No. 07-526

In the Supreme Court of the United States

DONALD L. CARCIERI, GOVERNOR OF RHODE ISLAND, ET AL., PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Narragansett Tribe is eligible to receive benefits pursuant to Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. 465, although the Tribe was not "federally recognized" on the date of the IRA's enactment.

2. Whether the Rhode Island Indian Claims Settlement Act, 25 U.S.C. 1701 *et seq.*, foreclosed the Narragansett Tribe's right to exercise sovereignty over any land located in Rhode Island.

3. Whether Section 5 of the IRA constitutes an unconstitutional delegation of legislative authority to the Secretary of the Interior.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-81) is reported at 497 F. 3d 15. The memorandum and order of the district court (Pet. App. 84-136) are reported at 290 F. Supp. 2d 167.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2007. The petition for a writ of certiorari was filed on October 18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the Indian Reorganization Act (IRA), 25 U.S.C. 461 *et seq*., Congress authorized the Secretary of the

Interior (Secretary) to acquire "any interest in lands, water rights, or surface rights to lands, within or without existing reservations, * * * for the purpose of providing land for Indians." 25 U.S.C. 465. The Department of the Interior exercises this authority in accordance with regulations found at 25 C.F.R. Part 151. In 1998, the Secretary approved the Narragansett Indian Tribe's application to have a 31-acre parcel of land owned in fee by the Tribe and located in Charlestown, Rhode Island, taken into trust for the Tribe's benefit pursuant to the IRA. The parcel is adjacent to the Tribe's pre-existing trust lands and was acquired by the Tribe to be used for low-income Indian housing. Pet. App. 162-164.

The State of Rhode Island, its governor, and the Town of Charlestown (petitioners) filed suit claiming, *inter alia*, that the Tribe is not eligible to receive benefits under the IRA; that Section 5 of the IRA, 25 U.S.C. 465, is unconstitutional; and that the Secretary's decision was arbitrary and capricious and contrary to the Rhode Island Indian Claims Settlement Act (Settlement Act), 25 U.S.C. 1701 *et seq*. The district court rejected all of petitioners' challenges. Pet. App. 84-136. The court of appeals, sitting en banc, affirmed. Pet. App. 1-81.

1. The Narragansett Indians were the aboriginal inhabitants of what is now Rhode Island. In 1975, the Narragansetts, then organized as a state-chartered corporation, filed suit against the State and private landowners, pursuant to the Trade and Intercourse Act of 1834, 25 U.S.C. 177, to recover 3200 acres of their aboriginal territory. Pet. App. 10-11, 86. After lengthy multilateral negotiations, the parties settled the land claims in 1978, pursuant to an agreement that was ratified by

Congress and implemented, *inter alia*, through the Settlement Act. The settlement conferred 1800 acres of land (the Settlement Lands) on the Narragansetts and expressly made those lands subject to the civil and criminal laws and jurisdiction of the State of Rhode Island. 25 U.S.C. 1708(a); Pet. App. 11. In exchange, the Narragansetts agreed to the extinguishment of their aboriginal land claims throughout the State. *Ibid.* The Settlement Act specifically anticipated that the Secretary could "subsequently acknowledge[] the existence of the Narragansett Tribe of Indians," by preventing those lands from being alienated without the Secretary's approval after any such acknowledgment. 25 U.S.C. 1707(c).

In 1983, the Secretary formally acknowledged the Narragansett Indian Tribe as a federally recognized Tribe under regulations promulgated by the Department of the Interior. *Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island*, 48 Fed. Reg. 6177 (1983). Following that formal acknowledgment, the Tribe applied to have the Settlement Lands taken into trust pursuant to the Part 151 regulations implementing Section 5 of the IRA. In 1988, the Secretary accepted the Settlement Lands in trust, subject to the provision of the Settlement Act (25 U.S.C. 1708(a)) requiring that the Settlement Lands remain subject to state civil and criminal law and jurisdiction. Pet. App. 11-12, 87.

2. In 1992, the Tribe acquired the 31-acre parcel that is the subject of this litigation. Pet. App. 4, 12. That parcel is "adjacent to the [S]ettlement [L]ands, across a town road." *Id.* at 13. The Tribe applied to the Secretary in 1993, requesting acquisition of this parcel in trust, and submitted a revised application in 1997. *Id.*

at 14. On March 6, 1998, following a lengthy administrative process, the Department announced the decision of the Area Director to approve the Tribe's application for trust acquisition of the 31 acres "for the express purpose of building much needed low-income Indian Housing via a contract between the Narragansett Indian Wetuomuck Housing Authority (NIWHA) and the [U.S.] Department of Housing and Urban Development." *Id.* at 162-163.

Petitioners sought review by the Interior Board of Indian Appeals (IBIA). Pet. App. 14. On June 29, 2000, after full briefing of the issues, the IBIA issued a decision affirming the trust acquisition decision and denying petitioners' appeals. *Id.* at 15.

3. Petitioners then initiated this suit in the United States District Court for the District of Rhode Island against the Secretary of the Interior and the Director of the Eastern Regional Office of the Bureau of Indian Affairs. In the district court, petitioners sought to invalidate the decision to acquire the land in trust on multiple grounds, including the following: that the Secretary's decision did not comply with the applicable law and should be reversed under the Administrative Procedure Act; that the Settlement Act precludes the Tribe from acquiring lands in Rhode Island that are exempt from the State's civil and criminal law and jurisdiction; that the IRA does not apply to the Narragansett Indian Tribe; and that Section 5 of the IRA is unconstitutional. On cross-motions for summary judgment, the district court rejected each of petitioners' claims and affirmed the Secretary's decision. Pet. App. 101-136.

4. A divided panel of the court of appeals affirmed, but the en banc court withdrew that opinion and granted rehearing. Pet. App. 15. Sitting en banc, the court of appeals unanimously affirmed the decision to accept the

land in trust. Pet. App. 1-81. The court of appeals rejected petitioners' various arguments that the relevant provision of the IRA is unconstitutional. *Id.* at 50-59. It further held that Interior's interpretation of that provision, under which the Tribe is entitled to benefit from the Secretary's authority to acquire land in trust, was reasonable and entitled to deference under *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 17-37. And it held that the decision to accept the application to acquire the land in trust was not arbitrary, capricious, or contrary to law. *Id.* at 59-71.

The majority of the court of appeals also concluded that the Settlement Act's provision applying state civil and criminal law and jurisdiction on the Settlement Lands is limited on its face to the Settlement Lands and cannot reasonably be interpreted to extend to other lands in Rhode Island. Pet. App. 37-50. Judge Howard and Judge Selya dissented as to the jurisdictional status of the lands once they were taken in trust. *Id.* at 71-81. Those two judges would have held that the Settlement Act prohibits "unrestricted" trust acquisition, because in their view the Settlement Act requires that any Indian trust land in Rhode Island remain subject to the State's civil and criminal laws and jurisdiction. *Id.* at 72 & n.25 (Howard, J., dissenting); *id.* at 79 (Selya, J., dissenting).

ARGUMENT

On each of the three questions presented by petitioners, the court of appeals' decision is consistent with this Court's precedents and does not conflict with the decision of any other circuit. Accordingly, further review by this Court is unwarranted.

1. Petitioners first argue that the IRA does not apply to the Narragansett Tribe because they contend that the definition of "Indian" in Section 19 of the IRA, 25 U.S.C. 479, applies only to Tribes that were "both federally recognized and under federal jurisdiction" on the effective date of the IRA in 1934, while the Narragansetts were not recognized until 1983. Pet. 14. The court of appeals, however, correctly concluded that the Interior Department, which is charged with administering the IRA, has reasonably interpreted the statute's ambiguous terms, and that the IRA's authorization to acquire land for "Indians" allows the Secretary to act for the benefit of any recognized Tribe and its members, and not solely for the subset of Tribes that were already "recognized" by the Secretary on June 18, 1934. Nor does that decision conflict, as petitioners claim, with decisions of this Court or other courts of appeals.

a. The relevant provision, Section 19 of the IRA, defines "Indian" for purposes of the IRA as including

> 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.

25 U.S.C. 479. The principal question is how to construe the phrase "any recognized Indian tribe now under Federal jurisdiction."

The court of appeals' opinion—which was unanimous on this point—amply demonstrates that the time meant by "now" is ambiguous. Pet. App. 19-28. Congress

sometimes uses the word to refer to the time a provision was enacted, and sometimes to a later time at which a provision will be applied. Compare *Montana* v. *Kennedy*, 366 U.S. 308, 312 (1961) (time of enactment), with *Difford* v. *Secretary of HHS*, 910 F.2d 1316, 1320 (6th Cir. 1990) (time of disability benefits hearing). Statutory context within the IRA does not clarify the matter, especially since the next clause of the same definition refers to a specific date, seventeen days before the statute's effective date, demonstrating that Congress knew how to fix a date.[1] Pet. App. 20-21. The court of appeals also analyzed policy considerations, *id.* at 21-22, and the IRA's legislative history, *id.* at 23-28.

Having established that the statute is ambiguous, the court of appeals then correctly concluded that the Secretary's interpretation is reasonable, consistent with the

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[1] Moreover, as discussed below (at p. 14, *infra*), settlement acts pertaining to certain Tribes in Maine and to the Mashantucket Pequot Indian Tribe in Connecticut preclude or limit the application of Section 5 of the IRA. Insofar as Section 5 is concerned, that preclusion would be unnecessary under petitioners' reading of the IRA, because they claim that it is inapplicable to Tribes recognized after 1934, and those Tribes were not recognized until long after that date. See GAO, *GAO-02-49*, *Indian Issues: Improvements Needed in Tribal Recognition Process* 25-26 (Nov. 2001) (noting that the Tribes in Maine were recognized by the Department of the Interior in 1972, and the Mashantucket Pequot Tribe was recognized by Congress itself in 1983). In that statutory context, it is noteworthy that the Settlement Act—enacted in 1978 and reflecting not only Congress's views but also the agreement of parties including the State of Rhode Island and the Town of Charlestown—specifically contemplated that the Secretary might "subsequently acknowledge[] the existence of the Narragansett Tribe of Indians." 25 U.S.C. 1707(c).

text, legislative history, and policy of the IRA, and thus entitled to *Chevron* deference. Pet. App. 29.[2]

b. Petitioners erroneously assert (Pet. 14-16, 18) that the meaning of the term "now" in Section 19 is controlled by the "sustained precedential value" of this Court's decision in *United States* v. *John*, 437 U.S. 634 (1978). The source of that alleged value is the fact that the Court described the definition of "Indians" in the IRA as including "not only * * * 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction,' * * * but also * * * 'all other persons of one-half or more Indian blood.'" *Id.* at 650 (bracketed alteration in original) (quoting 25 U.S.C. 479). Thus, petitioners' argument hinges solely on the Court's insertion of "[in 1934]" in its quotation of the statute.

As the court of appeals noted, however, the Court's passing editorial emendation "contains no analysis on this point" and, more importantly, was entirely unnecessary to its holding. Pet. App. 22-23. Recounting a series of congressional and executive actions, the Court thoroughly rejected the Fifth Circuit's conclusion that the federal government had been precluded from holding lands in trust for the benefit of the Mississippi Choctaws. *John*, 437 U.S. at 649-650. When it reached the point of "[a]ssuming for the moment that authority for the [relevant] proclamation can be found only in the [IRA]," the Court—like the briefs of the parties[3]—ad-

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[2] The court of appeals also rejected petitioners' claims that the Secretary's interpretation of the definition of "Indians" had varied over time. Pet. App. 30-37. The petition does not renew that argument.

[3] See U.S. Br. at 27, *United States* v. *John*, 437 U.S. 634 (1978) (No. 77-836) ("The term 'Indian' is then defined by Section 19, 25 U.S.C. 479, to include, among others, 'all other persons of one-half or more Indian

dressed whether Mississippi Choctaws were "persons of one-half or more Indian Blood," and, finding that they were, held that "the Mississippi Choctaws were not to be excepted from the general operation of the [IRA]." *Id.* at 650.

Moreover, regardless of what *John*'s editorial insertion meant at the time, petitioners overlook the critical fact that the Court's decision predates the Secretary's 1980 adoption, by notice-and-comment rulemaking, of the regulations in 25 C.F.R. Part 151, which govern trust acquisitions under Section 5 of the IRA and reject petitioners' reading. See 25 C.F.R. 151.2(b) (defining a Tribe as one "recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs"); see also Pet. App. 31 ("The regulation does not distinguish between tribes recognized before June 18, 1934 and those recognized thereafter.").

As this Court held in *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), a "judicial precedent" does not "foreclose an agency from interpreting an ambiguous statute" in a reasonable way that differs from the "court's opinion as to the best reading" of the statute, unless "the prior court decision *holds* that its construction follows from the *unambiguous terms of the statute* and thus leaves no room for agency discretion." *Id.* at 982-983 (emphases added). However much petitioners may seek to read into the insertion of the phrase "[in 1934]" in *John*'s quo-

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blood.'"); John Br. at 29, *John*, *supra* (Nos. 77-575 and 77-836); see also Miss. Band of Choctaw Indians Amicus Br. at 7, 17, *John*, *supra* (Nos. 77-575 and 77-836). In the case consolidated with *United States* v. *John*, the State of Mississippi simply asserted that "neither the 1934 Indian Reorganization Act nor the 1939 Act established Indian Country in Mississippi." Miss. Mot. to Dismiss at 8, *John*, *supra* (No. 77-575).

tation of Section 19, they certainly cannot establish that the glancing reference was a "hold[ing] that [the Court's] construction follows from the unambiguous terms of the statute." Accordingly, the decision in *John* cannot control the outcome in this case, and the court of appeals appropriately engaged in *Chevron* analysis in the wake of the 1980 rulemaking.

c. Petitioners also argue (Pet. 16-17) that the decision below conflicts with two decisions of other courts of appeals. There is, however, no square conflict with either decision.

The Fifth Circuit's decision in *United States* v. *State Tax Commission*, 505 F.2d 633 (1974), was superseded by this Court's decision in *John*, which reversed the Fifth Circuit's conclusion that a Mississippi Choctow Reservation was not Indian country.[4] Of course, even assuming, as petitioners suggest, that one strand of *State Tax Commission*'s reasoning maintains some force because this Court's decision in *John* did not affirmatively "express any disagreement with, never mind overrule, the earlier conclusion of the Fifth Circuit in [*State Tax Commission*]," Pet. 18, the Fifth Circuit's 1974 analysis still cannot dictate the construction of Section 19 under *Brand X*, because it predates the rulemaking that adopted the Part 151 regulations. See p. 9, *supra*.

Petitioners also exaggerate (Pet. 16-17) the significance of the Ninth Circuit's decision in *Kahawaiolaa* v.

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[4] As the Fifth Circuit later recognized, even though the United States believed that the Fifth Circuit's decision in *State Tax Commission* "incorrectly concluded that the Mississippi Choctaws are not a tribe," it did not seek certiorari in this Court because this conclusion "was unnecessary to the [Fifth Circuit's] resolution of the [case]." *United States* v. *John*, 560 F.2d 1202, 1205 (1977), rev'd, 437 U.S. 634 (1978).

Norton, 386 F.3d 1271 (2004), which involved an equal protection challenge to the exclusion of Native Hawaiians from the coverage of the Interior Department's regulations governing the acknowledgment of the recognized status of Indian Tribes. Petitioners seize (Pet. 17) on the Ninth Circuit's passing observation in that case after quoting Section 5 of the IRA that "[t]here were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934, nor were there any reservations in Hawaii." *Kahawaiolaa*, 386 F.3d at 1280. But the court in *Kahawaiolaa* was concerned only with the exclusion of Native Hawaiians from the IRA, and only for the purpose of assessing the Secretary's regulations that excluded them. The decision did not address the application of the IRA to non-Hawaiian groups; indeed, the Ninth Circuit expressly stated that it was not concerned with any legal distinctions among Indian groups in the continental United States:

> We do not think that the difference between the two groups [recognized and non-recognized] of native Americans domiciled in the continental United States is of legal significance for purposes of our opinion. The critical factor is the similarity of the geographic and historical circumstances of indigenous native American groups, federally recognized as Indian tribes or not, and the contrast between those circumstances and the geographic and historic circumstances of native Hawaiians as a whole.

Id. at 1281 n.5. In short, *Kahawaiolaa* had no occasion to answer the question whether the IRA applies to persons who are not members of Tribes recognized in 1934, and petitioners have identified no other authority that postdates the 1980 rulemaking and even purportedly

conflicts with the court of appeals' decision that the Secretary's interpretation of the IRA is reasonable and entitled to deference.

2. Petitioners next urge (Pet. 21-35) this Court to grant certiorari to consider whether the extinguishment of aboriginal land claims in the Settlement Act also implicitly foreclosed all future trust acquisitions for the Narragansett Tribe. The Settlement Act was enacted to implement a multilateral settlement of land-claims litigation, and it closely tracked the provisions of the joint memorandum of understanding that memorialized that specific settlement among those specific parties. As discussed above, the Settlement Act granted the Settlement Lands to the Narragansetts in exchange, *inter alia*, for the extinguishment of their aboriginal-title claims throughout the State.[5] The Settlement Act further provided that state civil and criminal law would apply on the Settlement Lands, 25 U.S.C. 1708(a), and that, in the event that the Narragansetts were acknowledged as a Tribe, those lands could not be alien-

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[5] The Settlement Act provides in part as follows:

> [B]y virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

25 U.S.C. 1705(a)(3).

ated without the approval of the Secretary, 25 U.S.C. 1707(c). Following the Tribe's formal acknowledgment as a federally recognized Tribe on February 10, 1983 (48 Fed. Reg. at 6177), the State transferred the Settlement Lands to the Tribe, subject to the Settlement Act's explicit provision that state civil and criminal jurisdiction would apply on those lands.

a. Petitioners contend (Pet. 26-32) that, by extinguishing aboriginal title, Congress effectively extended the provision in Section 1708(a) of the Settlement Act to all lands in Rhode Island, thereby implicitly limiting the authority of the Secretary as set forth in the IRA. The cornerstone of petitioners' theory is the proposition that "aboriginal title encompasses more than just a fee simple interest; it includes a sovereignty interest as well." Pet. 27. According to petitioners, it follows from this conception of aboriginal title that by extinguishing aboriginal title, Congress foreclosed the Tribe's exercise of "territorial sovereignty, including the sovereignty interest arising from trust." *Ibid.*

Petitioners' contention is irrelevant to the issue at hand, which is whether Congress in enacting the Settlement Act implicitly limited the authority of the Secretary to take land into trust for the Tribe pursuant to the IRA. Such implicit repeals are disfavored. See *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974). Moreover, in the context of limitations on governmental authority, this Court presumes that statutes do not limit prior governmental authority unless Congress states so expressly. See *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960) ("There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without

express words to that effect.") (quoting *United States* v. *United Mine Workers*, 330 U.S. 258, 272 (1947)).

Furthermore, there is even less reason to infer a repeal in this context, because Congress has demonstrated in other settlement acts that it knows how to expressly preclude future acquisition of trust land in a settlement act, as demonstrated by statutes enacted to effectuate agreements involving other Tribes and States. For example, as the court of appeals observed (Pet. App. 47-48), the Maine Indian Claims Settlement Act of 1980 includes a provision that precludes application of Section 5, 25 U.S.C. 1724(e), and the Mashantucket Pequot Indian Claims Settlement Act precludes the application of Section 5 to certain non-settlement lands, 25 U.S.C. 1754(b)(8).

b. Even assuming that petitioners' assumptions about aboriginal title are relevant to the implied-repeal analysis, petitioners err in contending (Pet. 27) that the First Circuit's decision conflicts with decisions of the Second and Ninth Circuits.[6]

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[6] Petitioners' amici claim (at 16) that the First Circuit's decision deepens a *different* purported circuit split, about "whether, and how, the Indian canon and other rules of construction should apply to modern settlement acts." It is, however, difficult to see how the First Circuit could have taken the position that amici attribute to it. The majority's discussion of the Settlement Act never invoked a presumption in favor of Indians, but rather made repeated references to the text of the Settlement Act and a straightforward application of the presumption against implied repeals. Pet. App. 37, 38, 39-40, 44, 46-47, 49. Moreover, Judge Howard's dissent cited First Circuit precedent for the proposition that "the generous rules of 'Indian construction' do not apply in analyzing an implied repeal," *id.* at 72, and, though he disagreed with the majority's construction of the statute, he did not claim it had departed from that precedent.

Petitioners assert (Pet. 27-28) that in *Native Village of Eyak* v. *Trawler Diane Marie, Inc.*, 154 F.3d 1090 (1998), the Ninth Circuit "determined that aboriginal title includes a claim of sovereignty over land." In that case, five Native Villages claimed to hold *unextinguished* aboriginal title to a portion of the outer continental shelf of the United States, which, they asserted, entitled them to "*exclusive* use of the ocean resources and regulatory power over third parties." *Id.* at 1096. The Villages argued that their claims, unlike those of States, were not barred by the "federal paramountcy doctrine," because aboriginal title is not a legal or fee title but is instead a "right to use and occupy territory" that is admittedly owned by the federal government. *Id.* at 1094-1095. The Ninth Circuit rejected their arguments because it found no "practical difference between" the Villages' claim to "*exclusive* rights to use or occupy areas of the ocean" and state claims of fee title that had previously been rejected under the paramountcy doctrine. *Id.* at 1095-1096. Thus, that court had no occasion to consider whether the extinguishment of aboriginal title would diminish a Tribe's "sovereignty" or its subsequent ability to assert rights in later-acquired trust lands. Petitioners' attempt to predict what the Ninth Circuit "would" do when presented with facts such as these in this case (Pet. 28) does not give rise to a conflict.

Similarly, notwithstanding petitioners' claims to the contrary (Pet. 28-29), the Second Circuit's decision in *Western Mohegan Tribe* v. *Orange County*, 395 F.3d 18 (2004), does not conflict with the decision in this case. In *Western Mohegan Tribe*, the court held that a suit attempting to assert the rights to exclusive use attendant upon unextinguished aboriginal title was the functional

equivalent of a challenge to New York State's exercise of fee title and was thus barred by New York's immunity under the Eleventh Amendment. It also made clear that aboriginal title is the "Indians' right of occupancy and use" of land, but is still subject to extinguishment by the sovereign (now the federal government). *Id.* at 22-23. It did not, however, have any occasion to address the consequences of extinguishing Indian title or the application of statutory mechanisms for establishing or restoring tribal sovereignty over land.

c. Petitioners incorrectly assert (Pet. 30) that the definition of "Indian country" in 18 U.S.C. 1151 acknowledges their theory that aboriginal title consists of both property interests and aspects of sovereignty by including "allotments the Indian titles to which have not been extinguished." According to petitioners (Pet. 30), that language embodies Congress's understanding that fee title held by Indian allottees is "transform[ed]" into Indian country by the "persistence of aboriginal title." In fact, even though aboriginal title is sometimes called "Indian title," the common view of aboriginal title is that it is held by Tribes. See *United States* v. *Dann*, 873 F.2d 1189, 1195 (9th Cir. 1989). The reference to "Indian title[]" in 18 U.S.C. 1151, by contrast, is to the beneficial interest of an individual Indian in trust or restricted-fee lands. The United States indefinitely retained trust title to Indian allotments that remained in individual Indian ownership in 1934, pursuant to the IRA. 25 U.S.C. 462. Those lands therefore were never conveyed to the Indian allottees in fee simple. Such trust allotments, like tribal reservation and dependent Indian community land, are "Indian country" under Section 1151, regardless of the "persistence of aboriginal title."

d. Petitioners also err in suggesting that their case is bolstered by *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197 (2005). In *City of Sherrill*, this Court considered circumstances where a Tribe claimed that its purchase of lands within its reservation boundary had reestablished "Indian country." While the Court rejected the unilateral assertion of "Indian country" status under the circumstances of that case, it specifically noted that Section 5 of the IRA provided a way for the Oneida Indian Nation to secure relief. After describing the trust-acquisition power under Section 5 and the "regulations implementing" it, the Court concluded that "Section [5] provides the proper avenue for [the Oneida Indian Nation] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." *Id.* at 220-221. Thus, *City of Sherrill* clearly endorses a Tribe's ability to use Section 5 to reestablish "sovereign control over territory" (*i.e.*, restore sovereign control after it has lapsed). *Ibid.* It does not, however, provide any support for petitioners' claim (Pet. 31) that the Narragansetts are implicitly barred from invoking Section 5 simply because their aboriginal title was extinguished by the Settlement Act.

This case merely presents an instance in which a recognized Tribe has availed itself of the statutory mechanism that was endorsed by this Court in *City of Sherrill*. And, because all recognized Tribes are equally entitled to the benefits of the federal programs established by the IRA, 25 U.S.C. 476(f), congressional extinguishment of the Narragansetts' aboriginal title is irrelevant to the Tribe's right to avail itself of the benefits of trust acquisition pursuant to Section 5.

e. Finally, as is obvious from the foregoing, the question about construing the Settlement Act is not one

of general national significance, but, as Judge Howard wrote in dissent, "a very narrow question" involving the "specific context" of the Narragansetts and the State of Rhode Island. Pet. App. 72. Although other Tribes and other States have their own settlement acts, the express language of those acts often differs on the very point at issue here. *Id.* at 47-48. Thus, contrary to the suggestion of petitioners' amici (at 18), this case would not provide a good vehicle for this Court to "clarify how settlement acts nationwide should be construed."

3. With respect to their third question, petitioners argue (Pet. 35-39) that this Court should grant certiorari to consider whether Section 5 of the IRA, 25 U.S.C. 465, is an unconstitutional delegation of the legislative power of Congress.

a. Petitioners do not, and could not, suggest that there is any conflict on this question. Each of the courts of appeals that has considered a constitutional challenge to Section 5 on nondelegation grounds—whether before or after this Court's decision in *Whitman* v. *American Trucking Associations*, 531 U.S. 457 (2001)—has upheld the statute's constitutionality. See Pet. App. 54-59; *South Dakota* v. *Department of the Interior*, 423 F.3d 790 (8th Cir. 2005), cert. denied, 127 S. Ct. 67 (2006); *Shivwits Band of Paiute Indians* v. *Utah*, 428 F.3d 966, 972-974 (10th Cir. 2005), cert. denied, 127 S. Ct. 38 (2006); *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).

b. Nor is this issue one of urgent importance warranting the Court's review despite the unanimity of the courts of appeals in sustaining Section 5. The statutory

provision that petitioners seek to have invalidated was enacted more than 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 5 of the IRA has provided the primary mechanism for the federal government to restore and replace tribal lands. Congress has, moreover, often revisited and amended the IRA, even after 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.[7]

Similarly, this Court has considered Section 5 on numerous occasions and has remarked, as noted above, that, along with its implementing regulations, it "provides the proper avenue" for a Tribe "to reestablish sovereign authority over [lost] territory." *City of Sherrill*, 544 U.S. at 220-221; see also *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) (noting that, in Section 5, Congress 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 & 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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[7] 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, § 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).

At root, petitioners' argument represents a disagreement with longstanding principles embodied in the IRA and numerous other statutes that govern Indian lands and Indian self-determination. Against that background, Congress made an explicit policy determination in Section 5 of the IRA 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.

c. Petitioners' contention (Pet. 37) that the acquisition of lands in trust status by the Secretary "precludes the state from exercising fundamental attributes of its sovereignty" provides no basis for granting certiorari. 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. 36-37 (citing *Whitman*, 531 U.S. at 475), that principle *supports* the constitutionality of the authority conferred by Section 5. In an area in which the Executive has historically exercised expansive authority,[8] such as the supervision of lands occupied by Indians, 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

[8] 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).

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").

Moreover, petitioners ignore the fact that the regulations promulgated by the Secretary to implement the purposes of Section 5 address the very concerns they raise about intrusions into state sovereignty. See *City of Sherrill*, 544 U.S. at 220-221 ("The regulations implementing [Section 5] are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory."). The regulations direct the Bureau of Indian Affairs, 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 must consider "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, Pet. App. 61-71, and petitioners do not challenge that ruling here.

d. Finally, petitioners are incorrect in their claim (Pet. 38) that "*Whitman* prohibits" the use of legislative history in determining whether the Executive is subject to an "intelligible principle." Like other courts of appeals presented with this argument, the First Circuit correctly looked to "the purposes evident in the whole of the IRA and its legislative history" to establish that the

Secretary's discretion is subject to guidance from an intelligible principle. Pet. App. 57 (quoting *South Dakota*, 423 F.3d at 797); see also *Shivwits Band of Paiute Indians*, 428 F.3d at 973 (observing that the claim that any "'intelligible principle' must be derived solely from the statutory text, rather than the legislative history, is nowhere to be found in *Whitman*"). *Whitman*'s reiteration of the requirement that Congress "lay down by legislative act an intelligible principle" did not 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 *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)). This Court has repeatedly made clear that a statute's purpose, factual background, and context are properly considered in determining whether a statute establishes an intelligible principle. See, *e.g.*, *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104 (1946); *Lichter* v. *United States*, 334 U.S. 742, 778-779 (1948). 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, this Court has 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 ("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)); *New Mexico* v.

Mescalero Apache Tribe, 462 U.S. 324, 335 n.17 (1983) (quoting same).

Accordingly, the court of appeals committed no methodological mistake (and certainly created no conflict) by taking legislative history into account.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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