No. 05-1428

In the Supreme Court of the United States

STATE OF SOUTH DAKOTA, ET AL., PETITIONERS

v.

DEPARTMENT OF THE INTERIOR, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the provision of the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, that authorizes the Secretary of the Interior to take real property into trust "for the purpose of providing land for Indians," 25 U.S.C. 465, is an unconstitutional delegation of legislative power.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 423 F.3d 790. The district court's opinion granting summary judgment in favor of respondents (Pet. App. 25-56) is reported at 314 F. Supp. 2d 935.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2005. A petition for rehearing was denied on February 6, 2006 (Pet. App. 138). The petition for a writ of certiorari was filed on May 8, 2006 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, Congress adopted a policy of distributing Indians' tribal lands to individual Indians. See *Hodel* v. *Irving*, 481 U.S. 704, 706 (1987). In addition, tribal lands that were deemed surplus were made available to settlement by non-Indians. See *ibid*. Other statutes of that era similarly provided for the allotment of land to individual Indians on particular reservations. See *id*. at 706-707; *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984); *Mattz* v. *Arnett*, 412 U.S. 481, 496-497 (1973). The allotment policy reduced Indian land holdings from 138 million acres in 1887 to 48 million acres in 1934, and led to a patchwork of ownership on Indian reservations. See *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 253-254 (1992); *Cohen's Handbook of Federal Indian Law* 1009 n.337 (Nell Jessup Newton et al. eds., 2005 ed.).

Congress repudiated the policy of allotment in 1934 in the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*).[1] In the IRA, Congress prohibited any further allotment of reservation lands (§ 1, 25 U.S.C. 461), extended indefinitely the periods of trust or restrictions on alienation of Indian lands (§ 2, 25 U.S.C. 462), provided for the restoration of surplus unallotted lands to tribal ownership (§ 3(a), 25 U.S.C. 463(a)), and prohibited any transfer of Indian lands (other than to the Tribe or by inheritance) except exchanges authorized by the Secretary as "beneficial for or compatible with the proper consolidation of Indian

[1] The relevant provisions of the IRA, as they presently appear in the United States Code (as amended), are reproduced in an appendix hereto. App., *infra*, 1a-9a.

lands and for the benefit of cooperative organizations" (§ 4, 25 U.S.C. 464).

In addition, the IRA authorized or directed the Secretary to undertake specified steps aimed at improving the economic and social condition of Indians, including: acquiring real property "for the purpose of providing land for Indians" (IRA § 5, 25 U.S.C. 465); adopting regulations for forestry and livestock grazing on Indian units (§ 6, 25 U.S.C. 466); proclaiming new Indian reservations or adding to existing reservations with acquired lands (§ 7, 25 U.S.C. 467); assisting financially in the creation of Indian-chartered corporations (§ 9, 25 U.S.C. 469); making loans to Indian-chartered corporations out of a designated revolving fund "for the purpose of promoting the economic development" of the Tribes (§ 10, 25 U.S.C. 470); paying tuition and other expenses for Indian students at vocational schools (§ 11, 25 U.S.C. 471); and giving preference to Indians for employment in positions relating to Indian affairs (§ 12, 25 U.S.C. 472).

Finally, the IRA included provisions designed to strengthen Indian self-government. Congress authorized Indian Tribes to adopt their own constitutions and bylaws (IRA § 16, 25 U.S.C. 476), to incorporate (§ 17, 25 U.S.C. 477), and to decide, by referendum, whether to opt out of the IRA's application (§ 18, 25 U.S.C. 478).

Petitioners challenge the constitutionality of Section 5 of the IRA. The full text of that Section is as follows:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee

> be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. 465.

b. The Secretary adopted regulations in 1980 to implement his authority to acquire property under the IRA, which is carried out by the Bureau of Indian Affairs (BIA). See 25 C.F.R. Pt. 151; 45 Fed. Reg. 62,036 (1980). Those regulations set forth the land-acquisition

policy and specify the factors that guide the Secretary's evaluation of land acquisition requests. See 25 C.F.R. 151.3(a), 151.10. The regulations provide that, subject to consideration of the specified factors, land may be acquired in trust for Indians when it is within or adjacent to the Tribe's reservation or tribal land-consolidation area, the Tribe already owns the land, or the acquisition "is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. 151.3(a)(3). The factors the Secretary considers include "[t]he need of the individual Indian or the tribe for additional land" and "[t]he purposes for which the land will be used," as well as "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls" and any other "[j]urisdictional problems and potential conflicts of land use." 25 C.F.R. 151.10(b), (c), (e) and (f).

The Secretary amended the land-acquisition regulations in 1995 and 1996. See 60 Fed. Reg. 32,874 (1995); 61 Fed. Reg. 18,082 (1996). The amended regulations retain the same statement of land-acquisition policy and the factors for reviewing an application that were identified in the 1980 regulations. In addition, the amended regulations require the BIA to give state and local governments notice of a proposed acquisition and an opportunity for comment. 25 C.F.R. 151.10, 151.11(d). If the land in question is neither within nor contiguous to a reservation, the Secretary will give increasing scrutiny to the Tribe's claim of anticipated benefits and increasing weight to any adverse impact of acquisition on the State or locality's regulatory jurisdiction or tax base as the distance of the property from the Tribe's reservation increases. 25 C.F.R. 151.11(b) and (d). Finally, the 1996 regulatory amendment provides a thirty-day period af-

ter publication of the Secretary's decision to take land into trust before title is actually acquired, 25 C.F.R. 151.12(b), so that an interested party may bring a judicial challenge to the acquisition.[2]

2. In 1990, the Lower Brule Sioux Tribe submitted a request to the BIA that the Secretary take into trust under Section 465 a 91-acre parcel of land owned by the Tribe. Pet. App. 2. The parcel at issue lies seven or eight miles south of the Lower Brule Sioux Reservation, adjacent to Interstate Highway 90 (I-90), and partially within the City of Oacoma, South Dakota. *Ibid.* The Tribe explained that it planned to use the land for an industrial park to develop businesses and employment opportunities for Native Americans. *Id.* at 101.

The BIA solicited comments on the Tribe's proposal from the State and the City of Oacoma. Both entities expressed concerns about the proposal, including possible problems regarding criminal and civil jurisdiction. Pet. App. 95-97, 101. The Tribe's reply contended that Oacoma did not presently provide government services to the property in question and that tribal police would be better able to respond to any incidents that might arise on the parcel than the single sheriff's deputy who was responsible for patrolling the entire county, including the City of Oacoma. *Id.* at 102-103. In December

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[2] Such a challenge would be barred by sovereign immunity after title is acquired, due to the exception for Indian lands in the Quiet Title Act (QTA), 28 U.S.C. 2409a. See, *e.g.*, *Neighbors for Rational Dev., Inc.* v. *Norton*, 379 F.3d 956, 961-962 (10th Cir. 2004) (QTA barred APA action challenging Secretary's acquisition of land in trust under Section 465 as violating NEPA); *Alaska* v. *Babbitt*, 75 F.3d 449, 452-453 (9th Cir. 1995) (QTA barred APA claim that Bureau of Land Management's approval of Indian's allotment under 43 U.S.C. 270-1 to 270-3 (1970) (repealed 1971), was ultra vires), cert. denied, 519 U.S. 818 (1996).

1990, the Department of the Interior approved the Tribe's request and, in 1992, the land was conveyed to the United States in trust for the Tribe. *Id.* at 103.

3. The State of South Dakota and the City of Oacoma filed suit in the United States District Court for the District of South Dakota alleging that the Department of the Interior's approval of the Tribe's request was arbitrary and capricious and an abuse of discretion under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and that Section 465, which authorized the acquisition, was an unconstitutional delegation of legislative power.

The district court rejected these challenges. Pet. App. 94-115. The court held that it lacked jurisdiction over the State and City's APA claims in light of the prohibition in the Quiet Title Act (QTA), 28 U.S.C. 2409a, against challenges to the United States' title to Indian trust lands. Pet. App. 105-108. The court further held that the State and City's constitutional claims lacked merit. *Id.* at 109-11.

4. A divided panel of the Eighth Circuit reversed. Pet. App. 64-93 (*South Dakota* v. *Dep't of the Interior*, 69 F.3d 878 (1995)). The majority found that Congress had failed to set an "intelligible principle" to constrain the Secretary's exercise of authority under Section 465, and that it was therefore an unconstitutional delegation of legislative authority. Pet. App. 72. In so ruling, the majority noted that the Secretary had urged that his acquisition of land under Section 465 was not subject to judicial review at all. *Id.* at 74. Judge Murphy dissented. *Id.* at 78-93. She concluded that the historical context in which Section 465 was enacted, the other provisions of the IRA of which it was a part, and the IRA's legislative history all indicated that Section 465's pur-

pose is to provide land and economic opportunity for Indians to replace the millions of acres lost through the allotment process and that that purpose provides the Secretary with adequate direction. *Id.* at 83-85.

5. The Department of the Interior petitioned this Court for a writ of certiorari. At the same time, as noted above, see pp. 5-6, *supra*, in response to the Eighth Circuit's decision, the Department of the Interior amended its trust acquisition regulations to ensure the availability of judicial review of the Secretary's action on an application under Section 465 before land is actually taken into trust—*i.e.*, before judicial review is barred by sovereign immunity under the exception for Indian lands in the QTA. See 25 C.F.R. 151.12; 61 Fed. Reg. 18,082 (1996). The government's petition for a writ of certiorari suggested that the Court grant the petition, vacate the Eighth Circuit's decision, and remand the action to the Secretary for further proceedings under the new regulations.

The Court granted the petition, vacated the Eighth Circuit's judgment, and directed that the matter be remanded to the Secretary of the Interior for reconsideration of his administrative decision under Interior's amended trust acquisition regulations. See *Department of the Interior* v. *South Dakota*, 519 U.S. 919 (1996) (Pet. App. 57-62); 62 Fed. Reg. 26,551-26,552 (1997) (explaining that the remand to the Department of the Interior operated to transfer the land out of trust).

6. Following remand, the Tribe submitted a renewed request in 1997 that the United States acquire the 91-acre parcel in trust status. Pet. App. 3. The Tribe's amended application explained that the purpose of the acquisition was to "enhance the economic development of the tribe and * * * to provide a nexus to the Oacoma

area which is of historical importance to the Tribe." *Id.* at 132.

The Tribe indicated that it intended to use the 91-acre parcel to attract I-90 tourist traffic onto South Dakota's Native American Scenic Byway. Pet. App. 132. The Tribe explained that it planned to build a "Circle of Tipis" comprised of seven tipis—each representing one of the South Dakota Sioux Tribes—and a visitor information and welcome center on the parcel for the Byway's southern terminal entrance. *Ibid.*

The Tribe further explained that acquisition of the property would help the Tribe achieve economic independence and benefit the surrounding localities and other Tribes. Pet. App. 131-132, 133. The Tribe noted that because of its small population and remote location, the Tribe's existing reservation was unable to sustain an economy. *Ibid.* As a consequence, over 40% of adult members residing on the reservation were unemployed, and over 25% of the residents had incomes below the poverty line. *Id.* at 131. The Tribe contended that acquisition in trust of the property along I-90 would allow the Tribe to attract business and employment opportunities for tribal members. *Id.* at 133.

The BIA notified the State, County and City of the Tribe's reapplication and requested their comments. Pet. App. 133. Each responded opposing the acquisition on the basis of lost tax revenue and jurisdictional conflicts, such as zoning, *ibid.*, although South Dakota's Governor later stated that he supported the application, as did various local entities, *id.* at 134.

The Assistant Secretary for Indian Affairs approved the application. Pet. App. 4; *id.* at 116-117. The agency determined that an analysis of the regulatory factors supported taking the land into trust to promote the eco-

nomic development of the Tribe. *Ibid.*; *id.* at 128-137. In response to the objections raised by the State and local governments, the Department found that the tax impact on local governments would be insignificant —$2587—and that a much larger trust acquisition for the Tribe a few years earlier had "not encountered any jurisdictional problems." *Id.* at 134.

7. The State, County and City filed suit challenging the acquisition decision under the APA and on constitutional grounds.[3] The district court rejected each of petitioners' challenges. The court reviewed the factors for taking land into trust, as outlined in the regulations, and determined that the Secretary had considered them adequately. Pet. App. 32-45. The court further held that Section 465 is not an unconstitutional delegation of legislative authority because, based upon a "plain reading of § 465" and "review of the historic context and legislative history of the IRA, Congress's 'general policy' supporting enactment of § 465 becomes apparent." *Id.* at 50.

8. The court of appeals affirmed. Pet. App. 1-24. The court observed that, in assessing petitioners' constitutional challenge, it must examine "the broader context of the Act to determine whether the delegation in 25 U.S.C. § 465 includes guidance sufficient to withstand a challenge based upon nondelegation doctrine grounds."

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[3] During the course of the district court litigation, the action was stayed temporarily to allow the Department of the Interior to re-examine its compliance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* Pet. App. 119. After preparing an environmental assessment analyzing the impacts of the proposed acquisition, the Department determined that the acquisition was not likely to significantly impact the environment. *Id.* at 120. In January 2001, the Department ratified its earlier decision to acquire the land in trust status. *Id.* at 116-117.

Id. at 10. Examining the language and the context of the Act, the court determined that the purposes of Section 465 are made "evident in the whole of the IRA and its legislative history." *Id.* at 11. The court found that, reading the statute as a whole and in its historic context, "[t]he statutory aims of providing lands sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from the prior allotment policy sufficiently narrow the discretionary authority granted to" the Secretary in Section 465. *Id.* at 14.

The court of appeals also rejected the State's argument that the Secretary had failed to consider adequately the regulatory factors governing the exercise of his discretion. Pet. App. 15-22. The court found that the agency's finding that the property "would greatly enhance the Tribe's economic base and its ability to be self-sufficient, thereby serving the purposes of the IRA," was supported by the evidence, as was its finding that the adverse impact on local jurisdictions would be insignificant. *Id.* at 19. The court also found that the agency had considered adequately the issue of the property's distance from the Tribe's existing reservation when it found that "considering the circumstances of rural central South Dakota," the eight-mile distance is "of no great significance," because the location along I-90 "holds the greatest potential for the accomplishment of the Tribe's goals." *Id.* at 21-22.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore unwarranted.

1. Notably, petitioners do not contend that review by this Court is necessary to resolve a conflict among the courts of appeals. Rather, as petitioners concede (Pet. 14-15), each of the courts of appeals that has considered a constitutional challenge to Section 465 on nondelegation grounds has rejected that argument. See Pet. App. 6-14; *Utah* v. *Shivwits Band of Pauite Indians*, 428 F.3d 966, 972-974 (10th Cir. 2005), petition for cert. pending, No. 05-1160 (filed March 9, 2006); *Carcieri* v. *Norton*, No. 03-2647, 2005 WL 2216322, **8-**9 (1st Cir. Sept. 13, 2005); *United States* v. *Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000); *Confederated Tribes of Siletz Indians* v. *United States*, 110 F.3d 688, 694, 698 (9th Cir.), cert. denied, 522 U.S. 1027 (1997).[4]

Nor is the issue presented one of urgent importance. To the contrary, the statutory provision that petitioners

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[4] The First Circuit panel's amended opinion in *Carcieri* was originally reported at 423 F.3d 45. Appellants filed a petition for rehearing en banc on November 7, 2005, which did not raise the nondelegation issue. The court thereafter requested that the opinion be withdrawn from the bound volume of the Federal Reporter. The editor's note at 423 F.3d at 46-72 makes clear, however, that the decision has not been vacated or withdrawn. To date, the court has taken no action on the petition for rehearing en banc. See No. 03-2647 Dkt.

Petitioners observe (Pet. 5-7) that a divided panel of the Eighth Circuit had, at an earlier stage of this litigation, upheld a nondelegation challenge to Section 465 (Pet. App. 64-93). This Court, however, vacated the panel's decision, and remanded the matter to the Secretary of the Interior to reconsider his administrative decision and to permit judicial review in light of newly amended regulations. *Id.* at 57-62. Accordingly, the initial panel decision has no precedential effect, see *O'Connor* v. *Donaldson*, 422 U.S. 563, 578 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect."), and the court of appeals has itself repudiated its reasoning, see Pet. App. 9-14.

seek to have invalidated was enacted nearly 70 years ago, and since that time it has become embedded in the practical, day-to-day administration of Indian affairs. For seven decades, Section 465 has provided the primary mechanism for the federal government to restore and replace tribal lands, which Congress concluded was crucial to promote tribal self-government and economic self-sufficiency. See pp. 17-18, *infra*. Congress has, moreover, often revisited and amended the IRA, including subsequent to the Secretary's promulgation of land-acquisition regulations, without expressing any disagreement with the Secretary's understanding of the statutory policies that are to guide his determinations.[5]

Similarly, this Court has considered Section 465 on numerous occasions and has remarked that "Section 465 provides the proper avenue" for a Tribe "to reestablish sovereign authority over [lost] territory." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 221 (2005). See also *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) (noting that, in Section 465, Congress had granted the Secretary "authority to place land in trust, to be held by the Federal Government for the benefit of the Indians" and "explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt"); *County of Yakima* v. *Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 155-159 (1973).

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[5] See Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709; Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b)-(c), 104 Stat. 207; Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, Tit. I, § 101, 102 Stat. 2938; see also Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* (extending the reach of Section 465 to all Tribes).

The Court previously declined to grant review on the nondelegation issue in *Roberts*, which the court of appeals followed in this case (Pet. App. 11), and the same disposition is warranted in this case as well.

2. Despite the uniform appellate decisions upholding the constitutionality of Section 465, petitioners urge (Pet. 15) that the Court should grant a writ of certiorari to review the court of appeals' application of this Court's decision in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001). The court of appeals' application to a particular statute of well-settled principles regarding the conferral of authority on the Executive Branch does not warrant this Court's review. In any event, contrary to petitioners' contentions, the courts of appeals have carefully considered and correctly applied this Court's nondelegation precedent.

a. It is well settled that "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991). It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). Accord *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)) (Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.").

Although "in 1935 [the Court] struck down two delegations for lack of an intelligible principle," the Court has "since upheld, without exception, delegations under

standards phrased in sweeping terms." *Loving* v. *United States*, 517 U.S. 748, 771 (1996); see, *e.g.*, *Lichter* v. *United States*, 334 U.S. 742, 778-786 (1948) (upholding a statute authorizing the War Department to recover "excessive profits" earned on military contracts); *Yakus* v. *United States*, 321 U.S. 414, 420-427 (1944) (upholding a statute authorizing the Price Administrator to set prices that are "generally fair and equitable and will effectuate the purposes of [the Emergency Price Control] Act"); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (upholding a statute authorizing the Federal Communications Commission to regulate broadcasting according to the "public interest, convenience, or necessity").

In *Whitman* itself, this Court reversed the court of appeals' determination that the Clean Air Act, 42 U.S.C. 7409(b)(1), unconstitutionally delegated Congress's legislative power to the Environmental Protection Agency to set national air quality standards. 531 U.S. at 472. The Court emphasized that "[i]n the history of the Court [it has] found the requisite 'intelligible principle' lacking in only two statutes," and that it had "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 474-475 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting), and citing *id.* at 373 (majority opinion)). The Court noted that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," and that in the two statutes struck down on nondelegation grounds, one "provided literally no guidance for the exercise of discretion," and the other "conferred authority to regulate the entire economy on the basis of no more precise a standard

than stimulating the economy by assuring 'fair competition.'" *Id.* at 474, 475 (citing *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935)). The Court stressed that it had never required "that statutes provide a determinate criterion for saying how much of the regulated harm is too much." *Id.* at 475 (internal quotation marks and alteration omitted).

b. The courts of appeals have correctly (and uniformly) held that "the purposes evident in the whole of the IRA and its legislative history sufficiently narrow the delegation and guide the Secretary's discretion in deciding when to take land into trust" to withstand constitutional challenge. Pet. App. 11.

Section 465 itself contains a number of express indications of Congress's policy. That section states that the purpose of the Secretary's land-acquisition authority is "providing land for Indians," which is a narrow group of individuals defined in 25 U.S.C. 479. See 25 U.S.C. 465. Section 465 provides a limited amount of federal funds to be used for the purpose and expressly forbids the use of those funds to acquire land for Navajo Indians outside of their established reservation boundaries. *Ibid.* Finally, Section 465 specifies that lands taken into trust "shall be exempt from State and local taxation." *Ibid.*

Moreover, whereas petitioners discuss solely Section 465 in isolation, that provision's context as part of the larger IRA is fundamental to understanding the scope of the Secretary's authority to take land into trust for Indians. The boundaries of the Secretary's authority under Section 465 "need not be tested in isolation," *American Power & Light*, 329 U.S. at 104, but may be discerned from the purposes of the IRA as a whole, its factual background, and the statutory context. *Ibid.*;

Lichter, 334 U.S. at 785; *Federal Radio Comm'n* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933) (holding that the "public convenience, interest, or necessity [standard] * * * is to be interpreted by its context"); *Fahey* v. *Mallonee*, 332 U.S. 245, 253 (1947) (finding broad delegation to regulate banks "sufficiently explicit, against the background of custom, to be adequate").

Congress enacted the IRA to promote Indian self-government and economic self-sufficiency. See *Mescalero Apache Tribe*, 411 U.S. at 152-154 ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934)); accord *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (the IRA reflects Congress's "overriding goal of encouraging 'tribal self-sufficiency and economic development") (quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980)); *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). Congress was particularly concerned with reversing the "disastrous" consequences of the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, which had eroded the tribal land base and weakened tribal organizations. *Hagen* v. *Utah*, 510 U.S. 399, 425 & n.5 (1994). Congress identified "conserv[ing] and develop[ing] Indian lands and resources" as one of the purposes of the IRA. Pmbl., 48 Stat. 984.

Accordingly, the IRA expressly repudiates the allotment policy, 25 U.S.C. 461, and contains several provisions designed to preserve and expand tribal lands. 25 U.S.C. 462, 463(a), 464, 465. Other provisions of the IRA likewise reflect Congress's policy of promoting the eco-

nomic development and self-governance of the Indian Tribes. 25 U.S.C. 469, 470, 471, 472, 476, 477. The Secretary's authority under Section 465 to acquire land in trust for Indians and the protection of that property against taxation is intended to further the larger statutory purposes, for example, by ensuring that tribal lands are not lost by condemnation, alienation, encroachment, or tax defaults. See generally *City of Sherrill*, 544 U.S. at 220-221 (recognizing that Section 465 serves as Congress's "mechanism for the acquisition of lands for tribal communities that takes account of the interest of others with stakes in the area's governance and well being" and "provides the proper avenue for * * * reestablish[ing] sovereign authority over territory" formerly held by an Indian Tribe).

The IRA's legislative history confirms the congressional purpose that is evident from the statutory text. As the court of appeals observed, the repeated references in the House and Senate Reports as well as floor debates to the goal of providing land to "Indian individuals and tribes whose land holdings are insufficient for self-support," Pet. App. 13 (quoting S. Rep. No. 1080, 73d Cong., 2d Sess. 2 (1934)), reflect that "Congress placed primary emphasis on the needs of individuals and tribes for land and the likelihood that the land would be beneficially used to increase Indian self-support," *id*. at 14.

The purposes of the IRA as reflected in its text, structure, context, and history provide the intelligible principles that guide the Secretary in the exercise of his authority under Section 465. The Secretary may acquire land "for the purpose of providing land for Indians," within the intent of Section 465, when the acquisition would serve such purposes as advancing tribal economic

development, assisting tribal self-governance, and restoring the ancestral tribal land base. Indeed, this Court has often identified those policies as the Congressional purposes that guide the Secretary's application of the IRA. See *Mancari*, 417 U.S. at 542 ("The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."); *Mescalero Apache Tribe*, 411 U.S. at 152 ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R. Rep. No. 1804, *supra*, at 6); see also *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 168 (1980) (Brennan, J., concurring in part and dissenting in part) (noting that the IRA reflects both the "policy of encouraging tribal self-government" and the "complementary interest in stimulating Indian economic and commercial development").

Consistent with this long-established focus of the IRA, the Secretary has recognized that Section 465 does not confer boundless discretion. For example, in adopting a regulatory statement of land-acquisition policy under Section 465, the Secretary expressed his understanding that "[t]he policy * * * is within the scope of existing statutory authority and * * * reflects Congressional intent." 45 Fed. Reg. 62,035 (1980). The Secretary has, moreover identified through regulation the specific factors, derived from the purposes of the IRA and the Secretary's experience in administering it, that guide his decisions to take lands into trust for Tribes

and individual Indians. See 25 C.F.R. Pt. 151.[6] By setting out ascertainable standards that govern trust acquisition decisions, the Secretary has not only observed, but has given concrete expression to, the limiting principles in the IRA. Cf. *Lichter*, 334 U.S. at 783 (recognizing that subsequent "administrative practices" under a statute may demonstrate the "*definitive adequacy*" of the terms of the statutory authorization).

c. Petitioners assert (Pet. 19) that, under this Court's decision in *Whitman*, "the nondelegation doctrine denies reliance on legislative history" for determining whether a statute sufficiently guides the exercise of the authority it delegates. *Whitman*'s reiteration that Congress must "lay down by legislative act an intelligible principle" does not, however, address in any way what reliance a court may give to legislative history in construing the text that Congress has enacted. *Whitman*, 531 U.S. at 472 (quoting *Hampton*, 276 U.S. at 409). And this Court has repeatedly made clear that a statute's purpose, factual background, and context are properly considered in determining whether a statute meets this test. See, *e.g.*, *American Power & Light*, 329

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[6] As discussed above, see pp. 4-5, *supra*, the regulations set forth a "Land acquisition policy," 25 C.F.R. 151.3, which provides for acquisitions in three circumstances: when the land is within or adjacent to an existing reservation, when the land is already owned by the Tribe, or when "the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. 151.3(a)(1)-(3). The regulations then set forth particular factors to guide the Secretary's decision whether to acquire such land, including "[t]he need of the individual Indian or the tribe for additional land" (25 C.F.R. 151.10(b)), "[t]he purposes for which the land will be used" (25 C.F.R. 151.10(c)), and, if the land is outside a reservation and is to be used for a tribal business purpose, "the anticipated economic benefits associated with the proposed use" (25 C.F.R. 151.11(c)).

U.S. at 104; *Lichter*, 334 U.S. at 778-779. To the same extent that legislative history may be useful to confirm the meaning of arguably ambiguous text in other contexts, see, *e.g.*, *Zedner* v. *United States*, 126 S. Ct. 1976, 1985-1986 (2006), so may it also serve that function in resolving a constitutional challenge on nondelegation grounds. And of particular relevance here, as noted above, this Court has repeatedly relied on the legislative history of the IRA in identifying its purposes and policies. See, e.g., *Mescalero Apache Tribe,* 411 U.S. at 152-154 (quoting H.R. Rep. No. 1804, *supra*, at 6); *New Mexico*, 462 U.S. at 335 n.17 (quoting same).

Additionally, petitioners err in suggesting (Pet. 21-22) that the legislative history demonstrates that Congress "stripped" Section 465 of any standards. To the contrary, Congress deliberately crafted the IRA to provide the Secretary with broad authority to implement the purposes of the Act—advancing tribal economic development, assisting tribal self-governance and restoring the ancestral tribal land base. See S. Rep. No. 1080, *supra*, at 1-2; accord H.R. Rep. No. 1804, *supra*, at 1, 6-7. As this Court has recognized, legislation through "broad general directives" is a necessary part of governance and is not constitutionally suspect. *Mistretta*, 488 U.S. at 372; *American Power & Light*, 329 U.S. at 105 ("legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation."). That is especially so with respect to the administration of Indian Affairs, involving the varying circumstances of a number of different Tribes. The court of appeals' reliance on the larger statutory and historical context in which the IRA was enacted,

including its legislative history, to determining whether the statute provides adequate guidance to the Secretary was proper and provides no warrant for this Court's review.

3. Petitioners' contention that the acquisition of lands in trust status by the Secretary impermissibly "invade[s] the jurisdiction of the State" (Pet. 25-26), provides no basis for granting the petition. Although petitioners correctly note that the Court stated in *Whitman* that the level of direction required of Congress will vary depending upon the nature of the power conferred, Pet. 25 (citing *Whitman*, 531 U.S. at 475), that principle *supports* the constitutionality of the delegation contained in Section 465. In an area in which the Executive has historically exercised expansive authority, such as the supervision of lands occupied by Indians,[7] broader authorizations are especially appropriate. *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (recognizing that Congress may accord to the President a greater degree of discretion in the area of foreign affairs than would be acceptable if only domestic affairs were involved); *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975) (upholding a broad conferral of authority on various Indian Tribes to regulate the introduction of liquor into Indian country on the ground that limitations on Congress's authority are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter").

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[7] See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 209 (1983); *Central Mach. Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980); *United States* v. *Jackson*, 280 U.S. 183, 191 (1930); *United States* v. *Hitchcock*, 205 U.S. 80, 85 (1907).

Nor is it exceptional that Congress determined in Section 465 to confer immunity on land held in trust for Indians from state taxation. "The policy of leaving Indians free from State jurisdiction and control" is one that "is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945); see also *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 168-173 (1973); *New Mexico*, 462 U.S. at 332-333.

Similarly, petitioners' complaint that "the acquisition of land in trust deprives the states and localities of their ability to zone, govern, regulate, or control the use of or development of any real or personal property" is not material to petitioners' constitutional claim that Section 465 lacks an "intelligible principle" to guide the Secretary's exercise of his authority under Section 465. Rather, petitioners' argument represents a disagreement with longstanding principles—embodied in the IRA and numerous other statues—that govern Indian lands and Indian self-determination. Against that background, Congress made an explicit policy determination to allow the Secretary to take into trust land "within or without existing reservations" and that "such lands or rights shall be exempt from State and local taxation." 25 U.S.C. 465.

Finally, petitioners ignore that the Secretary's regulations promulgated by the Secretary to implement the purposes of Section 465 address the very concerns they raise here. See *City of Sherrill*, 544 U.S. at 220-221 ("The regulations implementing [Section] 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory."). The regulations direct the BIA, when deciding whether to approve a request that it accept land into trust, to consider any "[j]urisdictional problems and

potential conflicts of land use which may arise." 25 C.F.R. 151.10(f). Similarly, when, as was true in this case, the land to be acquired is held in unrestricted fee status, the BIA considers "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," 25 C.F.R. 151.10(e), as well as whether the BIA "is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status," 25 C.F.R. 151.10(g). The court of appeals concluded that the BIA properly applied those regulations in this case, see Pet. App. 15-24, and petitioners do not challenge that ruling here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2006

APPENDIX

Act of June 18, 1934, h. 576, 48 Stat. 984 (25 U.S.C. 641 *et seq.*) provides in pertinent part:

§ 461. Allotment of land on Indian reservations

On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

§ 462. Existing periods of trust and restrictions on alienation extended

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

§ 463. Restoration of lands to tribal ownership

(a) Protection of existing rights

The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall

not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.

* * * * *

§ 464. [As amended by Pub. L. No. 109-221, § 501(b)(1), 120 Stat. 343-344.] Transfer and exchange of restricted Indian lands and shares of Indian tribes and corporations

Except as provided in this Act, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized under this Act shall be made or approved: *Provided*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived, or to a successor corporation: *Provided further*, That, subject to section 8(b) of the American Indian Probate Reform Act of 2004 (Public Law 108-374; 25 U.S.C. 2201 note), lands and shares described in the preceding proviso shall descend or be devised to any member of an Indian tribe or corporation described in that proviso or to an heir or lineal descendant of such a member in accordance with the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.), including a tribal probate code approved, or regulations promulgated under, that Act: *Provided further*, That the Secretary of the Interior may authorize any voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in the judgment of the Secretary, is

expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption for footnote style edittion

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

§ 466. Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

§ 467. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

* * * * *

§ 469. Indian corporations; appropriation for organizing

There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

§ 470. Revolving fund; appropriation for loans

There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.

§ 471. Vocational and trade schools; appropriation for tuition

There is authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans

to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

§ 472. Standards for Indians appointed to Indian Office

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

* * * * *

§ 476. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special

election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

* * * * *

(e) Vested rights and powers; advisement of pre-submitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

* * * * *

§ 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided,* That such charter shall not become operative

until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

§ 478. Acceptance optional

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

§ 479. Definitions

The term "Indian" as used in this Act 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 June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian

blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.