the Settlement Act conflicts directly with these cases.

The decision likewise conflicts with the interpretation of this language given by every lower court to consider the question. For example, in *California ex rel. California Department of Fish & Game v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979), the Ninth Circuit held that Public Law 280's grant of criminal jurisdiction does not abrogate tribal immunity because "[n]either the express terms of [Public Law 280], nor the Congressional history of the statute, reveal any intention by Congress for it to serve as a waiver of a tribe's sovereign immunity." *Id.* at 1156 (footnote omitted). The highest courts in Alaska, Florida, Iowa, and Minnesota have all reached the same conclusion. *See Atkinson v. Haldane*, 569 P.2d 151, 167 (Alaska 1977); *Houghtaling v. Seminole Tribe of Fla.*, 611 So. 2d 1235, 1238-39 (Fla. 1993); *Gross v. Omaha Tribe of Neb.*, 601 N.W.2d 82, 83 (Iowa 1999); *Meier v. Sac & Fox Indian Tribe of Miss. in Iowa*, 476 N.W.2d 61, 63-64 (Iowa 1991); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 289 (Minn. 1996); *see also Long v. Chemehuevi Indian Reservation*, 115 Cal. App. 3d 853, 856-58 (1981).

The decision below likewise conflicts with state-court decisions construing legislation providing for federal recognition of a Tribe. In *Silva v. Ysleta del Sur Pueblo*, 28

S.W.3d 122 (Tex. App.-El Paso 2000), for example, the court rejected the argument that Congress had abrogated the Tribe's sovereign immunity by passing 25 U.S.C. § 1300g-4(f), which extends state civil and criminal jurisdiction "within the boundaries of such reservation as if such state had assumed such jurisdiction with the consent of the tribe under [Public Law 280]." 28 S.W.3d at 124-25 (internal quotation marks omitted) (citing *Bryan* and *Three Affiliated Tribes*); *see also Val/Del, Inc. v. Superior Court*, 703 P.2d 502, 507-08 (Ariz. Ct. App. 1985) (rejecting contention that grant of federal recognition to the Pascua Yaqui Tribe and extension of state jurisdiction over Pascua Yaqui lands in 25 U.S.C. § 1300f abrogated the Tribe's sovereign immunity).

Indeed, prior to the decision below, the First Circuit itself had squarely held in *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993), that neither the Settlement Act nor the Settlement Agreement had accomplished "a waiver or abrogation of the Tribe's sovereign immunity." *Id.* at 16. The court in *Maynard* unanimously held that there was "no provision or source which even alludes to the concept of tribal sovereign immunity, much less to its relinquishment," and it noted that the Narragansetts' settlement of land claims "neither says nor implies anything about a surrender of its sovereign immunity from suit relating to its territorial or extraterritorial actions." *Id.* In the decision below, without citing any intervening statutes or new evidence, the First Circuit expressly "disavow[ed]" *Maynard*. Pet. App. 23a.[6]

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[6] The majority weakly suggested that *Maynard* might be distinguishable. *See id.* at 22a-23a & n.8; *see also id.* at 36a-37a. But *Maynard* is unambiguous, *see* Pet. App. 35a-36a (Lipez, J., dissenting), and other First Circuit panels had read *Maynard* to mean what it said. For example, in *Narragansett Tribe v. Guilbert*, 989 F.2d 484, 1993 WL 88161 (1st Cir. 1993) (unpublished table decision), then-Chief Judge Breyer explained that *Maynard* held that "the Narragansett Indian Tribe possesses sovereign immunity, despite Congress's enactment of the Rhode Island Indian Claims Settlement Act." *Id.* at *1.

B. The First Circuit's Decision Directly Conflicts with Numerous Decisions Holding that the Applicability of Substantive Law to a Sovereign Does Not Ipso Facto Abrogate that Sovereign's Immunity from Judicial Process.

In ruling that the Settlement Act abrogates tribal sovereign immunity by granting jurisdiction to the State to apply its substantive laws to the settlement lands, the First Circuit also expressly rejected the well-settled distinction between whether state law *applies* to a Tribe and whether a State can *enforce* that law through judicial process directed at a tribal government and tribal government property. *See* Pet. App. 13a-14a. Indeed, the court below began its analysis by expressly overruling its prior decision in *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 68 (1st Cir. 2005), which had recognized exactly that distinction. Pet. App. 14a. The First Circuit's novel understanding of sovereign immunity was critical to its ruling: The language making state law and jurisdiction applicable to the Narragansetts' settlement lands provided the only basis for the court of appeals' elimination of the Tribe's sovereign immunity.

The First Circuit's decision in this regard is flatly at odds with decisions of this Court and other courts of appeals. In *Kiowa Tribe*, for example, this Court considered whether sovereign immunity barred a suit in state court for breach of contract involving off-reservation conduct. 523 U.S. at 754. While recognizing that States generally may apply their substantive laws to tribal activities occurring outside Indian reservation lands, the Court held that "[t]o say state substantive laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. . . . *There is a difference between the right to demand compliance with state laws and the means available to enforce them.*" *Id.* at 755 (emphasis added). Similarly, in *Citizen Band Potawatomi*, the Court made clear that,

although "tribal sellers are obliged to collect and remit state taxes on sales to nonmembers at Indian smokeshops on reservation lands," sovereign immunity barred the State from enforcing that right by suing the Tribe directly. 498 U.S. at 513-14.

Relying on *Kiowa Tribe*, other federal courts of appeals have expressly held that the applicability of substantive law to a Tribe does not abrogate the Tribe's sovereign immunity from suit to enforce that law. In *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999), the Eleventh Circuit held that under the principle of *Kiowa Tribe* "whether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions." *Id.* at 1130. Applying this distinction, the court ruled that while Title III of the Americans With Disabilities Act applied to the Tribe, tribal sovereign immunity barred an action against the Tribe for violating the Act. *Id.* at 1130-35. Similarly, the Second Circuit held in *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir. 2000), applying the Copyright Act, that "the fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it." *Id.* at 357; *see also Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 85 n.5 (2d Cir. 2001); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir.), *cert. denied*, 543 U.S. 966 (2004).

This same principle is equally important in this Court's jurisprudence outside of Indian law. Although Congress may enact federal laws that apply to the States, whether state sovereign immunity has been validly waived to permit enforcement of those laws is a separate question. *See, e.g.*, *Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. at 374 n.9. And this Court has similarly concluded without exception that grants of "jurisdiction" to courts do not abrogate sovereign immunity, whether that immunity belongs to States, the United States, or Tribes. *See Nordic Village*,

503 U.S. at 38; *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 776 (1991); *see also Mack v. United States*, 814 F.2d 120, 122-23 (2d Cir. 1987); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967).

In sum, the First Circuit's holding that the applicability of substantive law to a Tribe also abrogates its sovereign immunity squarely conflicts with decisions of this Court and of the Second and Eleventh Circuits. Review by this Court is necessary to resolve this conflict and to correct a serious error of federal law on a question that is fundamental in both this Court's Indian-law jurisprudence and its jurisprudence outside of Indian law.

C. "Idiosyncratic" Features of the Settlement Do Not Support the First Circuit's Decision.

Although the First Circuit purported to focus on "idiosyncratic" features of the Settlement Act and the Settlement Agreement, Pet. App. 10a; *accord id.* at 17a n.5, there is no doubt that its decision squarely conflicts with the cases described above.

1. The Court of Appeals focused on the term "jurisdiction" and concluded that "if the reference to 'jurisdiction' in section 1708(a) is to have any meaning, it must effectuate some limitation on the Tribe's sovereign immunity." Pet. App. 16a-17a. That conclusion is plainly wrong.

First, the majority's logic is directly at odds with *Bryan* and *Three Affiliated Tribes*, where this Court emphatically rejected the notion that the unadorned reference to state "jurisdiction" in federal legislation would divest a Tribe of its sovereign immunity. *See Bryan*, 426 U.S. at 388-90; *Three Affiliated Tribes*, 476 U.S. at 890-92. Thus, whatever the word "jurisdiction" means in the statute, it cannot mean that tribal sovereign immunity is abrogated. Indeed, since *Bryan*,

no other court has *ever* held that the assignment of "jurisdiction" abrogates sovereign immunity. The First Circuit's stubborn conclusion to the contrary flatly contradicts *Bryan* and *Three Affiliated Tribes*.

Second, the First Circuit is wrong that reading the term "jurisdiction" to grant jurisdiction without waiving tribal sovereign immunity would render the term "mere surplusage." Pet. App. 16a. It is beyond dispute that States generally lack jurisdiction over suits involving Indians that arise on Indian lands, *see supra* note 5 – indeed, the First Circuit recognized as much later in its opinion. Pet. App. 20a. Against that backdrop, the grant of "jurisdiction" in the Settlement Act – like those in Public Law 280, the land-claims settlement acts, and the federal-recognition acts – simply provides state courts with jurisdiction over activities on Indian lands. In short, Section 1708(a) has the same effect as Public Law 280: It grants jurisdiction that the State would otherwise lack. *Cf. Three Affiliated Tribes*, 476 U.S. at 879. The fear that the statutory term would be superfluous thus provides no reason to disregard *Bryan* and its progeny. *See* Pet. App. 37a-39a.

2. A second alleged "idiosyncrasy" on which the Court of Appeals relied was the Settlement Agreement's provision that "all laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands." Pet. App. 10a. But that provision cannot possibly serve to *distinguish* this Court's decision in *Bryan* because, as the Court noted in *Bryan*, Public Law 280 provides that state laws "'shall have the same force and effect within such Indian country as they have elsewhere within the State.'" 426 U.S. at 377 (quoting 28 U.S.C. § 1360(a)). It is precisely the First Circuit's interpretation of that language in the face of *Bryan* that creates the conflict.

Nor is the analysis altered by the First Circuit's observation that the Settlement Agreement "did not

materialize out of thin air; it followed intense negotiations and led to the Tribe's receipt of over 1800 acres of land." Pet. App. 9a. *First*, although it cited the "intense negotiations," *id.*, the court never claimed that there was even a mention of tribal sovereign immunity in those negotiations, and indeed no party has ever asserted that there was. Thus, the negotiations do not render this case "idiosyncratic."

Second, that the Agreement resulted from voluntary negotiations cannot eliminate the split. Indeed, at the time *Bryan* was decided, Public Law 280 also required a Tribe's voluntary agreement to state jurisdiction. *Bryan*, 426 U.S. at 386. But nothing in *Bryan* suggests that such agreement would waive tribal sovereign immunity. The "voluntariness" of the State's assumption of jurisdiction is thus not a basis to distinguish Public Law 280 or to eliminate the direct conflict.

Third, the distinction offered by the First Circuit makes no sense. Even if the jurisdiction were by "mutual consent," Pet. App. 16a, 20a, that begs the question of what the parties were consenting to. The inescapable fact is that, a mere two years after *Bryan* was decided, the parties consented to the precise language construed by this Court in *Bryan*. The First Circuit had no license to ignore this Court's unambiguous definition of that language.[7]

The conflict presented here is thus direct and unavoidable.

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[7] The First Circuit also distinguished Section 1708 from Public Law 280 as construed in *Bryan* by relying on its prior decision in *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694-97 (1st Cir. 1994), which held that Section 1708, unlike Public Law 280, conferred regulatory jurisdiction upon Rhode Island over the Tribe's lands. Pet. App. 21a. But even if this conclusion were correct – which the Tribe does not concede – Section 1708 would at most authorize the State to enforce its regulatory laws against tribal members on reservation lands, not against the Tribe itself in the operation of its own government.

II. THE ISSUE PRESENTED IS OF THE UTMOST IMPORTANCE.

Review is warranted now because the issue presented is critically important not just in Rhode Island but throughout Indian country. As Judge Lipez noted in his dissent, the "history of litigation and legislation outlined in the majority opinion is prototypical of that involving several tribes, especially in the East but also in parts of the West," and thus "[w]hat the majority says about sovereign immunity in this case has implications for the application of sovereign immunity in these similar contexts." Pet. App. 27a-28a.

Judge Lipez was correct. Congress understood that the Rhode Island Act was "the first legislation submitted to the Congress which would resolve the land claims of an Indian Tribe arising under the Trade and Intercourse Act of 1790 . . . on the basis of an out-of-court settlement negotiated between the Tribe and the affected parties." H.R. Rep. No. 95-1453, at 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1948, 1951. Congress intended the bill to be "precedential" and a "landmark for the resolution of other land claims by eastern tribes under the Trade and Intercourse Act." *Id.* at 7-8. And indeed, many land-claims settlement acts contain similar language. *See, e.g.*, Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, § 6, 97 Stat. 851, 855 (1983) (codified at 25 U.S.C. § 1755) ("the reservation of the Tribe . . . [is] subject to State jurisdiction to the maximum extent provided in" Public Law 280); Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, § 9, 101 Stat. 704, 709 (codified at 25 U.S.C. § 1771g) ("settlement lands . . . shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the Town of Gay Head, Massachusetts"); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. No. 103-377, § 6, 108 Stat. 3501, 3505 (codified at 25 U.S.C. § 1775d(a))

(authorizing "assumption of jurisdiction of the State of Connecticut over criminal offenses committed by or against Indians on the reservation . . . to the same extent as the State has jurisdiction over such offenses committed elsewhere within the State," and providing that "[t]he criminal laws of the State shall have the same force within such reservation . . . as such laws have elsewhere within the State"). All reservations subject to these acts could be affected by the First Circuit's aberrant decision. *See* Pet. App. 27a-28a, 35a-36a, 44a n.17.

As noted above, the impact of this case extends beyond land-claims settlement acts to settlement legislation providing federal recognition to specific Tribes, *see, e.g.*, 25 U.S.C. § 1300b-11 (Texas Band of Kickapoo Indians); *id.* § 1300f (Pascua Yaqui Tribe); *id.* § 1300g-4(f) (Ysleta del Sur Pueblo), and to Public Law 280, which applies to hundreds of Tribes in 11 States, spread across four federal judicial circuits.[8] The First Circuit's jurisdictional holding is thus of broad nationwide significance.

Moreover, the decision's consequences for Tribes are far-reaching. First, the court below read the Settlement Act as effecting a broad abrogation of tribal sovereign immunity, subject only to the grudging acknowledgement that the Tribe would retain "some degree of autonomy 'in matters of local governance,' including 'matters such as membership rules, inheritance rules, and the regulation of domestic relations.'" Pet. App. 17a (citation omitted). But limiting sovereign immunity to these few areas would eviscerate Tribes' ability to function as sovereign governments rather than as "private, voluntary organizations," *Mazurie*, 419 U.S. at 557, and

[8] The 11 States are Alaska, California, Florida, Idaho, Iowa, Minnesota, Montana, Nebraska, Oregon, Washington, and Wisconsin. *See generally* Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 Conn. L. Rev. 697, 697 & n.2 (2006).

would leave Tribes subordinate to the command of state officials empowered to enforce state law. This Court has, by contrast, specifically rejected arguments that tribal immunity from suit should be confined to transactions on reservations, to the internal affairs of tribal government, or to governmental activities generally; and it has explained that "Congress has consistently reiterated its approval of the immunity doctrine," reflecting Congress's "desire to promote the 'goal of Indian self-government, including its "overriding goals" of self-sufficiency and economic development.'" *Citizen Band Potawatomi*, 498 U.S. at 510 (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)); *see Kiowa Tribe*, 523 U.S. at 755.

Indeed, the decision below threatens much of the recent progress in tribal-state relations. In areas such as tax and criminal law enforcement, Tribes and States increasingly have settled their differences on a sovereign-to-sovereign basis, forging bilateral agreements that resolve jurisdictional conflicts and provide mutual waivers of sovereign immunity. *See Nevada v. Hicks*, 533 U.S. 353, 372 (2001) (expressly recognizing "state-tribal cooperative agreements, including those pertaining to mutual law enforcement assistance, tax administration assistance, and child support and paternity matters"); *id.* at 393 (O'Connor, J., concurring) (providing numerous examples of States that have "enter[ed] into consensual relationships with tribes, such as contracts for services or shared authority over public resources"). If a State may use its coercive power to compel surrender of tribal immunity (while preserving its own immunity), this growing body of tribal-state agreements that benefit Indians and non-Indians alike is in jeopardy. Such a drastic reworking of tribal-state relations – for the Narragansetts and for scores of other Tribes – without any indication that this is what Congress intended, cries out for review.

Finally, the troubling practical implications of the First Circuit's decision are well illustrated by the facts of this case. The parties were engaged in what was indisputably a good-faith disagreement over the applicability of certain state tax laws. Rather than continuing discussions or engaging in civil litigation, the State resorted to armed enforcement of a state-court-issued search warrant. No federal or foreign sovereign would be subject to such treatment,[9] and the intrusion on tribal dignity was brazen and severe. It is hard to imagine an approach better designed to provoke a violent confrontation. No sensible rule of law would encourage such a result.

The fact that this Court very recently noted but reserved issues relating to state searches and seizures of Tribes' on-reservation property speaks both to the recurring nature of these conflicts and to their importance. In *Inyo County v. Paiute Shoshone Indians*, the Court granted certiorari in a case that likewise involved a tribal challenge to a State's efforts to enforce a search warrant against a Tribe and tribal government property. *See* 538 U.S. at 712 (noting, but reserving, Tribe's claimed right to be free from criminal processes). Here, the issues are squarely framed and cleanly presented, and this Court should resolve them now.

III. THE FIRST CIRCUIT'S DECISION IS PLAINLY INCORRECT.

The decision below also merits review because it is flat wrong. No other case holds that statutory language remotely like the language here effects an abrogation of immunity.

1. The First Circuit's decision is irreconcilable with case law from this Court regarding waiver and abrogation of

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[9] *See, e.g.*, *Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 21 (1846); *Elko County Grand Jury v. Siminoe (In re Elko County Grand Jury)*, 109 F.3d 554, 556 (9th Cir. 1997); Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 22, cl. 1, 23 U.S.T. 3227; Vienna Convention on Consular Relations, Apr. 24, 1963, art. 31, cl. 1, 21 U.S.T. 77.

sovereign immunity. As this Court has made clear, "a waiver of [tribal] sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo*, 436 U.S. at 58 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). That holding, which was expressly reaffirmed in *C&L Enterprises*, 532 U.S. at 418, protects tribal sovereign immunity using the same high standard that protects the immunity of the federal government and the States. *Nordic Village*, 503 U.S. at 33-34 (waiver of federal government's sovereign immunity must be "unequivocally expressed"); *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress . . . unequivocally expresses its intent to abrogate the immunity.").

The First Circuit's decision makes a mockery of this case law. Neither the Settlement Act nor the Settlement Agreement (nor the history of either) contains any evidence that the Tribe or Congress intended to subject the Tribe and its government – as distinct from individual tribal members – to the jurisdiction of state courts. Pet. App. 34a & n.13, 47a, 127a-144a.[10] Nor does the language of the Act refer at all to sovereign immunity – indeed, as noted above, the language used has authoritatively been construed by this Court *not* to abrogate sovereign immunity.

The First Circuit's approach is all the more egregious because Congress has *expressly* abrogated tribal immunity in other land-claims settlement acts. In the Maine Indian Claims Settlement Act – passed in 1980 by virtually the same Congress that just two years earlier enacted the Rhode Island Act – Congress provided that Indian Tribes in Maine "may sue and be sued in the courts of the State of Maine and the

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[10] The absence of such evidence is telling. As the Court stated in *Bryan*, "some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress." 426 U.S. at 381.

United States to the same extent as any other entity or person residing in the State of Maine." 25 U.S.C. § 1725(d)(1). If Congress had intended to abrogate the Narragansetts' sovereign immunity in the 1978 Act, it would have said so, as it did in the Maine Act two years later. Pet. App. 33a n.11, 50a; *see Bryan*, 426 U.S. at 389-90 (clear abrogation language in termination acts is strong evidence that Congress did not intend to abrogate when it used different language in Public Law 280).

2. The First Circuit likewise erred in its apparent belief that its result was necessary to give effect to the state tax laws at issue here. In *Citizen Band Potawatomi*, this Court expressly rejected the State's complaint that allowing the State to impose the tax but not to sue to collect it would effectively "give them a right without any remedy." 498 U.S. at 514. Although "sovereign immunity bars the State from pursuing the most efficient remedy," the Court was "not persuaded that [the State] lacks any adequate alternatives." *Id.*; *see id.* (listing remedies).

3. Finally, to the extent the First Circuit had concerns about the practical impact of tribal sovereign immunity more broadly, it was error to address those concerns by radically reinterpreting settled law. This Court has repeatedly "defer[red] to the role Congress may wish to exercise" in shaping tribal sovereign immunity, recognizing that Congress is best positioned "to weigh and accommodate the competing policy concerns and reliance interests." *Kiowa Tribe*, 523 U.S. at 758-59. If Congress is unhappy with the allocation of jurisdiction accomplished by Public Law 280, the Rhode Island Indian Claims Settlement Act, and similar legislation, Congress knows how to change it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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