No. 07-526

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 Department of the Interior, United States; FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION and THE RISC FOUNDATION, INC. AS AMICI CURIAE SUPPORTING PETITIONERS

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MOTION OF THE CITIZENS EQUAL RIGHTS FOUNDATION AND THE RISC FOUNDATION, INC. FOR LEAVE TO FILE A BRIEF PURPORTED TO BE FILED OUT OF TIME AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Citizens Equal Rights Foundation and The RISC Foundation, Inc. respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the Petition for a Writ of Certiorari submitted by the Petitioners. It has been suggested by the Respondent that the filing of this brief is filed out of time. The *Amici* believe that they have complied with the new Rule 37.2(a) and have filed their brief timely for the following reasons.

1. Rule 37.2(a) provides, in pertinent part, that the brief of an *amicus curiae* "shall be filed within 30 days after the case is placed on the docket **or a response is called for by the Court, whichever is later**, ... (Emphasis added.) This case was placed on the Court's docket on October 23, 2007.

2. On November 16, 2007, it came to the attention of Counsel for the *Amici* that the Respondent had applied for an extension of time in which to file their response. On Monday, November 19, 2007, the *Amici* Counsel of Record enquired of the Clerk's office as to the granting of the request and was informed that the extension to file the response was granted to December 26, 2007.

3. Upon inquiry to the Clerk's office staff on November 19, 2007 Counsel for *Amici* was assured that its time to file was continued to the Response due date. This was confirmed by the Clerk's Office. This information was consistent with Counsel for the *Amici*'s reading of the above quoted section of the rule. (The President of CERA, independently, received the same information regarding the extension of the time to file the *Amici*'s brief.)

4. Subsequently, letters requesting consent to file this brief were sent to the parties on December 10-11, 2007. Prior to December 26, 2007 the Respondent requested an additional extension to file on January 25, 2008, which was also granted. *Amici* received notice from the Respondent and the Clerk of granting this extension and presumed that the previous information of the Clerk applied, as well, to this extension, hence the present filing.

5. The Respondent, Solicitor General, on January 23, 2008, on inquiry regarding the request for consent made on December 10, 2007, raised the issue of the timeliness of this filing, warranting this motion.

As this motion regarding the interpretation of the new rule in this context is one of first impression, the *Amici* respectfully request review of the rule text for clarification and, in consideration of the critical concerns substantively raised in the attached brief, *Amici* respectfully request that leave to file be granted.

Respectfully submitted,

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January 25, 2008

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INTEREST OF THE AMICI CURIAE

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights. CERF has a critical interest in this case, as the extension of the decision of the First Circuit as precedent will affect CERA members who own various assets and pay property taxes on fee lands near tribal fee property which may be taken into trust all over the United States.

The RISC Foundation, Inc., incorporated in the State of Rhode Island, is headquartered in Charlestown, where the lands to be taken into trust lie. It is the purpose of the foundation to identify and address significant issues affecting the quality of life in Rhode Island. Allowing the Narragansett Indian tribe to assert sovereignty over fee lands taken into trust pursuant to 25 U.S.C. § 465 will adversely affect all citizens of Rhode Island.

All parties have consented in writing to the filing of this Amicus Brief.[1]

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amici curiae, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The first section of this brief analyzes the Rhode Island Indian Claims Settlement Act and explains how the Justice Department intentionally took decisions against the Western States and then applied them in the Eastern States to get even more expansive decisions. The second section discusses federal case law and how the "Indian trust" was used to create unlimited Secretarial discretion to benefit Indians. The last section explains how this Court can apply its prior decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) to restrict the Indian Reorganization Act (IRA) as Congress intended.

ARGUMENT

The Rhode Island Indian Claims Settlement Act (Settlement Act), 25 U.S.C. § 1701, *et seq.*, settled two lawsuits asserting aboriginal title claims of the Narragansett Indian Tribe in the Town of Charlestown, Rhode Island. These claims followed the pattern created by this Court's decision in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)(*Oneida I*) that allowed the Oneida Indian Nation to sue to reclaim aboriginal rights they claimed violated the Nonintercourse Act of 1790, 25 U.S.C. § 177. In *Oneida I*, the United States contended that it could and should apply cases decided in the Western United States in the Eastern States through the application of the Nonintercourse Act. By accepting the federal premise that federal Indian common law decisions for actual reservations of federal public domain land in the West were valid precedents to establish a sufficient federal claim arising under the laws of the United States in the

East, the federal reserved rights doctrine was made enforceable through the Indian Commerce Clause against the original thirteen colonies in *Oneida I*. The Western decisions were a combination of Property Clause, Treaty Clause and Indian Commerce Clause authorities decided on the basis of territorial rights being reserved to the United States before statehood. In one misguided decision, all forms of Indian occupancy rights became indistinguishable between East and West even though the United States never had any reserved rights against the Eastern states.

Admittedly, this Court in the *City of Sherrill* ruling, by applying the doctrine of laches to *Oneida I* has attempted to limit the mischief caused by this error in judicial review. While the *Sherrill* ruling calls into question the equity of reestablishing long extinguished rights of tribal sovereignty, it expressly did not overrule *Oneida I*.

This brief explains why Section 5 of the IRA, 25 U.S.C. § 465, as Congress intended, must be confined to reservations of federal public domain lands that have never been subject to state jurisdiction. Under this standard, the Narragansett Tribe is not eligible to have lands placed into trust status under 25 U.S.C. § 465.

I. THE INDIAN REORGANIZATION ACT IS A PUBLIC LAND LAW

A. The Settlement Act Did Not Create A Federal Indian Reservation In Rhode Island

Sections 1705(a) and 1712(a) of the Settlement Act are very straightforward, they extinguish any and all aboriginal claims of the Narragansett Tribe in

Rhode Island upon acceptance of the lands purchased and transferred under the settlement and at any other location in Rhode Island. It is uncontested the Settlement Act was executed and that the Tribe's Indian title and Nonintercourse Act claims are extinguished. As the Rhode Island parties have argued, this case is about the authority of the Secretary of Interior to place additional lands purchased by the Tribe into trust for the Narragansett Tribe through 25 U.S.C. § 465 without a subsequent act of Congress. The Secretary asserts unlimited authority to take any lands purchased by any Indian tribe into trust status. The Secretary and United States assert that the Settlement Act does not apply to limit Secretarial authority to accept additional lands into trust status for the Narragansetts. The question of whether the Secretary has authority to accept fee lands purchased by or for the tribe into trust depends on the intent of Congress in enacting the Indian Reorganization Act (IRA).

The Petition for Certiorari addresses this question through interpreting the phrase "now recognized" in the IRA, 25 U.S.C. § 479. This brief incorporates that reasoning and adds to it by including the contemporaneous writings of Commissioner of Indian Affairs John Collier, the primary author of the bill that became the IRA. The MEMORANDUM FOR THE PRESS, (PRESS MEMO, p.1c-6c) outlines the "sweeping bill" introduced by Representative Edgar Howard of Nebraska. This Memo and two other Collier documents attached to this brief make it very clear that all Indians and Indian Tribes were either considered "landless" or were physically located on lands subject to the federal public land laws of the United States as required by Section 479. This bill was intended to create separate tribal municipal governments and

claimed the authority in the United States Congress to do this. There is only one clause of the Constitution that contains authority for the federal government to establish local governments: the Property Clause, Art. IV, Sec. 3, Cl. 2.

The Property Clause expressly sets the authority of the Congress to acquire new territorial lands of the United States and to establish local governments to prepare the people in those areas for citizenship. As this initial PRESS MEMO makes absolutely clear, this was the exact purpose of the bill introduced on February 12, 1934 that eventually became the IRA. (p.1c, 3c). Therefore, this bill applied directly to Indians and Indian tribes located on federal reserved public domain lands that still held their territorial land status. See First Circuit Decision, Comments of John Collier regarding 25 U.S.C. § 479, App. 23-4, 27. The purpose of the Wheeler-Howard Bill was to end the allotment practices of the Dawes Act and make territorial tribal governments that would govern the lands held by the United States for them. It was intended to be "along the lines of the subsistence homestead projects now being developed by the government for white communities." (p.2c) This irrefutable fact that the IRA was intended to apply only to Indians and Indian tribes located on federal public domain territorial lands, if overlooked by the federal courts, allows the Secretary to expand the IRA beyond its constitutional limits. In addition, it violates the separation of powers because the Property Clause is exclusively Congressional authority.

In the original thirteen colonies there never has been any federal territory or federal public domain land. For example, as a matter of federal law, the Seneca lands in the State of New York never left state

jurisdiction. *See United States ex rel Kennedy v. Tyler*, 269 U.S. 13 (1925). The federal courts as a matter of federal Indian common law interpreted conflict zones as "Indian country." "Indian country" developed as a sort of hybrid between federal enclaves and temporary federal territory. The Constitution only contains two clauses that address federal land ownership and control requiring the federal courts to create temporary federal common law designations. Acknowledging a temporary status because of an Indian uprising did not change the underlying land classification.

The State of Rhode Island made a permanent cession for an express federal purpose to provide land for the Narragansett Tribe in the Settlement Act. The land encompassed in the Settlement Act is like a federal enclave except that Congress reserved specific jurisdictional rights for the State. It is not reserved federal public domain territorial land or lands under temporary military jurisdiction to suppress a tribal uprising. More importantly, due to the extinguishment of aboriginal title no lands can be characterized as federal territorial land unless this Court is willing to apply the majority decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857) today. This is not an exaggeration. Even the PRESS MEMO quoting Commissioner Collier says "It [this bill] seeks to give to the Indians the simple right -- the inalienable right of all men who are not slaves -- of establishing an elementary form of self-government, organizing for collective action, and taking part in the management of their own affairs." (p.1c) The *Dred Scott* decision is most remembered for its positions on slavery. What is not generally recognized is that the majority opinion of Chief Justice Roger B. Taney compared and contrasted the rights of Indians to the rights of slaves to justify its harsh

statements that Negro persons could never become citizens. *Id.* at 404, 420. This Court using its equity jurisdiction has preserved the *Dred Scott* decision as part of federal Indian common law.

Allowing the Secretary of the Interior to characterize any fee lands of the Narragansett Tribe, as a federal Indian reservation allows unlimited territorial authority as defined in *Dred Scott* to apply to the people and State of Rhode Island. The Part 151 regulations first adopted by the Secretary in 1980 in claiming to apply Section 5 of the IRA, 25 U.S.C. § 465, to "Indian reservations" converted the IRA from a federal public lands statute that only applied to increasing or using the land base of reserved federal land reservations in the West to all types of land still occupied by Indians, including state reservations in the East. As explained by Amicus CERF in its amicus brief for the *Sherrill* case, all federal Indian common law was based on this territorial war power. See http://www.narf.org/sct/sherrill/amiciequalrightsfoundation.pdf. By reinterpreting the word "reservation" in the IRA to apply to any lands occupied by Indians whether the land was reserved federal public domain land or not, all land in the United States is conquered territory ceded by some Indian tribe or still subject to Indian occupancy.

B. Taking fee lands into federal ownership creates federal public land.

The PRESS MEMO says that landless Indians were going to be assisted through the Wheeler-Howard Bill "through various devices of relinquishment, purchase and exchange, for restoring allotted and inherited lands to community ownership..."(p.2c). It

was in the congressional discussion of these "various devices" that the expansive vision of Commissioner Collier was expressly limited by Congress. One of these "devices" was the idea of the Indians purchasing their own lands or having other persons or entities purchase lands for them that could then be added to or create new Indian reservations. This fee to trust device was originally in Section 5 of the IRA. The BULLETIN of the Mission Indian Agency of April 16, 1934 (BULLETIN, p.7c-12c) in Paragraph 10 states:

> "The bill authorizes an appropriation of two million dollars of Federal funds each year for the purchase of land, which will be assigned to Indians who need land. In addition, any tribe or community may use tribal funds to buy new lands to be assigned or leased to needy members."

(underline added)(p.11c).

This BULLETIN was released almost three months before the IRA bill was passed by Congress. The device we now call "fee to trust" in the original bill was expressly removed by Congress before it passed the IRA. Therefore, as passed by Congress, the only way to add additional lands under Section 5 of the IRA, 25 U.S.C. § 465, is for Congress to make a specific appropriation to purchase lands.

Congress did not intend to alter the nature of the Indian trust when it adopted the IRA. Under both the Dawes Act and IRA the Indian trust was based on the trust corpus of the Indian right of occupancy or Indian title. (p.9c) Payments for ceded lands and the remaining unceded lands were deemed to be in trust to protect the lands from alienation and taxation. The IRA altered

these individual land rights by extending the trust period indefinitely and by requiring tribal members to exchange trust patent allotments rather than to sell the allotments to non-Indians. This is exactly what this Court concluded in *United States v. John*, 437 U.S. 634, 645-46, 650 (1978).

When the IRA is viewed properly in its public lands context, the act of the Secretary accepting additional lands for the Narragansett Tribe pursuant to 25 U.S. C. § 465 is a subsequent land transfer. The Settlement Act does not authorize additional land purchases or transfers. As said in the concurrence by Justices Rehnquist and Powell in *Oneida I*:

> "The majority today finds this strict rule (mere allegation of a federal source of title does not convert an ordinary ejectment action into a federal case) inapplicable to this case, and for good reason. In contrast to the typical instance in which the Federal Government conveys land to a private entity, the Government, by transferring land rights to Indian tribes, has not placed the land beyond federal supervision. Rather the Federal Government has shown a continuing solicitude for the rights of the Indians in their land. The Nonintercourse Act of 1790 manifests this concern in statutory form. Thus, the Indians' right to possession in this case is based not solely on the original grant of rights in the land but also upon the Federal Government's subsequent guarantee. Their claim is clearly distinguishable from the claims of land grantees for whom the Federal Government has taken no such responsibility." (parentheses and emphasis added).

Id. at 684.

It is a subsequent land transfer because it literally conveys land specifically not included in the Settlement Lands from state to federal ownership in trust for the Narragansett Tribe twenty years after specific land parcels were selected and transferred under the express terms of the Settlement Act. The parcels selected under the Settlement Act were a final selection. The transfer extinguished all tribal aboriginal claims. See 25 U.S.C. § 1705(a)(2) and § 1712(a)(2). As a matter of federal public land law, this transfer was the only federal acquisition allowed by the Settlement Act. To hold otherwise, destroys the intent of Congress in protecting the sovereign interests of the State of Rhode Island to maintain state jurisdiction over the transferred land. See 43 U.S.C. § 1715(c). The State of Rhode Island did not consent to any further lands being transferred to federal ownership under the Settlement Act. As the First Circuit concludes, the Secretary is asserting a federal Indian trust responsibility beyond that delegated in the Settlement Act. The Secretary claims this authority pursuant to Section 5 of the IRA. App. 38-49.

II. THE EXPANSION OF THE INDIAN TRUST

How the IRA was put into affect by Commissioner Collier is crucial to understand the profound impacts resulting even decades later. In 1937, Senator Wheeler attempted to repeal the IRA. In reaction, Collier released a Statement to the Associated Press (AP MEMO, p. 13c-16c) justifying his implementation of the IRA. Collier believed "that the powers vested in Indian tribes through their

constitutions may be not only those specified powers named in the Act but 'in addition, all powers vested in any tribe or tribal council by existing law.'" (p.14c)

The IRA was written to take full advantage of the federal Indian common law trust relationship. As the PRESS MEMO states:

> "The bill was drafted after months of intensive study of the complex field of law and administration covered by the bill, and with the advice of numerous Indian welfare associations which have unanimously endorsed the main principles of the bill. The proposed legislation embodies many of the major policies which Collier, previous to his appointment as Commissioner on March 4th last, championed as founder and director of the Indian Defense Association." (p.5c)

Collier intended the IRA to use the Indian trust to invoke the paramount sovereign authority of the United States. Although Congress struck out the most blatant parts of Collier's plan including the federal court for Indian claims and fee to trust, his fundamental goal was nevertheless met when this Court decided *United States as Guardian of the Walapai v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941).

A. The Indian Trust Under the IRA

In the *Santa Fe* case, the United States asserted the right of the Walapai Tribe to all the lands it had occupied in 1866 within and without its present reservation. This claim was for all of the aboriginal lands ever occupied by the Walapai Tribe. The claim

was based on the adoption of the Trade and Intercourse Acts for the Territory of Arizona in 1851 which preceded the grant of public land to the railroad. The United States argued that their policy placing the Indian trust relationship ahead of other interests was established through the application of the Trade and Intercourse Acts. *Id.* at 347. This policy was clearly not based on making a specific reservation for the Walapai Tribe. The argument made in *Santa Fe* is that the Indian country territory of the Walapai Tribe was a separate federal territory merely because the Indians occupied the area. This follows the federal common law separate Indian territory position of the *Dred Scott* decision.

In *Dred Scott*, Chief Justice Taney separated the Indians from former slaves by concluding that all Indians Tribes were foreign governments.

> "These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other."

Scott at 404.

To be a foreign government, Chief Justice Taney assumed that each Indian tribe occupied its own sovereign territory.

> "The situation of this population (Negroes) was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial

> communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English or the colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it."

Id. at 403-4.

Chief Justice Taney's assumptions were utterly untrue. For example, the Treaty of Fort Schuyler between the Oneida Indian Tribe and the State of New York ceded all of the Oneida Indians lands to the State before the Constitution was in effect. *See Sherrill* at 203. In the West, many Indians had been enslaved under Mexican rule before the United States won the Mexican-American War. In California, the Spanish Missions had obliterated tribal affiliations leaving behind "Mission Indians" that were under the jurisdiction and protection of the State.

His incorrect assumptions did not prevent Chief Justice Taney from deciding as a matter of federal common law that the authority of the United States over all territories outside of the Northwest Territory was unlimited by any act of Congress or any clause of the Constitution. *Id.* at 432. This rewriting of the

Constitution was done to prevent the Negro race from ever becoming state or national citizens. But the comparing and contrasting of the Indian rights by which it was accomplished in the *Dred Scott* majority opinion turned the protective Indian trust relationship of the Marshall trilogy into an unlimited federal weapon asserting the "political relationship" with an Indian tribe to challenge the right to self-government. All the Executive branch has to do is reclassify an area as "Indian country" to apply the separate unlimited territorial power. Chief Justice Taney's federal Indian trust is completely separate from the Constitution because the Indians are completely separate from the white society that comprises the Sovereign People. *See Elk v. Wilkins*, 112 U.S. 94 (1884). Therefore, the Indian trust is whatever the federal government decides it is without any Constitutional constraints if the *Dred Scott* opinion remains part of federal Indian common law.

After the passage of the IRA, there was no reason to restrict the claims of the United States on behalf of Indian tribes to federal lands actually reserved for their use. According to Collier, any tribal interest could be asserted against any interest at any time because the Congress had just made the recognized Indian tribes separate territorial governments with direct powers of self-government. Under Collier's view this was only a temporary status until the Indians were able to become parts of white society. Collier acknowledged the Indian Naturalization Act of 1924 and did nothing to impair the constitutional rights of Native Americans. BULLETIN p. 8c-9c. His IRA was an early type of affirmative action program. PRESS MEMO p. 1c-6c. But instead of using Section 5 of the 14th Amendment as later established through the

Civil Rights Movement of the 1950's, his program relied on attempting to convert the reasoning of the majority opinion in *Dred Scott* into promoting tribal sovereignty and Indian self-determination to help the Indians pull themselves out of poverty.

Within a very short time of its passage, the roots of the IRA became apparent in cases like *Santa Fe* and Congress balked at providing funding to promote its expansive goals. See AP Memo, p.13c-16c. When this Court limited the IRA and the Secretarial expansion of the Indian trust in *Hynes v. Grimes Packing*, 337 U.S. 86, 123 (1949) by placing the federal Indian trust lands within the overriding context of the equal application of the law, only a very small amount of land was purchased for Indians by Congress under Sec. 5 of the IRA. Besides assigning more marginal federal public domain lands to Indian reservations, the IRA had very little impact after 1948. By the mid-1950's Congress was back to terminating tribal status and selling Indian lands.

B. The Era of Unlimited Indian Trust Authority

The IRA languished until the American Indian Movement began in the mid-1960's. With President Nixon's Message to Congress of July 8, 1970, the era of the Nixon Indian Policy began. It was based on making the unlimited territorial power permanent through preservation of tribal sovereignty. As the first heading of the Nixon Message says: Self-Determination Without Termination. The policy goes on to articulate how any federal program can be delegated to tribal authority. This is unlimited Executive authority to define the Indian trust. No longer is there any deference to

Congress required as this Court assumed in *United States v. Kagama*, 118 U.S. 375, 384-5 (1886). President Nixon took his newly declared "Indian trust" power without any act of Congress and proceeded to the federal courts to have his assumed power legitimized as federal Indian common law. And this Court began issuing opinions unleashing this "Indian trust" power on the States and people. Starting with *Mescalero Apache v. Jones*, 411 U.S. 145 (1973) and *McClanahan v. Arizona*, 411 U.S. 164 (1973), this Court again allowed off reservation "trust responsibility." This Court then directly allowed the Nixon Administration to reinterpret the IRA. See *Morton v. Mancari*, 417 U.S. 535, 545 (1974). This decision let the Nixon administration and all subsequent administrations reinterpret the "political relationships" that existed only on real federal Indian reservations of public domain land under Section 479 of the IRA to being any recognized "political relationship" the Secretary or President recognized at any time. Through federal Indian common law in the 1970's, this Court unleashed the twisted reasoning of *Dred Scott* at the States, local communities and every individual. This massive expansion of the Indian trust was applied to 25 U.S.C. § 465, to achieve the fee to trust power that Congress had expressly removed from the IRA in 1934.

For the Indian trust to become unlimited the federal courts had to assume that the Secretary could interpret the IRA and 25 U.S.C. § 465 to apply to any land classification, just as the First Circuit did in this case. App. 30-31. In *Stevens v. Commissioner of the Internal Revenue*, 452 F.2d 741 (9th Cir. 1971), a Gros Ventre tribal member with trust patent allotments exchanged his lands through the Bureau of Indian Affairs for other allotted lands. The Commissioner

claimed the individual Indian owed back federal taxes on the income gained on the exchange of the lands because they were not of equal value and did not qualify as being tax exempt. The case turned on the discretion of the Secretary of the Interior to accept the trust patent lands and exchange them for other individual allotment lands already held in trust by the United States. The Secretary argued that the exchange of lands was made pursuant to 25 U.S.C. § 465.

In *Stevens*, the Ninth Circuit concluded that all of the Indian statutes should be construed in *pari materia* as evidencing one continuous federal Indian policy to allow this exchange of allotted lands to be tax exempt pursuant to 25 U.S.C. § 465. *Stevens* at 746-8. In the conclusion of the *Stevens* case the Ninth Circuit opined:

> "Bearing in mind that "doubtful expressions are to be resolved" in favor of the Indians (*Squire v. Capoeman, supra*) and giving weight to the interpretation of the various acts by Interior, we conclude that the Secretary of the Interior has the discretionary power under the Indian Reorganization Act to purchase land for Indians with funds supplied by them and when lands are so purchased they are subject to the implied exemption from income taxation contained in the General Allotment Act." *Stevens* at 749.

Exchanging individual Indian trust allotments for other individual Indian trust allotments to preserve their tax exempt status was certainly within the intent of Congress in adopting the IRA in 1934. Section 4 was the provision to restore "surplus lands" contained within historical reservation boundaries. Section 4 of

the IRA delegated the Secretary discretion to restore or exchange allotted lands within historical territorial reservation boundaries that maintained a reserved right in the United States under the Property Clause for the protection of Indians. Section 4 of the IRA was codified in 25 U.S.C. § 463 - § 464. Section 4 of the IRA specifically allows the exchange of untaxed allotted lands still restricted from alienation to be exchanged for different untaxed allotments as done in *Stevens*. Instead, in *Stevens* the Secretary claimed the tax exempt status for the exchanged allotted lands was 25 U.S.C. § 465. The Nixon administration intentionally misconstrued the IRA in the *Stevens* case. The federal attorneys for the Secretary of Interior could rely on the fact that the federal attorneys for the defendant Commissioner were not going to question the statutory construction of the IRA made by the Secretary. This allowed the BIA to falsely represent that the exchange of Indian allotted lands was made pursuant to 25 U.S.C. § 465 when the correct provision of the IRA was 25 U.S.C. § 464.

The Ninth Circuit's erroneous language in the conclusion of *Stevens* regarding 25 U.S.C. § 465 was almost immediately used in Washington State to acquire lands within the "historical boundaries of the Puyallup reservation" situated within the City of Tacoma into trust status. *City of Tacoma v. Andrus*, 457 F.Supp 342 (D.D.C. 1978). As in *Stevens*, these lands were also subject to acquisition pursuant to Section 4 of the IRA. Section 4 of the IRA, 25 U.S.C. § 463, specifically addresses the rights of non-Indians located within historic reservation boundaries and balances their interests to the asserted need to reacquire lands for Indians. By intentionally misapplying 25 U.S.C. § 465 to a type of land acquisition

specifically addressed in 25 U.S.C. § 463, all of the safeguards incorporated in the IRA for non-Indians are removed from the Secretary's determination of whether to acquire the additional land for individual Indians or tribes. The *City of Tacoma* case explains how the overbroad language of *Stevens* becomes the basis of the first fee to trust regulations promulgated by the Secretary of the Interior in 1978. *Id.* at 345-6.

Immediately following the *City of Tacoma* decision, the Secretary took lands into trust in the City of Sault Ste. Marie, Michigan. The City sued to stop the fee lands purchased by the tribe that were not situated within historic reservation boundaries from being placed into trust status. However, the City was not considered a person that could raise due process claims. *City of Sault Ste. Marie v. Andrus*, 532 F.Supp 157, 167-8 (D.D.C. 1980). This left the City with standing but no enforceable right against this assumed fee to trust power of the Secretary asserted under Section 5 of the IRA, codified as 25 U.S.C. § 465. Because of this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974) that removed the Fourteenth Amendment defense that naturally went against this inequity, there was no means to argue against the asserted Secretarial authority.

The decisions in *Stevens*, *City of Tacoma* and *City of Sault Ste. Marie* are the basis of the fee to trust regulations, 25 C.F.R. Part 151, promulgated pursuant to Section 5 of the IRA, 25 U.S.C § 465. These cases found that 25 U.S.C. § 465 does not encompass interests considered to be within the "zone of interests" for prudential standing for any non-Indian opposing a fee to trust application. The Secretary makes fee to trust decisions only for the Indian tribes because they are Indians and separate territorial governments. This

decision making process rests on the intentional misapplication of the IRA as explained above. It is important to note that the *Sault Ste. Marie* case is cited by the First Circuit as the basis that these Petitioners have no right to question the Secretary's authority under 25 U.S.C. § 465 to place these lands into trust for the Narragansett Tribe. App. 33-34.

Under the Nixon Indian Policy the Indian trust is unlimited. It encompassed any and all federal programs or federal functions that can be delegated to an Indian tribe, including the decision to place additional lands for Indians into trust status under 25 U.S.C. § 465. On January 4, 2008, Assistant Secretary Carl J. Artman, limited the policy of acquiring "off reservation" fee lands into trust status. *See* http://www.indianz.com/News/2008/006483.asp. The Secretary has for the first time since 1970 interpreted the IRA as imposing a limitation on Secretarial discretion. However, this concession falls far short of limiting the IRA to only Indians and Indian tribes on actual federal Indian reservations as required by 25 U.S.C. § 479.

III. LIMITING FEE TO TRUST ENDS THE UNLIMITED TERRITORIAL AUTHORITY

It needs to be made clear that proposing to end the unlimited territorial authority of the Nixon Indian Policy does not terminate the Indian trust relationship. All Amici RISC and CERF are proposing to end is the application of the territorial power to lands under state jurisdiction. By addressing the fee to trust issues in this case, this Court can conclude that the IRA does not apply to Indians or Indian tribes that were not recognized or did not have reserved federal public

domain lands in June 1934, unless specifically recognized and given lands by Congress. In other words, interpret the IRA as Congress intended -- a federal public land law to correct the Dawes Act. Lands purchased by Congress by special act as for the Narragansett Tribe or using the express terms of Section 5 of the IRA for the Mississippi Choctaw would be unaffected by such a ruling. Such a ruling would terminate the threat of the Executive Branch being able to recreate federal territorial land anywhere in the United States.

This Court has already asserted its judicial review authority to rebalance the federal common law equities in *Sherrill*. *Sherrill* at 218-20. By correctly interpreting the IRA as a federal public lands statute, this Court can rule that Sec. 5 of the IRA, 25 U.S.C. § 465, cannot be applied in Rhode Island to end the unlimited territorial power assumed by the Secretary of the Interior. The Petitioners have continuously argued that the Settlement Act prevents these 31 acres from being placed into "trust" to create sovereign Indian land in Rhode Island. By applying the rebalancing of the equities from the *Sherrill* decision as a limitation on the discretion of the Secretary to acquire additional lands for Indians, this Court can place the Indian trust back within the equal protection of the laws.

This Court in *Sherrill* expressly rejected the "unification theory" of the Nixon administration that allowed a merger of Indian title and fee ownership to recreate tribal sovereignty. *Id.* at 213-4. Fee to trust is just another version of the same "unification theory" that purportedly allows tribally purchased or owned fee lands to become Indian territory by having their title transferred to the United States pursuant to 25 U.S.C.

§ 465. This transfer to federal ownership in "trust" by the Secretary of Interior is supposed to restore tribal sovereignty rights as if they were never extinguished over the accepted land. Congress expressly removed any authority in the IRA for the Secretary to accept tribally purchased or individually obtained fee lands outside of existing Indian reservation boundaries into trust status pursuant to Section 5 of the IRA. Congress did not expand the federal reserved rights doctrine in the IRA. This Court can correct the Secretary's assumption of fee to trust authority in this case by interpreting the IRA as Congress intended.

This Court finally applied the equal protection clause of the Fourteenth Amendment to overrule *Dred Scott* in *Saenz v. Roe,* 526 U.S. 489, 502 Fn. 15 (1999). Removing land from state jurisdiction by placing fee lands into federal trust for one group of state residents because they are recognized as "Indians" completely removes the political process rights of all other state residents. Removing the state political process rights of the non-Indian people nullifies their exercise of local self-governance. Local self-governance is the political sovereignty to make their own laws and be governed by them. *Williams v. Lee,* 358 U.S. 217, 220 (1959). This was the reason Congress limited the application of Section 5 of the IRA to only those lands reserved before statehood in the Western states or lands expressly purchased by Congress for Indian tribes. On reserved public lands, the rights of state and local self-government have never completely vested. Congress certainly did not delegate to the Secretary of the Interior in the IRA the unlimited weapon of recreating Indian territory as defined in *Dred Scott* to remove state and individual sovereignty where it is vested. All of the reasons this Court refused to rekindle the long

dead embers of the tribal sovereignty of the Oneida Indian Nation apply to this case and all other fee to trust cases.

CONCLUSION

The Court should accept the petition for certiorari and reverse the decision of the First Circuit.

Respectfully submitted,
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