No. _____ 07-526 OCT 18 2007

In The
Supreme Court of the United States

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

Petitioners,

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of Interior, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs,

Respondents.

On 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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QUESTIONS PRESENTED

The Indian Reorganization Act of 1934 permits the Secretary to take land into trust for certain Indian tribes, significantly impairing state jurisdiction. The Fifth Circuit held that the 1934 Act "positively dictates" that the only Indian tribes for whom land can be taken into trust are those that were "recognized" and "under federal jurisdiction" as of "June 1934." This Court similarly concluded in that the 1934 Act contained a temporal "recognized [in 1934] tribe" limitation. *United States v. John,* 437 U.S. 634 (1978) (bracket by Court). The Ninth Circuit affirmed a district court decision to the same effect.

The Rhode Island Indian Land Claims Settlement Act provides land specifically for the later recognized Narragansett Indian Tribe and comprehensively disposes of all Indian land claims in Rhode Island. The Tribe received 1,800 acres of land for free. In exchange, Congress extinguished aboriginal title and all Indian interests in land in Rhode Island.

The questions presented are:

1. Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934.

2. Whether an act of Congress that extinguishes aboriginal title and all claims based on Indian rights and interests in land precludes the Secretary from creating Indian country there.

3. Whether providing land "for Indians" in the 1934 Act establishes a sufficiently intelligible principle upon which to delegate the power to take land into trust.

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OPINIONS BELOW

The First Circuit sitting en banc issued a divided opinion, the subject of this appeal, reported at 497 F.3d 15 (1st Cir. 2007)(en banc) and reprinted in the Appendix ("App.") App 1. The en banc court upheld a decision of the District Court for the District of Rhode Island reported at 290 F.Supp.2d 167 (D.R.I. 2003). App.84.

JURISDICTION

The final Judgment of the Court of Appeals was entered on July 20, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, §1 of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, it shall consist of a Senate and House of Representatives.

Pertinent provisions of the Indian Reorganization Act of 1934 (the "1934 Act" or the "IRA"), 25 U.S.C. §465 and §479 are reprinted at App.142 and 143, and the Rhode Island Indian Claims Settlement Act (the

"Settlement Act") 25 U.S.C. §1701 *et seq.*, is reprinted at App.148-161.

INTRODUCTION

This petition presents jurisdictional issues of enormous import not only to Rhode Island, but also to scores of other states and tribes across the country.[1] That is because the future allocation of civil and criminal jurisdiction between states and tribes over a potentially unlimited amount of land hangs in the balance.

The first question concerns whether Congress temporally limited the Indian tribes included in the Indian Reorganization Act, 25 U.S.C. §461 *et seq.*, to those recognized and under federal jurisdiction at the time of passage of the Act. The operative language, contained at 25 U.S.C. §479, as restated by this Court, expressly limits tribal inclusion in the IRA to "all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction." *United States v. John*, 437 U.S. 634, 649 (1978) (bracket by Court). The text of Section 479 has not changed since passage of the IRA in 1934.

[1] During the First Circuit proceedings, eleven states from Alaska to Alabama, and several dozen tribes from across the country, participated through extensive briefing and oral argument.

To overcome the effects of a previous federal allotment policy (not applicable to the Narragansetts) by which certain Indian tribes lost their land, the IRA allows the federal government to take land into trust, thereby severely impairing State jurisdiction over that land. On trust land, states are precluded from exercising fundamental attributes of their sovereignty, including state and local taxation, zoning and regulation of land. The Narragansett Indian Tribe, unlike over 250 other Indian tribes, was neither recognized by the federal government nor under federal jurisdiction in 1934. For some Indian tribes recognized after the IRA, Congress has enacted separate legislation to allow certain land to be taken into trust, and for others it has not.

In addition to this Court's opinion in *John*, both the Fifth and Ninth Circuits have concluded that the IRA is limited to tribes recognized and under federal jurisdiction in 1934. Review of this case is essential to resolve both the newly created Circuit split and to clarify this Court's conclusion in *John* for the benefit of states and tribes across the country. Under the First Circuit's opinion, the Secretary is now empowered to take land into trust under the IRA not only for Indian tribes recognized by the federal government at the time of its passage, and individual tribes for whom Congress expressly authorized trust after 1934, but also for the hundreds of tribes recognized by the federal government long after the IRA became

law.[2] The petition should be granted so this Court can determine whether this unprecedented expansion is authorized by the 1934 Act.

The second question concerns whether the extinguishment provisions of the Rhode Island Indian Claims Settlement Act, 25 U.S.C. §1701 *et seq.*, foreclose Indian country in Rhode Island. They do not foreclose Indian country if, as the First Circuit held, Indian interests in land (including aboriginal title) are confined to a mere fee simple interest. The extinguishment provisions, however, definitively foreclose Indian country if, as this Court in *Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) and the Second and Ninth Circuits have concluded, Indian interests in land include a broader sovereignty component.

The answer is important here, and in many other states, where Congress has extinguished aboriginal title and all Indian claims based on interests in or rights involving land. Given the number of trust acquisitions for tribes, the amount of land involved, the resulting ouster of state jurisdiction and the potential use of trust land for activities otherwise prohibited, regulated or taxed under state law – as well as *Sherrill* and the Circuit split – this question warrants review. This Court must clarify whether

[2] Today, there are nearly 600 Indian tribes recognized by the federal government. The First Circuit's novel interpretation of 25 U.S.C. §479, therefore, would more than double the number of tribes eligible for jurisdiction–stripping trust without any act of Congress.

Indian interests in land include a sovereignty component such that a congressional extinguishment of those interests (as in the Settlement Act) necessarily forecloses any assertion of Indian sovereignty thereon, including the assertion of Indian territorial sovereignty arising from trust. In his separate dissent, Judge Selya plainly set forth the need for review: "The controversy that divides our court today is vexing and of paramount importance to both the State and the Tribe. Thus, the issue – as well as the underlying principles of Indian law – doubtless would benefit from consideration by the Supreme Court. That is a consummation devoutly to be wished." 497 F.3d at 52. (Selya J., dissenting). App.80-81.

The third question presents a constitutional challenge to Section 465 of the IRA, which authorizes the Secretary – "in his discretion" – to acquire property in trust "for Indians." This standardless delegation by Congress has evaded this Court's review on several prior occasions. If the Constitution's nondelegation doctrine has any continued vitality, the IRA delegation cannot stand. Because of its jurisdictional importance, the issue will continue to arise in the lower courts until this Court resolves it.

The questions presented by this petition must be confronted so that this Court may determine whether a fundamental jurisdictional shift from states to Indian tribes is authorized by law.

STATEMENT OF THE CASE

Historical Background

In 1934, the Narragansett Indian Tribe – like a number of other tribes in New England – was neither federally recognized nor under the jurisdiction of the federal government. *See* Letters from the Department of the Interior to Narragansett tribal leaders between 1927 and 1937 expressly disavowing any federal jurisdiction over the Narragansett Indians. App.144-147.[3] Indeed, the Tribe did not receive federal recognition until 1983. *Carcieri v. Kempthorne,* 497 F.3d 15, 23 (1st Cir. 2007). App.11.

In 1975, the Tribe brought two lawsuits against the State, the Town of Charlestown and some Charlestown land owners to recover 3,200 acres based upon ancient aboriginal title to the Tribe's former colonial reservation (the "Lawsuits"). The Tribe argued its land had been sold without congressional approval as required by the Indian Nonintercourse Act, 25 U.S.C. §177, and that, accordingly, the transfer of land was null and void. *Id.* App.10. The 31 acre housing site that is the subject of this litigation

[3] *See also* William W. Quinn, Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept, 34 Am. J. Legal Hist. 331, 332 (1990) (discussing the unrecognized status of several New England Indian tribes, including the Narragansetts: "Until the 1980's, however, none of these tribes ever existed in the cognizance of the United States: they were unacknowledged, unserviced, nonentities *vis à vis* the federal government.").

(the "Parcel") was part of the 3,200 acres over which the Tribe asserted aboriginal title in the Lawsuits. *Carcieri v. Norton,* 290 F.Supp.2d 167, 170-71 (D.R.I. 2003). App.126.

In 1978, the parties settled the Lawsuits and executed an agreement the terms of which were set out in a Joint Memorandum of Understanding signed by the State, the Tribe, the Town and others. Congress approved and codified this agreement in the Rhode Island Indians Claims Settlement Act, 25 U.S.C. §1701, *et seq.* App.148. The Settlement Act provided that the Tribe would receive 1,800 acres of land, half of which was donated by the State and the other half of which was purchased with federal funds (the "Settlement Lands"). Congress required the Settlement Lands to be permanently held by a state-chartered corporation in trust for the Tribe. In exchange, Congress extinguished the Tribe's aboriginal title to land throughout Rhode Island. 25 U.S.C. §1705(a)(2); §1712(a)(2). App.152-53; 159-60. Congress separately extinguished the Tribe's (or any successor in interest to the Tribe) ability to make any "claims" "based upon any interest in or right involving" land in Rhode Island. 25 U.S.C. §1705(a)(3); §1712(a)(3). App.152-54; 159-60.

In a separate section, Congress mandated that "the 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). App.157. When Congress subjected the Settlement Lands to the State's civil and criminal laws and jurisdiction, it "largely abrogate[d] the Tribe's sovereign immunity"

and effected a surrender by the Tribe of "any right to operate the settlement lands as an autonomous enclave." *Narragansett Indian Tribe v. Rhode Island,* 449 F.3d 16, 26, 30 (1st Cir. 2006)(en banc). The Settlement Lands were ultimately conveyed to the Secretary in trust for the Tribe. The Secretary took them subject to the full applicability of the State's civil and criminal laws and jurisdiction ("restricted trust"). The Parcel, although claimed in the Lawsuits, did not become part of the Settlement Lands; it was separately purchased by the Tribe's housing authority many years later.[4] *Carcieri,* 497 F.3d at 23. App.12.

On March 6, 1998, the State was notified that the Secretary intended to take the Parcel into federal trust for the Tribe. App.162-64. Because the proposed unrestricted trust acquisition would have resulted in an ouster of the State's civil and criminal laws and jurisdiction from the Parcel in favor of a federal and tribal jurisdictional regime – a jurisdictional first given that there has never been any sovereign territory for any Indian tribe in Rhode Island since statehood – the State, the Governor and the Town (collectively, the "State") immediately appealed. The Interior Board of Indian Appeals (IBIA) affirmed the Secretary's decision to convert the Parcel to trust.

[4] There is no HUD or other federal requirement mandating that the Parcel be in trust for housing. There is also no tax avoidance rationale since the Tribe's housing authority is a tax-exempt non-profit agency under state law.

District Court Proceedings

The IBIA decision was, in turn, appealed to the United States District Court for the District of Rhode Island. There, the State argued, *inter alia*, that the Secretary was prohibited from converting land to trust for the Narragansetts under the IRA. First, by its own terms, the IRA is temporally limited to those tribes both federally recognized and under federal jurisdiction in 1934; since the Narragansetts were neither recognized nor under jurisdiction then, the Secretary cannot convert land to trust for their benefit under the IRA. Second, the Settlement Act independently precludes trust conversions by the Secretary for Indians in Rhode Island by extinguishing aboriginal title and all Indian claims "based upon any interest in or right involving" land in Rhode Island. Finally, the State argued that Section 465 of the IRA violates the Constitution by delegating a core legislative function – creating sovereign territory for an Indian tribe – to the full discretion of the Secretary without providing any standards for the exercise of that discretion. The District Court rejected all three arguments and entered final judgment in favor of the Secretary. *Carcieri v. Norton,* 290 F.Supp.2d 167 (D.R.I. 2003). App.84-136.

First Circuit Proceedings

The State appealed the District Court's final decision to the United States Court of Appeals for the First Circuit pursuant to 28 U.S.C. §1291. There, a

three judge panel held that the Secretary could take land into trust for the Tribe in Rhode Island but declined to reach the issue of whether the lands so converted must remain subject to the State's civil and criminal laws and jurisdiction. *Carcieri v. Norton,* 398 F.3d 22 (1st Cir. 2005). The State petitioned for a rehearing because the panel failed to reach the central issue of the case: jurisdiction. Supplemental briefing was ordered by the court and, on September 13, 2005, the full court ordered the three-judge panel to rehear the case. The panel opinion was withdrawn and the judgment vacated. Order of September 13, 2005. App.137-38. The three-judge panel issued another decision which rejected the State's argument, permitted the Secretary to take the Parcel into trust and determined that the Parcel would be subject to federal and tribal law, rather than state law. This time, Judge Howard dissented arguing that the extinguishment provisions of the Settlement Act encompassed all Indian sovereignty claims, including those arising from trust. *Carcieri v. Norton,* 423 F.3d 45 (1st Cir. 2005) (Howard, J. dissenting) (rehearing opinion). The State petitioned for an en banc rehearing. The full court granted the State's petition, the rehearing opinion was withdrawn and the judgment based thereon once again vacated. The parties (as well as the scores of amici that were, by then, involved in the case) were permitted to file another round of supplemental briefs and the case was reheard, en banc, on January 7, 2007. Order of December 5, 2006. App.139-41.

After lengthy review, a now sharply divided court issued a decision, which affirmed the Secretary's ability to take land into unrestricted trust for Indians in Rhode Island. The court, noting that "[t]he State's challenges to the Secretary's authority under the IRA and the Constitution have national implications that reach beyond Rhode Island" rejected each of the State's defenses to the Secretary's trust acquisition. *Carcieri v. Kempthorne*, 497 F.3d 15, 21 n.2 (1st Cir. 2007)(en banc). App.7. First, it determined that the "recognized in [1934] tribe" limitation contained in Section 465 of the IRA is "ambiguous" and, having injected ambiguity, accorded the Secretary's complete deference in construing the 1934 Act as applying to any and all federally recognized tribes, regardless of the date of recognition. *Id.* at 26-35. App.17-37.

On the State's argument that the later-enacted Settlement Act's extinguishment of aboriginal title and Indian interests in land separately prohibited trust acquisitions, the court was sharply divided. Both the majority and dissenters agreed on the obvious – that the Secretary's acquisition will divest the State of fundamental aspects of its sovereignty over land so acquired, while at the same time granting the Tribe broad territorial sovereignty there. The four-judge majority narrowly confined the scope of Indian claims extinguished by Congress to "traditional property claims." As a result, the majority concluded that the Settlement Act did not prohibit the ouster of state sovereignty and the concomitant imposition of Indian sovereignty that are the hallmarks of unrestricted

trust. In the majority's view, Indian claims of sovereignty over land simply are not the type of claims extinguished by Congress in the Settlement Act. *Id.* at 34-39. App.40-44.

The dissenters, by contrast, viewed the extinguishment provisions broadly. They argued that Congress intended to extinguish claims raised by "Indians *qua* Indians" and that the ouster of state jurisdiction over land and the establishment of Indian territorial sovereignty there are *quintessential* Indian land claims. *Id.* at 49. App.74-75. They also pointed to the anomalous result yielded by the majority opinion: that on the Settlement Lands – the heart of the Tribe's ancestral home – Congress requires that the Tribe be subject to the State's civil and criminal laws and jurisdiction while allowing the Secretary to grant the Tribe full territorial sovereignty outside of them. *Id.* at 49-50. App.75-76.

Finally, the court dismissed the State's non-delegation claims. Instead of determining for itself, however, whether the language of Section 465 of the IRA sets forth sufficiently intelligible principles to guide the Secretary's trust acquisitions, the court merely relied on a second-hand recitation of the legislative history of the IRA and this Court's historical disinclination "to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 42-43. App.57-59.

Shortly after the en banc decision was issued, the State filed a Motion for a Stay of Mandate. Recognizing the impact of the case, both in Rhode Island and nationwide, the First Circuit stayed its mandate "pending a resolution of the petition by the United States Supreme Court." App.82-83.

REASONS FOR GRANTING THE PETITION

I. THE FIRST CIRCUIT'S APPLICATION OF THE IRA TO A TRIBE NOT BOTH FEDERALLY RECOGNIZED AND UNDER FEDERAL JURISDICTION IN 1934 CONFLICTS WITH OPINIONS OF THE FIFTH AND NINTH CIRCUITS AND THIS COURT

The First Circuit held that the IRA applies to a Tribe neither federally recognized nor under federal jurisdiction in 1934. *Carcieri*, 497 F.3d at 26-35. App.17-37. It did so on the ground that the applicable statutory test is "ambiguous" and therefore that under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), it was "permissible" for the Secretary to interpret "now" when used by Congress in 1934 to mean not only at the time of passage of the Act, but also any point in the future. 497 F.3d at 30. App.29.

In declining to apply the IRA's plain language as a temporal limitation,[5] the First Circuit is not only wrong, but is in conflict with the decisions of two sister circuits, *United States v. Tax Comm'n*, 505 F.2d 633 (5th Cir. 1974) and *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005). Moreover, the First Circuit's holding is contrary to the conclusion of this Court in *United States v. John*, 437 U.S. 634 (1978).

Each of these cases hold that the IRA, on its face, does not apply to Indians or tribes who were not both federally recognized and under federal jurisdiction as of 1934. The authority to take land into trust is limited to "Indians" as carefully defined in the IRA. Section 465 authorizes the Secretary "to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. §465. App.142. For the purpose of Section 465:

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

[5] As this Court also noted in *Chevron*, 467 U.S. at 842-43, where Congress has plainly expressed its intent "the court, as well as the agency, must give effect to th[at] unambiguously expressed intent."

> June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all of the persons of one-half or more Indian blood. . . . The term "tribe" whenever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. . . .

25 U.S.C. §479 (emphasis added). App.143.

In *United States v. John*,[6] this Court set forth the applicable statutory test necessary for a tribe, such as the Narragansetts, to be included in the IRA absent a later act of Congress. The IRA includes:

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

[6] Since its passage in 1934, other than the Mississippi Choctaws in *John,* this Court has never been called upon to interpret the applicability of the IRA to a tribe. That would be in part because for at least the first forty (40) years after passage of the IRA, the Secretary at no time attempted to take land into trust under the 1934 Act for any tribe not recognized and under federal jurisdiction in 1934. Theodore Taylor, Bureau of Indian Affairs, "Report on Purchase of Indian Land and Acres in Trust 1934-1975," Appendix A3, *microformed at* Suffolk Univ. Sch. of Law Microforms Drawer 162, Title 3322. Since then, the Secretary has only taken land into unrestricted trust from somewhere between one to no more than a handful of tribes that did not meet the "recognized [in 1934] tribe" test.

2) "all other persons of one-half or more Indian blood."[7]

437 U.S. at 649 (bracket by Court).

John was decided four years after the Fifth Circuit's own analysis of whether the IRA was temporally limited. In *United States v. Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974), the Fifth Circuit squarely held that: "The language of [25 U.S.C. §479] positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words '*any recognized Indian tribe now under Federal jurisdiction*' and the additional language to like effect." The First Circuit nowhere confronts this contrary holding of a sister circuit.

Like the Fifth Circuit, the Ninth Circuit has also weighed in on the question of whether the 1934 Act contains a temporal limitation. After a detailed discussion of the text and history of Section 479, the District

[7] Immediately after citing Section 479, this Court further confirmed the temporal limitation of the Act, stating that "[t]here is no doubt that persons of this description [half bloods] lived in Mississippi, and were recognized as such by Congress and by the Department of the Interior *at the time the Act was passed*." 437 U.S. at 650 (emphasis added). This separate "Indian blood" test for IRA inclusion is not at issue in this case. The Secretary has proposed to take the Parcel into trust "for the use and benefit of the Narragansett Indian Tribe of Indians of Rhode Island," and not individual Indians. App.162. The Narragansetts have never claimed, nor could they claim, that tribal members today or at the time the 1934 Act was passed met the half-blood test.

Court interpreted the "recognized [in 1934] tribe" test as a clear temporal limitation. *Kahawaiolaa v. Norton*, 222 F.Supp.2d 1213, 1221 & n.10 (D. Haw. 2002).

On appeal, the Ninth Circuit affirmed, holding that "by its terms, the Indian Reorganization Act did not include any Native Hawaiian group. There were no *recognized* Hawaiian Indian tribes *under federal jurisdiction in 1934*, nor were there any reservations in Hawaii." *Kahawaiolaa*, 386 F.3d at 1281 (emphasis added). This Court denied certiorari. 545 U.S. 1114 (2005). Once again, the First Circuit ignored this contrary conclusion.

The First Circuit did, however, mention this Court's opinion in *John*. Referring to *John's* discussion of the question presented here as "musings" which "fall short even of being dicta," the First Circuit dismissed it in a single paragraph. 497 F.3d at 28. App.22-23. *John*, however, cannot be so cavalierly discarded.[8] The First Circuit correctly notes that *John* was decided on a "different clause" for IRA eligibility; namely, that the Choctaw Tribe had members "of one-half or more Indian blood," and not on the ground that the Tribe qualified under Section 479 regardless of the date it was recognized by the federal government.

[8] As the First Circuit itself correctly holds, "federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . a dictum is of recent vintage and not enfeebled by any subsequent statement." *Rossiter v. Potter*, 357 F.3d 26, 31 n.3 (1st Cir. 2004).

497 F.3d at 27-28. App.22. That, however, hardly makes this Court's conclusion on Section 479's temporal limitation dicta or worse. That is because nowhere in *John* did this Court express any disagreement with, never mind overrule, the earlier conclusion of the Fifth Circuit in *Tax Comm'n.,* that the language of Section 479 "positively dictates that tribal status is to be determined as of June, 1934." 505 F.2d at 642. Indeed, this Court itself affirmed Section 479's temporal limitation by expressly noting the "recognized [in 1934] tribe" requirement.[9]

By not reversing the Fifth Circuit's earlier conclusion that the 1934 Act was temporally limited to certain tribes, and resting its reversal on an unrelated alternative ground, this Court's interpretation of Section 479 – while it may fall just short of an outright holding – is in no way mere "musings" or an interpretation that "fall[s] short even of being dicta." 497 F.3d at 28. App.23. This Court's conclusion that a "recognized [in 1934] tribe" test exists in the 1934 Act – like that of the Fifth Circuit – has sustained precedential value.

John is supported by considerable additional evidence. First, Section 478 of the IRA mandated that

[9] As such, if no member of the Choctaw Tribe possessed one-half or more Indian blood at the time of passage of the Act, this Court would have properly concluded that: 1) a "recognized in [1934] tribe test" was contained in Section 479; and 2) the Choctaw Tribe did not pass that test. That same conclusion applies to the Narragansetts here.

the Secretary call for an election by existing reservation Indians on whether to opt out of the IRA "within one year of June 18, 1934," *not* within a year some unknown future recognition of a tribe or reservation. The plain language is entirely inconsistent with the notion that the IRA applied to tribes not then recognized and under federal jurisdiction. *See City of Sault Ste. Marie v. Andrus*, 532 F.Supp. 157, 161 n.6 (D.D.C. 1980) ("That this election was to be held only one year after the passage of the IRA suggests that the IRA was intended to benefit only those Indians federally recognized at the time of passage.").

Second, in order to determine which tribes were eligible to opt out of the 1934 Act, the Secretary had to determine which tribes were *in* the Act. Therefore, "a list of 258 tribes was made of all those eligible to participate in voting to reorganize under the IRA or not. As a practical matter, this list can be said to be the constructive 'list' of Indian tribes recognized by the United States in 1934." Quinn, *Federal Acknowledgment,* 34 Am. J. Legal Hist. at 356; *see also* Theodore H. Hass, *United States Indian Service, Ten Years of Tribal Government Under I.R.A.* (1947), Table A at http://thorpe.ou.edu/IRA/IRAbook (Interior-commissioned report detailing which tribes voted to accept or reject the IRA with election dates). The contemporaneous compilation of tribes eligible for IRA inclusion or opt out is further support for *John's* temporal limitation.

Third, when Congress wished to include future events subsequent to passage of the IRA it did so expressly. Section 472 of the IRA, for example, made

itself applicable to employment positions maintained "now *or hereafter.*" (emphasis added). The absence of the words "or hereafter" in Section 479 precludes an interpretation that effectively reads those words into that section.

Fourth, on numerous occasions since 1934, Congress has passed specific acts including additional tribes within the scope of the IRA or granting them trust land.[10] The addition by Congress of certain specific tribes to the scope of the 1934 Act decades after its passage is inconsistent with the First Circuit's view that all tribes, regardless of the date of recognition, are automatically included in the IRA as soon as they become federally recognized.

Certiorari is necessary because of the conflict between the First Circuit on the one hand and the Fifth and Ninth Circuits and this Court on the other, over the important question of whether the IRA's "recognized [in 1934] tribe" requirement nonetheless "allow[s] trust acquisitions for tribes that" become "recognized and under federal jurisdiction" decades after 1934, so long as the tribe is recognized and

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[10] *See, e.g., Hoopa-Yurok Settlement Act,* 100-580 (1988)("The Indian Reorganization Act of June 18, 1934, as amended, is hereby made applicable to the Yurok Tribe and the tribe . . . "); *Coquille Restoration Act,* Pub. L. No. 101-42 (1989)("Indian Reorganization Act Applicability. The Act of June 18, 1934, as amended, shall be applicable to the Tribe and its members."). Although Congress passed two specific laws for the Narragansetts (the Settlement Act in 1978 and an amendment to the Act in 1996), it has never added them to the scope of the IRA.

under federal jurisdiction "at the time of the trust application." 497 F.3d at 30. App.29.

II. THIS COURT SHOULD DETERMINE WHETHER CONGRESSIONAL EXTINGUISHMENTS OF ABORIGINAL TITLE AND INDIAN INTERESTS IN OR RIGHTS INVOLVING LAND FORECLOSE INDIAN TERRITORIAL SOVEREIGNTY

When Congress passed the Settlement Act, it implemented a specially negotiated agreement that gave the Tribe a viable land base and a locus for the exercise of its retained sovereignty over its members. The Settlement also gave the Tribe (through a state-chartered corporation established for the purpose), and not the federal government, control over the management and disposition of the Settlement Lands. In return, the State bargained for and obtained a guarantee that its laws and jurisdiction – and not that of the federal government or any Indian tribe – would continue to apply throughout the State, including on the Settlement Lands.[11] For its part, the federal government was relieved of any further land-based duties and liabilities to the Tribe, foreclosing the conventional dependency that had characterized Indian relations with the United States. The effect of

[11] *Narragansett Indian Tribe,* 449 F.3d 16 (interpreting the guarantee of continuing state civil and criminal jurisdiction in the Settlement Act as fully applicable on the Settlement Lands).

the Settlement Act was to establish an allocation of power that continued a long tradition of Narragansett independence from the federal government, left tribal sovereignty over its members and internal governance intact and permitted tribal lands to be subject to the regular application of state law – all in the heart of the Tribe's ancestral home.

The Settlement Act's extinguishment provisions ensure that the State's jurisdiction, and thus, its territorial sovereignty is preserved within its borders. First, Congress extinguished all aboriginal title throughout the State. 25 U.S.C. §1705(a)(2) (extinguishing Narragansett aboriginal title everywhere within the United States and all other tribes' aboriginal title within Charlestown). App.152-53; 25 U.S.C. §1712(a)(2) (extinguishing all other Indian tribes' aboriginal title in Rhode Island outside Charlestown). App.159-60.

Second, Congress effected an even broader, more powerful preclusion by extinguishing any claims by any tribe, including the Narragansetts, or any "successor in interest" against the State based upon "any interest in or right involving land" in Rhode Island. 25 U.S.C. §1705(a)(3) (extinguishing Narragansett Indian and successor rights and interests in land anywhere in the United States). App.152-54; 25 U.S.C. §1712(a)(3) (effecting precisely the same extinguishment of other tribes' land rights and interests in Rhode Island). App.159-60.

When the State and Tribe settled the Lawsuits and when Congress implemented that settlement, all Indian claims involving land in Rhode Island were eliminated, "whether monetary, possessory *or otherwise.*" *Carcieri,* 290 F.Supp.2d at 170. (emphasis added) App.86. Indeed, the congressional record specifies that Congress was foreclosing "those claims raised by Indians *qua* Indians" but not "any claims of any Indians under any law generally applicable to Indians as well as non-Indians in Rhode Island." H.R. Rep. 95-1453 (1978) *reprinted in* 1978 U.S.C.C.A.N. 1948, at 1955. In other words, the Settlement Act extinguished *uniquely* Indian rights and interests in land. This Court must determine whether those uniquely–held Indian interests include a territorial sovereignty interest. If so, the Secretary cannot convert land to trust in Rhode Island because doing so would establish Indian territorial sovereignty–a result that Congress precluded in the Settlement Act.

1. Defining the Reach of Congressional Extinguishments of Indian Interests in Land is Critically Important to Settlement Act States

When the Secretary converts land to trust for Indians, Indian country may also be created[12] – the

[12] The First Circuit held that the Parcel automatically becomes Indian country once converted to trust, without any analysis of whether it meets the Indian country definition

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jurisdictional touchstone for delineating federal, state, and tribal authority over Indian-occupied lands. Within Indian country, tribes possess broad authority – subject to federal limitations – to govern not only their own members, but also the land and non-members. States, on the other hand, are precluded from exercising fundamental attributes of their sovereignty within Indian country. *See Alaska v. Native Village of Venetie,* 522 U.S. 520, 527 n.1 (1998); *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 332 (1983).

The conversion of land to trust for Indians has a profound and permanent jurisdictional impact on states, local communities and the public and is of particular significance in a tiny and densely populated state like Rhode Island. As an example, tribes enjoy immunity from state and local taxation on trust land. From a central location, 95% of Rhode Island's population of just over one million people is within half an hour's drive. Tax-advantaged Indian business enterprises at that location could seriously undermine state tax revenues that fund schools, roads and other critical infrastructure. Likewise, land taken into trust may be used for gaming purposes; Indian gaming from any location within Rhode Island will jeopardize another of the State's significant sources of

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contained in 18 U.S.C. §1151. Here, there is no dispute that the Parcel is intended to be used for Indian housing, and if so used, would constitute a "dependent Indian community" under 18 U.S.C. §1151(b).

revenue – its state-operated gaming facilities. Moreover, there is nothing – save secretarial discretion – that prevents virtually the entire state from being converted to Indian country through trust acquisitions. This is the case even though there has never been Indian country in Rhode Island in its entire constitutional history.

Whether the Secretary can reallocate territorial sovereignty from a state to a tribe through trust conversions, in the face of congressional extinguishments of aboriginal title and Indian rights and interests in land, is a question of obvious importance to Rhode Island. But that question also affects a host of other states – including some within the First Circuit – where Congress has passed Indian land claims settlement acts with similar extinguishment provisions.[13] Yet despite Congress' widespread use of these

[13] *See, e.g.,* Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §1603(a),(b) (extinguishing aboriginal title in most of Alaska); Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §1723(b) (extinguishing all aboriginal title in Maine) and 25 U.S.C. §1723(c) (extinguishing all Indian claims "based on any interest in or right involving" land in Maine); Massachusetts Indian Claims Settlement of 1987, 25 U.S.C. §1771b(b) (extinguishing aboriginal title of the Wampanoag of Gay Head); Mashantucket Pequot Indian Claims Settlement Act of 1983, 25 U.S.C. §1753(b) (extinguishing aboriginal title of the Mashantucket Pequots) and 25 U.S.C. §1753(c) (extinguishing any Pequot "interest in or right involving" land); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, 25 U.S.C. §1775b(d)(1)(A) (extinguishing Mohegan aboriginal title) and 25 U.S.C. §1775b(d)(1)(B) (extinguishing any other Mohegan claims

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extinguishment provisions, this Court has never directly determined what Indian rights and interests in land are foreclosed thereby. Given the enormous jurisdictional consequences for both tribes and states arising out of trust acquisitions, there is a compelling need for guidance from this Court on the question.

2. The First Circuit's Restriction of Aboriginal Title to a Mere Fee Interest Conflicts with Opinions of the Ninth and Second Circuits – as Well as Teachings of this Court – Defining Aboriginal Title as Inclusive of a Sovereignty Interest

The critical question for this Court is whether congressional extinguishments of aboriginal title and Indian interests involving land prohibit trust under the IRA in Rhode Island. While acknowledging that acquiring the Parcel in trust would establish Indian territorial sovereignty there, the First Circuit held that the Settlement Act's extinguishment provisions simply do not reach sovereignty interests in land. Along the way, the majority reduced the scope of Indian title, rights and interests in land to a mere fee simple interest. As a result, it restricted the reach of Indian interests extinguished by Congress in the Settlement Act to "traditional property claims." *Carcieri*, 497 F.3d at 36. App.43. That cabined view of

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to lands in Connecticut, including any claim or right based on recognized aboriginal title).

Indian rights and interests in land is erroneous given the plain language of the Settlement Act, Congress' stated intent to extinguish every claim raised by "Indians *qua* Indians," (H.R. Rep. 95-1453 (1978) *reprinted in* 1978 U.S.C.C.A.N. 1948, at 1955) and the anomalous result yielded by the decision: that on the Settlement Lands – the heart of the Tribe's ancestral home – Congress requires that the Tribe be subject to the State's civil and criminal laws and jurisdiction while allowing the Secretary to grant the Tribe full territorial sovereignty everywhere else.

The majority's opinion is not merely wrong, although it surely is that. Its restrictive view of what interests make up aboriginal title conflicts with decisions of the Ninth and Second Circuits. These courts recognize what a majority of the First Circuit did not – that aboriginal title encompasses more than just a fee simple interest; it includes a sovereignty interest as well. Because the Ninth and Second Circuits both define aboriginal title as inclusive of a sovereignty interest, these courts would have found that a congressional extinguishment of aboriginal title forecloses Indian territorial sovereignty, including the sovereignty interest arising from trust. *Sherrill* adds robust support to this view.

The Ninth Circuit specifically recognizes that a claim of aboriginal title to land includes claims of sovereignty thereon. In *Native Village of Eyak v. Trawler Diane Marie, Inc.,* 154 F.3d 1090 (9th Cir. 1998), five Alaskan Native villages brought a claim against the United States asserting unextinguished

aboriginal title to a portion of the outer continental shelf (OCS). The Ninth Circuit rejected the aboriginal title claim on the ground that the tribes were making a prohibited "claim of *sovereign* right or title" over the OCS. *Id.* at 1095 (emphasis added). The Ninth Circuit held that since possession under a claim of aboriginal title would permit the tribes to exercise "regulatory power" over third parties (*i.e.*, sovereignty), such claims were inconsistent with federal interests in the OCS. *Id.* at 1096. Thus, unlike the First Circuit, the Ninth Circuit has determined that aboriginal title includes a claim of sovereignty over land. With this predicate firmly in place, the Ninth Circuit would necessarily conclude that an extinguishment of aboriginal title prohibits further claims of Indian territorial sovereignty like those arising from trust.

A recent opinion of the Second Circuit is in full accord. In *Western Mohegan Tribe v. Orange County,* 395 F.3d 18 (2nd Cir. 2004), the Mohegans claimed aboriginal title to land in ten New York counties. For the purpose of determining whether the Mohegan's claims could survive defendants' motion to dismiss on Eleventh Amendment grounds, the Second Circuit was required to analyze the nature of the Mohegan's aboriginal title claim. The Mohegans argued that aboriginal title claims are limited to certain usufructory rights. The Second Circuit, however, rejected that limited reading. Instead, it held that in asserting a claim of aboriginal title, the Mohegans were, *inter alia*, seeking a determination that the lands in question were not within the regulatory jurisdiction of the

state. *Id.* at 23. In other words, in asserting aboriginal title claims against the State of New York, the Second Circuit held that the Mohegans were, indeed, making claims to sovereignty over land there. Accordingly, the Second Circuit affirmed the District Court's dismissal of the Mohegan's claims.

The determination by both the Ninth and Second Circuits that aboriginal title includes a sovereignty interest rests on sound footing. This Court has "repeatedly emphasized that there is a significant geographical component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 151 (1980). Indeed, this Court's most recent discussion of aboriginal title strongly supports the conclusion of the Ninth and Second Circuit that territorial sovereignty is an inherent attribute of aboriginal title.

In *Sherrill*, the Oneida Indian Nation purchased fee title to two parcels of land within what had once been the Oneida's historic reservation. Relying on prior recognition of the Oneida's aboriginal title to land within that historic reservation, the United States and the Oneida argued – just as the State does here – that the unification of fee title and aboriginal title permits the exercise of tribal "sovereign dominion" over the parcels. 544 U.S. at 213.

Crucially, the Oneida were not using aboriginal title as a means of gaining physical possession of land owned by others. Indeed, the Oneida had purchased the parcels and owned them in fee. Instead, the *sole* reason for the assertion of aboriginal title was to

extend tribal sovereignty over the parcels by removing them from state jurisdiction (and its concomitant taxing power). If aboriginal title were nothing more than a fee simple interest in land, lacking sovereign jurisdictional import, this Court would have simply ended the case by holding that aboriginal title cannot effect an ouster of state laws. *Sherrill* instead agreed with the Oneida's core position (and that of the State here) that when an Indian tribe holds both the fee title and aboriginal title to land, it owns the land *and* may exercise *"present and future Indian sovereign control"* over the land. 544 U.S. at 219-20 (emphasis added). Thus, *Sherrill* accepts that aboriginal title is greater than a fee simple; it includes a sovereignty interest as well.

Finally, Congress itself has expressly recognized that aboriginal title is more than a mere fee interest in land. In 18 U.S.C. §1151, Congress defines "Indian country" as including "all Indian allotments, the Indian titles to which have not been extinguished." Since an Indian allotment is, itself, a fee interest in land (the fee being held by the United States for the first 25 years and then conveyed to the Indian allotee in fee simple absolute), the persistence of aboriginal title transforms the land into "Indian country." As such, Congress itself has determined that aboriginal title *makes* land Indian country. Conversely, it has also determined that the extinguishment of aboriginal title *precludes* Indian country.

Sherrill also discusses the proposition that the Oneidas may regain ancient sovereignty over land

through Section 465 trust. 544 U.S. at 220-21. The First Circuit holds that the Narragansetts can do the same. It is wrong. Unlike the Oneidas, the Narragansetts cannot reinvigorate their ancient right to territorial sovereignty because Congress in the Settlement Act has affirmatively eliminated their ability to assert that right. While the First Circuit holds that, in relation to the establishment of Indian territorial sovereignty in Rhode Island, the congressional extinguishment of aboriginal title is "beside the point" because "the IRA provides an alternative means of establishing tribal sovereignty over land," 497 F.3d at 36. App.42, quite the opposite is true. The legal fact that Congress extinguished Indian sovereign interests in land in Rhode Island *is* the point since that extinguishment is outcome determinative – preventing any "alternative means" of establishing Narragansett sovereignty over land (absent a separate act of Congress).

The Oneidas were not faced with a post-1934 act of Congress extinguishing their territorial sovereignty. The 1978 Settlement Act, however, does precisely that here with respect to the Narragansetts – thereby impliedly repealing the application of Section 465 of the IRA in Rhode Island. Had Congress passed the same type of act in New York as it did in Rhode Island, the Oneidas, like the Narragansetts, would be unable to use the 1934 Act to establish tribal sovereignty over their land.

If, as this Court, the Ninth and Second Circuits and Congress all hold, the right of an Indian tribe to

be sovereign over land is an inherent part of the aboriginal title estate, then a statewide congressional extinguishment of aboriginal title must be, as a matter of law and logic, preclusive of Indian territorial sovereignty there. Indeed, *Sherrill* compels this conclusion. Since trust, by definition, establishes Indian sovereign authority over territory (*Sherrill,* 544 U.S. at 221), trust is barred in Rhode Island by congressional extinguishment of aboriginal title. When the Settlement Act extinguished aboriginal title throughout the State, it necessarily placed a future limitation on the exercise of tribal sovereignty over land in Rhode Island, including on the Parcel.

3. The First Circuit's Opinion is Wrong

The First Circuit's decision to limit the reach of the Settlement Act's extinguishment provisions and, as a result, to permit the Secretary to create Indian country in Rhode Island for the first time in the State's constitutional history is "error – and error of the most deleterious kind." *Carcieri*, 497 F.3d at 51 (Selya, J. dissenting). App.80. The majority failed to appreciate a fundamental aspect of Indian land tenure: that Indian tribes are governments; they have special governmental rights and interests in land that conventional fee simple owners do not. *See* Felix S. Cohen, Handbook of Federal Indian Law, Chapter 9 at 472 (1982 ed.) (discussing the tribal estate as a unique form of collective property ownership with no known analog in Anglo-American property law).

Thus, when Congress extinguishes a tribe's interests in land, it extinguishes not only any fee interest but also any tribal governmental interest such as the right to exercise police power, the right to levy taxes, and the right to be free of state and local laws on the land. As noted in Judge Howard's dissent, Congress passed the Settlement Act for the purpose of extinguishing claims that could be raised "**by Indians qua Indians**." 497 F.3d at 49 (emphasis in original) *citing* H.R. Rep. 95-1453 (1978) *reprinted in* 1978 U.S.C.C.A.N. 1948, at 1955. App.74. Indian tribes have a unique and significant sovereignty interest in their land. The Settlement Act targeted – and extinguished – precisely that interest. Regardless of how this Court defines aboriginal title – inclusive of a property interest or not – there are other provisions in the Settlement Act that compel the conclusion that Congress meant to extinguish Indian claims of sovereignty over land, *particularly* those arising from trust.

First, even if the extinguishment of aboriginal title merely terminated a tribal right to possess land, a second, far broader extinguishment slams the door shut on any argument that any tribe may claim territorial sovereignty in Rhode Island. Sections 1705(a)(3) and 1712(a)(3) of the Settlement Act extinguish any claims by any tribe based upon any "interests in" or "rights involving" land in Rhode Island. App.152-54; 159-60. Under this second extinguishment, Indian tribes are precluded from making claims that tribal law, rather than state law, applies

on tribal land anywhere in the State because such assertions are claims of right (sovereignty) involving land in Rhode Island.

Second, the bar against claiming territorial sovereignty in Rhode Island applies not just to Indian tribes. The Settlement Act also independently bars any "successor in interest" from claiming "interests in" or "rights involving" land in Rhode Island on behalf of Indian tribes. 25 U.S.C. §1705(a)(3); §1712(a)(3). App.152-54; 159-60. When the Secretary takes land into trust for a tribe under Section 465 of the IRA, he becomes that tribe's "successor in [fee title] interest" and is, therefore, confronted with precisely the same bar faced by Indian tribes themselves. These sections separately prevent the United States from doing indirectly what Congress, through the Settlement Act's broad extinguishment provisions, prohibits an Indian tribe from doing directly: effecting an ouster of the State's jurisdiction over land in Rhode Island. In order to prevent such an ouster, the Act places a prospective limitation on the federal government's ability to divest state sovereignty by converting land into trust for Indians. The Secretary can no more assert a claim that the Parcel is Indian country than the Tribe can.

Finally, the Settlement Act bars the United States from any "further duties or liabilities" under the Settlement Act with respect to the Tribe. 25 U.S.C. §1707(c). App.156. Since the Settlement Act is a congressional implementation of a settlement of Indian *land* claims, this provision – to mean anything

at all – must mean that upon the discharge of the Secretary's duties specified in Sections 1704-1707, the Secretary has no further duties or liabilities to the Tribe concerning *land* in Rhode Island.

These crucial provisions of the Settlement Act – the extinguishment of aboriginal title, the further extinguishment of all Indian claims of rights and interests in land in Rhode Island, the barrier preventing the Secretary from making such claims on the Tribe's behalf and the ban preventing the Secretary from any further land-based duties or liabilities to the Tribe under the Settlement Act – all lead to one inescapable conclusion. The Settlement Act prohibits the Secretary from taking land into unrestricted trust in Rhode Island.

III. THE CONGRESSIONALLY DELEGATED AUTHORITY TO PROVIDE LAND "FOR INDIANS" CONTAINS NO GUIDANCE FOR THE SECRETARY'S DISCRETIONARY TRUST TAKING POWER

Federal, state and tribal sovereignty clash where Congress delegates complete discretion to the Secretary to take land into trust "for Indians" pursuant to 25 U.S.C. §465. App.142. The intrusion into state sovereignty that results from a trust conversion is profound and, if constitutional in the first instance, must be governed by a clear set of standards. As

states have loudly complained, Section 465 of the IRA contains no standards at all.[14]

The nondelegation doctrine is an underpinning of separation of powers jurisprudence. *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States," U.S. Const. art. I, §1, and the "text permits no delegation of those powers." *Whitman v. American Trucking Assn. Inc.*, 531 U.S. 457, 472 (2001). Congress is therefore not permitted to abdicate or to transfer to other branches of government its essential legislative function. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

Delegating decision-making authority to agencies requires "Congress" *itself* to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform. . . ." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). A constitutionally sufficient "intelligible principle" is established "if Congress clearly delineates the general policy, the public agency which

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[14] *See, e.g., South Dakota v. Department of Interior,* 69 F.3d 878 (1995) *granted, vacated, remanded* 519 U.S. 919 (8th Cir. 1996); *Shivwits Band of Paiute Indians v. Utah,* 428 F.3d 966 (10th Cir. 2005), *cert. denied,* 127 S.Ct.38 (2006); *South Dakota v. Department of Interior*, 423 F.3d 790 (8th Cir. 2005), *cert. denied,* 127 S.Ct. 67 (2006); *see also United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), *cert. denied,* 529 U.S. 1108 (2000)(private party challenge to statute).

is to apply it, and the boundaries of the delegated authority." *Mistretta*, 488 U.S. at 371.

Section 465 of the IRA violates the nondelegation doctrine because it fails to lay down any principle at all, let alone an "intelligible" one. It provides no guidance and no ascertainable standards to test whether the will of Congress has been obeyed in providing land "for Indians."

What makes the total failure to provide any standards for the Secretary's exercise of discretion fatal is that the resulting trust acquisition precludes the state from exercising fundamental attributes of its sovereignty there.[15] That is because "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman* 531 U.S. at 475. Here, the broadest power – to provide land "for Indians" – is coupled with the broadest grant of authority – significantly impairing

[15] While not important in this case, whether land taken into trust under Section 465 also constitutes Section 1151 Indian country is outcome determinative on the question of whether exclusive federal jurisdiction exists under the Indian Major Crimes Act, 18 U.S.C. §1153. *See John*, 437 U.S. 647-48 (only land within "Indian country" is subject to the Act and crimes thereunder are "within the exclusive jurisdiction of the United States."). Land taken into Section 465 trust is not automatically Indian country, *United States v. Stands*, 105 F.3d 1565, 1572 n.3 (8th Cir. 1997), *cert. denied,* 522 U.S. 841 (1997), nor is it automatically a "reservation" under Section 467. Section 467 itself requires the Secretary to affirmatively "proclaim" a "reservation," thereby negating the idea that reservation status is automatic.

state jurisdiction. That combination is prohibited by the Constitution. *Whitman* requires that Congressional grants of broad authority be accompanied by "substantial guidance." *Id.* In light of the breadth of the trust taking power and its dramatic impact, the phrase "for Indians" falls far short of "substantial guidance."

In attempting to create an "intelligible principle" where none exists, the First Circuit looked to the legislative history of the IRA. *Whitman* prohibits this. Instead, *Whitman* held that "*Congress* must lay down *by legislative act* an intelligible principle to which the person or body authorized to [act] is directed to conform." *Id.* at 472 (emphasis added). Congressional reports and statements from the floor of Congress do not constitute a "legislative act."

In a footnote, the First Circuit claims that a resort to legislative history to divine an "intelligible principle" is warranted by *Mistretta*. *Carcieri*, 497 F.3d at 42 n.20. App.57. If Congress had actually enacted standards in Section 465 or elsewhere they could be fleshed out by reference "to the purpose of the [IRA], its factual background and the statutory context in which they appear." *American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 104 (1946). In *Mistretta*, the Court looked to the legislative history to add content to the factors provided in the statute itself. 488 U.S. at 376 n.10. Where there is no standard to begin with, however, no case holds that resort to legislative history can save a statute.

Finally, the First Circuit took the standardless delegation in Section 465 of the IRA to a level never taken by any circuit court. That is because the First Circuit found "both the text and context of" Section 479 "to be ambiguous" and that the "[legislative] history also does not clearly resolve the issue." *Carcieri*, 497 F.3d at 28. App.23. With respect to the definition of Indian for whom the "for Indians" principle would operate, the ambiguity was cited to allow the Secretary to more than double the number of tribes eligible for trust acquisition. It is simply not possible for Section 479 to be both "ambiguous" *and* to provide "substantial guidance" to the Secretary at the very same time.

This Court should take this opportunity to resolve the nondelegation challenge to Section 465 once and for all.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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