No. 03-2647

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DONALD L. CARCIERI, in his capacity
as Governor of the State of Rhode Island, et al.,
Plaintiffs-Appellants,

v.

GALE A. NORTON, in her
capacity as Secretary of the Department of the Interior, et al.,
Defendants-Appellees.

On Appeal from a Judgment of the United States
District Court for the District of Rhode Island

BRIEF FOR AMICI CURIAE NATIONAL CONGRESS OF AMERICAN INDIANS, INDIVIDUAL INDIAN TRIBES, AND TRIBAL ORGANIZATIONS IN SUPPORT OF DEFENDANTS-APPELLEES

(full listing of Amici Curiae inside)

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April 20, 2004

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LIST OF AMICI CURIAE TRIBES AND TRIBAL ORGANIZATIONS

Absentee Shawnee Tribe
Akiak Native Community
Cahto Tribe of the Laytonville Rancheria
Cheyenne River Sioux Tribe
Coeur d'Alene Tribe
Confederated Salish and Kootenai Tribes of the Flathead Nation
Confederated Tribes of the Warm Springs Reservation of Oregon
Eastern Pequot Tribal Nation
Eastern Shawnee Tribe of Oklahoma
Ely Shoshone Tribe
Fallon Paiute-Shoshone Tribe
Ft. McDermitt Paiute-Shoshone Tribe
Grand Traverse Band of Ottawa and Chippewa Indians
Inupiat Community of Arctic Slope (IRA)
Kenaitze Indian Tribe, IRA
Kickapoo Tribe in Kansas
Lac Courte Oreilles Band of Lake Superior Chippewa
Lovelock Paiute Tribe
Lummi Nation
Moapa Paiute Band of the Moapa Indian Reservation
Modoc Tribe of Oklahoma
Narragansett Indian Tribe of Rhode Island
Native Village of Venetie IRA Tribal Government
Nez Perce Tribe
Oneida Tribe of Indians of Wisconsin
Prairie Band of Potawatami Nation
Pueblo of Laguna
Pueblo of Santa Ana
Pueblo of Taos
Seminole Tribe of Florida
Shoshone-Paiute Tribes of the Duck Valley Reservation
Sisseton-Wahpeton Oyate of the Lake Traverse Reservation
St. Regis Mohawk Tribe
Suquamish Tribe

LIST OF AMICI CURIAE TRIBES AND TRIBAL ORGANIZATIONS
(continued)

Tanana Chiefs Conference
Te-Moak Tribe of Western Shoshone Indians
Tuolumne Band of Me-Wuk Indians
United South and Eastern Tribes, Inc.*
Washoe Tribe of Nevada and California
Yomba Shoshone Tribe
Oglala Sioux Tribe

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* The members of USET are as follows: Alabama-Coushatta Tribe of Texas; Aroostook Band of Micmac Indians; Catawba Indian Nation; Cayuga Nation; Chitimacha Tribe of Louisiana; Coushatta Tribe of Louisiana; Eastern Band of Cherokee Indians; Houlton Band of Maliseet Indians; Jena Band of Choctaw Indians; Mashantucket Pequot Tribal Nation; Miccosukee Tribe of Florida; Mississippi Band of Choctaw Indians; Mohegan Tribe of Connecticut; Narragansett Indian Tribe; Oneida Indian Nation; Passamaquoddy Tribe-Indian Township; Passamaquoddy Tribe-Pleasant Point; Penobscot Indian Nation; Poarch Band of Creek Indians; Seminole Tribe of Florida; Seneca Nation of Indians; St. Regis Band of Mohawk Indians; Tunica-Biloxi Indians of Louisiana; Wampanoag Tribe of Gay Head (Aquinnah).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amici state as follows: Amicus National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages. Amicus United South and Eastern Tribes, Inc. ("USET") is a nonprofit inter-tribal organization founded in 1968. Tanana Chiefs Conference ("TCC") is a nonprofit intertribal organization of Interior Alaska tribes. NCAI, USET, and TCC have no parent corporations, and no publicly held corporation owns 10% or more of stock in NCAI, USET, or TCC.

The remaining amici are tribal governments that are exempt from Fed. R. App. P. 26.1(a).

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INTEREST OF AMICI

Amici are leading national and regional Indian organizations and individual Tribes from throughout Indian country, all of whom have a strong interest in the outcome of this case.[1] Amicus National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages. For nearly 60 years, NCAI has advised tribal, federal, and state governments on a range of Indian issues, including the implementation of the Indian Reorganization Act and the trust-acquisition authority principally at issue here.

Amicus United South and Eastern Tribes, Inc. ("USET") is a nonprofit inter-tribal organization founded in 1968. USET is dedicated to promoting Indian leadership, improving the quality of life for American Indians, and protecting Indian rights and natural resources on tribal lands. USET includes 24 federally recognized Tribes stretching from Maine to Texas.

The individual amici Tribes represent a cross-section of tribal governments. Great variations exist among them, including with respect to their lands, economic bases, populations, and histories. All of the Tribes, however, share a common interest

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[1] This Brief is submitted with the consent of all the parties. The Brief will address only the arguments of the State and its amici related to 25 U.S.C. § 465.

in opposing the State's attack on the authority of the Secretary of the Interior to acquire land in trust for Indian Tribes. For the past 70 years, the trust authority has been critical for the Tribes in restoring a measure of economic self-sufficiency and political self-determination. Amici are thus well positioned to address the arguments presented here by Rhode Island and its amici.

BACKGROUND

The State of Rhode Island challenges the Secretary's interpretation and application of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461-479, and, in particular, the Secretary's exercise of her authority to acquire lands in trust for Indian Tribes under Section 5 of the IRA, id. § 465. The decades preceding passage of the IRA were marked by a policy of assimilation designed to break individual Indians loose from their tribal bonds. In 1871, Congress officially suspended treaty-making with Indian Tribes. See 25 U.S.C. § 71. By that time, the United States had entered into nearly 400 ratified treaties with Indian Tribes, setting aside reservations for Indians' exclusive use and promising protection in exchange for the cession of vast tracts of Indian lands. See 2 Charles J. Kappler, Indian Affairs: Laws and Treaties (1904); Vine Deloria, Jr. & Raymond J. DeMallie, Documents of American Indian Diplomacy: Treaties, Agreements and Conventions, 1775-1979 (1999).

But despite assurances that Tribes would receive "permanent, self-governing reservations, along with federal goods and services," government administrators "tried to substitute federal power for the Indians' own institutions by imposing changes in every aspect of native life." S. Rep. No. 101-216, at 3 (1989). Policymakers sought to eradicate native religions, indigenous languages, and communal ownership of property to shift power from tribal leaders to government agents. See generally Francis Paul Prucha, The Great Father 609-916 (1984).

Critical to this broad assimilationist campaign was the General Allotment Act of 1887, 24 Stat. 388, known as the "Dawes Act," and the many specific tribal allotment acts of this era, which authorized the division of reservation lands into individual Indian allotments and required the sale of any remaining "surplus" lands. Although the purported intent of those acts was to improve the economic conditions of Indians, the primary beneficiaries were non-Indian settlers and land speculators, who quickly acquired large portions of Indian lands at prices well below market value. In less than half a century, the amount of land in Indian hands shrunk from 138 million acres to 48 million. See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 436 n.1 (1989) (opinion of Stevens, J.). The loss of these lands was catastrophic, resulting in the precipitous decline of the economic, cultural, social, and physical health of the Tribes and their members. See

Charles F. Wilkinson, American Indians, Time, and the Law 19-21 (1987); Lewis Meriam, Institute for Government Research, The Problem of Indian Administration 40-41 (1928); Felix S. Cohen, Handbook of Federal Indian Law 26-27 (1942 ed.).

The Narragansett Indian Tribe ("Narragansett Tribe") itself was the victim of such assimilationist policies. Throughout the 1800s, Rhode Island sought to "extinguish [the Narragansetts'] tribal identity." Narragansett Indian Tribe v. National Indian Gaming Comm'n, 158 F.3d 1335, 1336 (D.C. Cir. 1998). The State's campaign culminated in 1880 with the Tribe's agreement "to sell (for $5,000) all but two acres of its reservation." Id. (citing William G. McLoughlin, Rhode Island 221 (1978)).

The IRA reflected a shift away from these devastating policies. Congress sought to "establish machinery whereby Indian Tribes would be able to assume a greater degree of self-government, both politically and economically," Morton v. Mancari, 417 U.S. 535, 542 (1974), thereby restoring stability to Indian communities and promoting Indian economic development, see Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 n.5 (1987); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-52 (1973). Tribes were encouraged to "re-organize" and incorporate themselves as chartered membership corporations with tribal constitutions and by-laws, which would in turn render them eligible for economic-development loans from a revolving

credit fund, as well as other federal assistance. See 25 U.S.C. §§ 469-470, 476-478. More than 180 Tribes adopted and ratified constitutions pursuant to the IRA, returning control over some Indian resources to the Tribes.

Critically for present purposes, Congress recognized that tribal self-determination and economic self-sufficiency could not be achieved without adequate lands. The IRA immediately stemmed the loss of Indian lands by prohibiting further allotment, id. § 461, and by extending indefinitely all restrictions on alienation of Indian lands, id. § 462. "Surplus" lands that the Government had opened for sale, but had not yet sold, were restored to tribal ownership. Id. § 463. And in the provision at issue in this case, the Secretary was given authority to acquire land in trust for Tribes. Id. § 465. Once acquired, the land could be added to an existing reservation or proclaimed as a new reservation. Id. § 467. In less than a decade, Indian land holdings increased by nearly three million acres. See Cohen, supra, at 86. Over the last 70 years, virtually all federally recognized Indian Tribes have had land taken into trust, much of it thousands of parcels covering millions of acres pursuant to § 465.[2]

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[2] Much of the IRA's promise, however, remains unrealized. Although 8 million acres have returned to tribal control, that represents less than 10% of the lands lost through allotment.

ARGUMENT

For nearly 70 years, the Secretary has exercised her authority under § 465 to acquire millions of acres of land in trust for Indian Tribes. Trust land is the lifeblood for many Tribes and has helped to foster the tribal economic self-sufficiency and political self-government that decades of assimilationist policies had threatened to destroy.

Rhode Island and its amici seek to undo this progress. They argue that the Secretary lacks authority under § 465 to acquire land in trust for a Tribe that was not both "recognized" and "under Federal jurisdiction" on June 18, 1934, and, indeed, that the Secretary lacks authority under § 465 to acquire land in trust for any Tribe because § 465 is an unconstitutional delegation of legislative power. A decision adopting the State's arguments would be unprecedented. To amici's knowledge, no court has ever invalidated the exercise of the Secretary's trust-acquisition authority on the ground that the Tribe at issue was recognized only after June 18, 1934. The only decision ever to strike down § 465 as an unconstitutional delegation was promptly vacated by the Supreme Court, and every court to consider the claim since then has rejected it.

As this history suggests, the State's arguments are meritless. The Secretary's authority to acquire land in trust for a federally recognized Tribe (such as the

Narragansett Tribe) is plain from the text of the IRA and is confirmed not only by the legislative history, but also by numerous congressional enactments, by regulations duly promulgated by the Secretary, by a consistent federal policy of precluding arbitrary distinctions among federally recognized Tribes, and by the nature of federal recognition itself. The State's effort to invalidate § 465 on nondelegation grounds cannot be squared with 70 years of Supreme Court precedent upholding countless delegations including delegations such as the directive to regulate "in the public interest" that are far broader than the one at issue here. The State's desperate effort to invalidate the Secretary's exercise of her trust authority here must be rejected.

I. SECTION 465 AUTHORIZES THE SECRETARY TO ACQUIRE LAND IN TRUST FOR THE NARRAGANSETT TRIBE.

The State contends that 25 U.S.C. § 465 extends only to Tribes that were both federally recognized on June 18, 1934 and "under Federal jurisdiction" on that date, and that the Secretary thus may not acquire land in trust for any of the scores of federally recognized Tribes, such as the Narragansett Tribe, that received their federal recognition after June 18, 1934. That argument is meritless.

A. Section 465 Does Not Exclude a Federally Recognized Tribe such as the Narragansett Tribe from Its Scope.

The State here challenges the Secretary's decision to acquire land in trust for a Tribe. Section 465 allows land to be taken into trust for an "Indian tribe or individual

Indian." 25 U.S.C. § 465; see also Pit River Home & Agric. Coop. Ass'n v. United States, 30 F.3d 1088, 1096 (9th Cir. 1994) ("Section 465 expressly provides that the Secretary may take title in the name of the United States in trust for an 'Indian tribe or individual Indian'" (quoting 25 U.S.C. § 465)). Section 479 defines the term "tribe" broadly to include "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479. There is no question that the Narragansett Tribe is an "Indian tribe." See 68 Fed. Reg. 68180, 68182 (Dec. 5, 2003) (including Narragansett Tribe on list of federally recognized Tribes). Thus, the Secretary's decision to acquire land in trust for the Narragansett Tribe falls comfortably within the plain language of the statute.

The State urges an alternative reading based on not the term "tribe," but the term "Indian," which the State suggests narrows § 479's otherwise broad definition of "tribe." See 25 U.S.C. § 479 (defining "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction"). But the statutory language does not permit the State's mechanical analysis. Under the State's view that § 479's definitions of "Indian" and "tribe" modify each other, those definitions become circular: Section 479 defines the term "Indian" using both the term "Indian" and the term "tribe," and similarly defines "tribe" using "Indian" and "tribe." The State's claim to a "plain language"

interpretation of the statute is therefore empty rhetoric. See, e.g., Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (looking beyond statutory definition when that definition was "completely circular and explains nothing"); Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 124 S. Ct. 1330, 1339 (2004) (same).

The circularity in definition under the State's approach underscores that Congress instead used the word "Indian" in the IRA in at least two senses: in some places, "Indian" is used in its more colloquial sense to refer to "aboriginal" or "indigenous" people, and in others "Indian" incorporates the more restrictive definition set forth in § 479. For example, as noted, the definition of "Indian" in § 479 includes persons of "Indian descent." The term "Indian descent" can only refer to descendants of "Indians" in the colloquial sense, rather than Indians as defined in § 479. Likewise, § 461 speaks of treaties between the United States and "Indians." 25 U.S.C. § 461. Because the United States made treaties not with individual Indians but with Tribes, it is again clear that the word "Indians" here must be read colloquially.

Context similarly dictates that the word "Indian" in the definition of "Indian tribe" was meant in its colloquial, rather than technical, sense. Section 479's definition of "Indian," for example, includes "persons of one-half or more Indian

blood." Id. § 479. Under the State's reading of § 479, does that mean that a Tribe with a single half-blood Indian qualifies as an "Indian tribe"? Or does it have to be ten half-bloods? Or a hundred? The State offers no guidance.

Moreover, even if the State were correct that § 479's definition of "Indian" somehow limits the scope of the Secretary's authority to acquire land in trust for an "Indian tribe," the statute still would not foreclose the exercise of that authority here. That is because the term "now" in "now under Federal jurisdiction" is best read to refer to the moment when the Secretary exercises her statutory authority. See, e.g., Williams v. Ragland, 567 So. 2d 63, 65-66 (La. 1990) (exception contained in mandatory retirement provision for a judge "now serving" was not limited to judges serving when the provision was enacted); Pierce v. Pierce, 287 N.W.2d 879, 882 (Iowa 1980) (reference in statute to a court "now hav[ing] jurisdiction" refers to time petition was filed, not time statute was enacted); People ex rel. Martin v. Hylan, 210 N.Y.S. 30, 31 (App. Ct. 1925) (term "now" in pay-equalization statute does not refer to time of enactment).

The State suggests that "now" means "June 18, 1934," the date on which the IRA was enacted. But when the Code specifies the IRA's date of enactment as a limiting principle, it does so expressly. See, e.g., 25 U.S.C. § 478 (elections to be held "within one year after June 18, 1934"); id. § 461 (no allotment "[o]n and after

June 18, 1934"); but cf. id. § 472. Moreover, the very next clause in § 479 incorporates a specific date ("June 1, 1934"). If Congress had intended the relevant date of recognition to be June 18, 1934, it would not have used the term "now." Reading "now" to refer to when the Secretary exercises her statutory authority is also more consistent with the broad restorative purposes of the IRA, since it permits the Secretary to act on behalf of all federally recognized Tribes. See Karl A. Funke, Educational Assistance and Employment Preference: Who Is an Indian?, 4 Am. Indian L. Rev. 1, 30-32 (1976) (concluding that "now" refers not to 1934 but to time of administrative action); Anita Vogt, Eligibility for Indian Employment Preference, 1 Indian Law Reporter, No. 6, at 34 n.6 (June 1974) (same).

The legislative history, quoted on page 11 of the States' Amicus Brief, supports precisely that reading of the statute, although the States in their brief inexplicably omit critical portions of the relevant history. (The entire colloquy is included in the Addendum to this Brief.) In the relevant colloquy, Senate Indian Affairs Committee Chairman Burton Wheeler suggested that there were Tribes then under federal supervision that should not be, and he argued that those Tribes should eventually be removed from federal supervision. See Hearing Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., part 2 at 266 (attached hereto as Addendum 1) ("I think you have to sooner or later eliminate those . . . so-called tribes there. They

are no more Indians than you or I , perhaps. . . . And yet they are under the supervision of the United States, and there is no reason for it at all in my judgment."). In response, Senator Joseph O'Mahoney stated that Chairman's Wheeler's concern "could be handled by some separate provision excluding from the benefits of the act certain types." Id. Commissioner of Indian Affairs John Collier then proposed meeting their concern by adding "now under Federal jurisdiction" to § 479. In context, then, given Chairman Wheeler's desire that the Act not apply to Tribes that leave federal supervision after passage of the Act, "now" must refer to the time the trust authority is exercised, not the date of enactment.

The State's reading achieves precisely the opposite result. Under the State's view, a Tribe that was recognized on June 18, 1934 but is later terminated remains eligible to receive lands in trust under § 465 while terminated. That result that a terminated Tribe would be eligible for benefits while a federally recognized Tribe would not is flatly contrary to congressional intent. See United States v. Granderson, 511 U.S. 39, 56 (1994) (interpreting statute to avoid absurd results).

Nor is that the only anomaly created by the State's reading. For example, § 461 provides that, "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." 25 U.S.C.

§ 461. That provision was written broadly to end the disastrous allotment policy. Under the State's reading, however, § 461 leaves unprotected most Tribes recognized after 1934. That cannot be what Congress intended.[3]

The State's position is also at odds with the nature of recognition itself. See Carcieri v. Norton, 290 F. Supp. 2d 167, 179-81 (D.R.I. 2003). As this Court has stated, "Federal recognition is just that: recognition of a previously existing status." Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994). That principle is reflected in the regulations governing administrative acknowledgment, which set forth as "mandatory criteria" that the proposed Tribe "has existed as a distinct community from historical times to the present," 25 C.F.R. § 83.7(b); that the proposed Tribe has "maintained political influence or authority over its members as an autonomous entity from historical times until the present," id. § 83.7(c); and that members of the proposed Tribe "descend from a historical Indian tribe," id. § 83.7(e). See also General Accounting Office Report, No. GAO-02-49, Indian Issues: Improvements Needed in Tribal Recognition Process, Appendix I, at 24 (Nov. 2001) ("The essential prerequisite for recognition is the tribe's continuous existence as a political entity since a time when the federal government broadly acknowledged a

[3] Some small number of members of Tribes recognized after 1934 would fall within the "half-blood" provision of § 479's definition of "Indian." It is undisputed, however, that most would not.

political relationship with all Indian tribes."). To read the IRA as foreclosing application to Tribes federally recognized after 1934 is inconsistent with the understanding that the federal recognition process "acknowledges" a historical tribal existence. See Narragansett Indian Tribe, 19 F.3d at 694.

Indeed, because recognition reflects a historical fact, the only reason that a Tribe would be recognized currently but not in 1934 is that the federal government due to inaction, mistake, or neglect happened to ignore the Tribe's existence until after 1934. The State's approach would bind the government to its earlier mistakes, to the detriment of the Tribe, without any reasonable justification. See, e.g., City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157, 161 (D.D.C. 1980); see also GAO Report at 24 ("[T]he underlying position of the administration has always been that the executive branch can correct mistakes and oversights regarding which groups the federal government recognizes as Indian tribes . . . .").

The present case illustrates the problem. The District Court correctly noted that "there can be no serious dispute concerning the Narragansetts' tribal status in 1934." 290 F. Supp. 2d at 180. "[T]he Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications," and have a "documented history dating from 1614." Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177,

6178 (Feb. 10, 1983). As the State would have it, the government is now bound by its failure to recognize this history, and the Tribe must suffer the consequences. Congress could not sensibly have intended that result.

In short, the better way to read the statute is to cover all Tribes that are federally recognized today, not just ones that happened to be recognized on June 18, 1934. The State's contrary reading is at odds with the purpose and text of the statute and with the very nature of recognition, and it is inconsistent with the Supreme Court's repeated admonition that "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." Chickasaw Nation v. United States, 534 U.S. 84, 88 (2001) (internal quotation marks omitted); see Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

B. Congressional Legislation over the Past 70 Years, as well as Agency Regulations and Administrative Practice, Confirm that Section 465 Extends to Federally Recognized Tribes such as the Narragansett Tribe.

The briefs of Rhode Island and its amici proceed as if history stopped in 1934. But this Court cannot ignore the past 70 years of law and administrative practice, which confirm that the Secretary's trust authority extends to federally recognized Tribes such as the Narragansett Tribe.

1. Congressional Legislation

Congressional legislation enacted since the IRA and entirely ignored by the State and its amici confirms the Secretary's authority under § 465 to take land into trust for a federally recognized Tribe such as the Narragansett Tribe.

In 1983, for example, Congress enacted the Indian Land Consolidation Act ("ILCA"), Pub. L. No. 97-459, Title II, 96 Stat. 2517 (1983). Section 203 of ILCA states that "[t]he provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title." 25 U.S.C. § 2202 (emphasis added).[4] Section 202 of ILCA defines "tribe" as "any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust," id. § 2201(1), and defines "Indian" in relevant part as "any person who is a member of any Indian tribe," id. § 2201(2).

ILCA is critical here in two respects. First, ILCA further refutes the State's notion that Congress intended rigid lines between the exercise of § 465 authority for Tribes recognized on June 18, 1934, and the exercise of that authority for Tribes recognized thereafter. Congress used exceedingly broad language § 465 extends to "all tribes" without any mention of the State's arbitrary June 18, 1934 dividing

[4] Section 478 allowed Tribes to opt out of the IRA: It provided that the Act would not apply to any Tribe that "voted against its application" before June 18, 1936. 25 U.S.C. § 478.

line. See also H.R. Rep. No. 97-908, at 7 (1982) (noting that, after ILCA, "Section 5 of the Indian Reorganization Act would automatically be applicable to any tribe, reservation or area excluded from such Act"). ILCA thus strongly suggests that Congress did not share the State's view that § 465 applies only to Tribes recognized after 1934.

Moreover, under the State's view, ILCA created even more arbitrary distinctions among Tribes: The original IRA extends § 465 only to Tribes recognized on June 18, 1934; ILCA extends § 465 to all Tribes recognized after 1934 for whom "the United States holds lands in trust," 25 U.S.C. § 2201(1); and § 465 is unavailable for all other Tribes. Nothing in the text, history, or purposes of the IRA or ILCA indicates that Congress intended such a bizarre scheme.

Second, by its unambiguous language, ILCA removes any doubt about the Secretary's authority with respect to the parcel at issue here. The Narragansett Tribe has 1800 acres of land (apart from the 31 acres at issue here) held in trust by the United States, and thus the Tribe meets ILCA's definition of "tribe." See id. § 2201(1). Under § 2202, therefore, the exercise of the Secretary's trust-acquisition authority for the Narragansett Tribe was plainly proper.

Other legislation confirms Congress' hostility to distinctions among federally recognized Tribes. In 1994, for example, Congress added two subsections to the IRA

precisely to eliminate such distinctions. See 25 U.S.C. § 476(f), (g). Section 476(f) provides that federal departments and agencies "shall not promulgate any regulation or make any decision or determination pursuant to the [IRA], as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." Id. § 476(f); see also id. § 476(g) (invalidating any existing regulations creating distinctions in the privileges and immunities available to federally recognized Tribes). These provisions prevent exactly the type of distinction that the State urges here: an exercise of the Secretary's trust-acquisition authority for Tribes that had federal recognition in 1934, but not for those that received recognition in the subsequent 70 years. See also 140 Cong. Rec. S6144, S6147 (daily ed. May 19, 1994) (statement of cosponsor Sen. McCain) ("[O]ur amendment is intended to prohibit the Secretary or any other Federal official from distinguishing between Indian tribes or classifying them based not only on the IRA but also based on any other Federal law."); id. (statement of cosponsor Sen. Inouye) ("Each federally recognized Indian tribe has the same governmental status as other federally recognized tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States. . . . This is true without regard to the

manner in which the tribe became recognized by the United States . . . .") (emphasis added).

Finally, that same federal policy against creating distinctions among federally recognized Tribes is reflected in the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a et seq. (the "List Act"), which endorsed and made mandatory the Secretary's practice of maintaining a list of federally recognized Tribes. The Secretary's list, both before and after passage of the List Act, has included all federally recognized Tribes, without distinguishing among Tribes by date or process of recognition.[5]

2. Agency Regulations

The State's reading of the IRA is also flatly at odds with the regulations promulgated by the Secretary to implement the Act. In those regulations, the Secretary has adopted definitions of "Indian" and "Indian tribe" that extend the benefits of the IRA to all federally recognized Tribes. The regulations implementing § 465, for example, define "tribe" broadly to include all Tribes currently recognized

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[5]The Secretary's regulations reflect this strong congressional policy against distinctions among federally recognized Tribes, stating that a "newly acknowledged tribe shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally acknowledged historic tribes by virtue of their government-to-government relationship with the United States." 25 C.F.R. § 83.12(a).

by the federal government. See 25 C.F.R. § 151.2(b) ("Tribe means any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians . . . recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs."). And they define "individual Indian" to include "any person who is an enrolled member of a tribe." Id. § 151.2(c).

The Secretary's regulations implementing the IRA's other provisions reflect the same approach. For example, the IRA extends BIA employment preferences to certain "qualified Indians." 25 U.S.C. § 472. The Secretary's regulations extend that preference to members of all federally recognized Tribes, rather than just to members of Tribes that were recognized and under federal jurisdiction in 1934. See, e.g., 25 C.F.R. § 5.1(a) (extending preferences to "[m]embers of any recognized Indian tribe now under Federal Jurisdiction"). Similarly, in implementing § 466's directive to promulgate rules for the operation and management of "Indian forestry units," the Secretary has adopted definitions virtually identical to trust-acquisition definitions contained in Part 151, defining "Indian" as "a member of an Indian tribe," and defining "Indian tribe" as "any Indian tribe, band, nation, rancheria, Pueblo, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 C.F.R. § 163.1. And perhaps most critical of all, in the provisions

governing tribal reorganization including the adoption and modification of tribal constitutions and charters pursuant to 25 U.S.C. §§ 476 and 477 the Secretary defines "Indian" to include "[a]ll persons who are members of those tribes listed or eligible to be listed in the Federal Register pursuant to 25 C.F.R. § 83.6(b) as recognized by and receiving services from the Bureau of Indian Affairs," provided that the Tribe did not vote to opt out of the IRA pursuant to 25 U.S.C. § 478. 25 C.F.R. § 81.1; see also 68 Fed. Reg. at 68182 (including Narragansett Tribe on list of federally recognized Tribes).

The Secretary's consistent and longstanding implementation of the Act, including her interpretation of the scope of § 465, expressed in formal regulations, merits substantial deference from this Court under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984), especially in light of the canon of construction that requires "doubtful expressions" to be construed in favor of the Tribes, Bryan, 426 U.S. at 392. Indeed, the Secretary's trust-acquisition regulations in Part 151 enjoy special force because they have been acknowledged and implicitly approved by Congress. The Puyallup Land Settlement Act, for example, expressly directs that "the Secretary shall exercise the authority provided him in Section 465 of this title, and shall apply the standards set forth in part 151 of title 25, Code of Federal Regulations." 25 U.S.C. § 1773c. The same directive was given in

the Cherokee, Choctaw, and Chickasaw Nations Claims Settlement Act. See id. § 1779d(b)(1)(A). When Congress has expressly endorsed an agency's implementation of a statute, deference to the agency is at its zenith. See, e.g., City of Pleasant Grove v. United States, 479 U.S. 462, 468 (1987); Alexander v. Choate, 469 U.S. 287, 294 n.11 (1985).

3. Administrative Practice.

Reading the IRA to exclude Tribes recognized by the Federal government after 1934 also runs counter to decades of practice by the Secretary. The Port Gamble Band of S'Klallam Indians in Washington State provides just one example. As of 1934, the Band had no trust land, had no reservation, and was not under federal jurisdiction. Using his newly enacted authority under § 465, the Secretary acquired for the Band more than a thousand acres on the Kitsap Peninsula in Puget Sound, just across from Seattle. See Tiller's Guide to Indian Country: Economic Profiles of American Indian Reservations 592 (Veronica E. Velarde Tiller ed., 1996); The Port Gamble S'Klallam Tribe: Culture and History, available at www.pgst.nsn.us. Title to the land was taken in the name of the United States in trust for the Band. On June 6, 1938, pursuant to Section 7 of the IRA, the Secretary proclaimed this land the "Port Gamble Reservation." See United States v. Washington, 459 F. Supp. 1020, 1039 (W.D. Wash. 1978), order aff'd, 645 F.2d 749 (9th Cir. 1981). With help from the

Interior Department, the Band set about drafting a constitution and bylaws and taking an official census of its members, many of whom were of less than one-half Indian blood. See Port Gamble Indian Community Const. art. II, § 1, available at www.thorpe.ou.edu/IRA/pgcons.html. The IRA constitution was approved by the Secretary and duly ratified in a tribal referendum in 1939. See id. arts. I-VI. For 65 years now, the Tribe has operated continuously under this IRA constitution, and since 1940 its enrolled membership has grown five-fold with most of the members now living on the reservation. See S'Klallam Government, available at www.pgst.nsn.us; Theodore H. Haas, Ten Years of Tribal Government Under I.R.A. 22-27 (U.S. Indian Service 1947).

This history is also consistent with the Secretary's regulations implementing the trust-acquisition provisions, which date back a quarter century. Indeed, within the Department, the policy of acquiring land in trust for newly recognized Tribes is viewed as routine: As the staff attorney who formerly handled Section 5 land acquisitions for the Solicitor of the Interior put it, "Tribes that have not gained federal recognition must first be recognized pursuant to the regulations found at 25 C.F.R. Part 83 before they are eligible to apply to the Department for trust acquisitions" under 25 U.S.C. § 465 and 25 C.F.R. Part 151. Mary Jane Sheppard, Taking Indian Land into Trust, 44 S.D. L. Rev. 681, 688 (1999).

Given this alignment of statutory text, purpose, and administrative interpretation, it is unsurprising that the State can point to no instance in which a court has invalidated an acquisition of land in trust for an Indian Tribe under the State's theory. This Court should not be the first.

II. SECTION 465 IS NOT AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY.

Invoking a doctrine that the Supreme Court has used to strike down congressional legislation only twice in its history and not at all since 1935, the State argues that the authority to take land into trust for Tribes under § 465 authority the Secretary has used to acquire millions of acres of land in trust over the last 70 years is an unconstitutional delegation of legislative power.

The sole case supporting the State's position is the Eighth Circuit's sharply divided decision in South Dakota v. United States Department of the Interior, 69 F.3d 878 (8th Cir. 1995). But the Supreme Court vacated that decision, see Department of the Interior v. South Dakota, 519 U.S. 919 (1996), and every court to consider the issue since that time has concluded that the Eighth Circuit's analysis was misguided. See, e.g., United States v. Roberts, 185 F.3d 1125, 1136-37 (10th Cir. 1999); Confederated Tribes of Siletz Indians of Oregon v. United States, 110 F.3d 688, 698 (9th Cir. 1997); South Dakota v. United States Dep't of the Interior, CIV-00-3026-

RHB (D.S.D. Apr. 19, 2004); see also City of Roseville v. Norton, 219 F. Supp. 2d 130, 154-56 (D.D.C. 2002) (rejecting application of Eighth Circuit decision to analogous land-acquisition statute), aff'd, 348 F.3d 1020 (D.C. Cir. 2003), cert. denied, No. 03-1156, 2004 WL 297021 (U.S. Apr. 5, 2004); TOMAC v. Norton, 193 F. Supp. 2d 182, 191-92 (D.D.C. 2002) (same).

Even on its own terms, the Eighth Circuit's decision is easily distinguishable. As the Supreme Court's vacatur makes clear, central to the analysis of the Eighth Circuit majority was the Secretary's claim that his decisions under § 465 were unreviewable. See, e.g., 519 U.S. at 920; see also 69 F.3d at 881-82, 884-85 (emphasizing importance of Secretary's claim of nonreviewability). But the Secretary has since abandoned that claim, see Department of the Interior v. South Dakota, 519 U.S. at 920, and thus the State's reliance on the Eighth Circuit's decision is misplaced.[6]

Moreover, the Eighth Circuit's decision was wrong. "[N]otwithstanding the Constitution's vesting of 'all legislative power' in Congress, enactments which leave discretion to the executive branch are permissible as long as they offer some

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[6] Indeed, in the proceedings that followed the Supreme Court's vacatur of the Eighth Circuit's decision, the District Court rejected the State's nondelegation challenge notwithstanding the Eighth Circuit's earlier decision. See South Dakota v. United States Dep't of the Interior, CIV-00-3026-RHB (D.S.D. Apr. 19, 2004).

'intelligible principle' to guide that discretion." Doe v. Bush, 323 F.3d 133, 143 (1st Cir. 2003) (citation omitted). Applying this standard, the Supreme Court has upheld countless delegations since 1935, including directives to regulate the airwaves "in the public interest," National Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943); see also New York Central Securities Corp. v. United States, 287 U.S. 12, 24-25 (1932) (ICC's authority to approve railroad consolidation "in the public interest"); Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., concurring in the rejection of non-delegation challenge), to set air-quality standards that are "requisite to protect the public health," Whitman v. American Trucking Ass'ns, 531 U.S. 457, 472-76 (2001), and to recoup "excessive profits," Lichter v. United States, 334 U.S. 742, 785-86 (1948). See generally American Trucking, 531 U.S. at 472-73 (citing cases). Because "a certain degree of discretion, and thus of lawmaking, inheres in most executive and judicial action," the Supreme Court has "almost never felt qualified to second-guess Congress regarding the degree of policy judgment that can be left to those executing or applying the law." Id. at 474-75 (internal quotation marks omitted).

Under this case law, § 465's delegation of authority easily survives the State's challenge. As an initial matter, the language of § 465 itself guides the Secretary's discretion. Section 465 authorizes the Secretary to acquire land only for Tribes or

individual Indians. 25 U.S.C. § 465. Moreover, that land cannot be acquired in fee, but must be retained in trust by the United States for the beneficial owners. Id. This brings into play the government's trust obligations to Tribes and their members, see Seminole Nation v. United States, 316 U.S. 286, 296 (1942) (defining government's duty to act consistent with trust obligations); Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1101 (8th Cir. 1989) (same), and prohibits acquisitions inconsistent with those obligations.

The purposes of the IRA, and the interrelationship between § 465 and its companion provisions, well define the manner in which the Secretary's trust authority may be exercised. As noted, the IRA and § 465 were a direct response to the economic and social devastation caused by federal assimilationist policies, as Congress sought to end the loss of Indian land and to provide Tribes with the land base needed to "rehabilitat[e] the Indian's economic life" and "develop[] the initiative destroyed by . . . oppression and paternalism," Mescalero, 411 U.S. at 152, while encouraging tribal enterprise and allowing Indians "to enter the white world on a footing of equal competition," id. at 157. See supra p. 2-5 (describing the Act's purposes and provisions). The need for trust acquisitions to advance these critical goals and thereby to fulfill the government's trust obligations guides agency discretion and helps to provide the requisite "intelligible principle." See generally

69 F.3d at 889 (Murphy, J., dissenting); South Dakota v. United States Dep't of the Interior, CIV-00-3026-RHB (D.S.D. Apr. 19, 2004).[7]

Nor is failure to recognize the intelligible principles in the Act the only flaw in the State's challenge. The State ignores that limitations on Congress' ability to delegate its legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" United States v. Mazurie, 419 U.S. 544, 556-57 (1975) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-22 (1936)). In Loving v. United States, 517 U.S. 748 (1996), for example, which involved a delegation to the President to prescribe aggravating factors for capital murder cases tried in courts-martial, the Court upheld the delegation because the delegated authority was "interlinked" with the President's constitutionally assigned power as Commander-in-Chief to superintend the military. 517 U.S. at 772-73; see also United States v. Curtiss-Wright, 299 U.S. 304, 319-22 (1936) (upholding constitutionality of

[7] The IRA's detailed structure and history belie the State's contention that the statute allows the Secretary to "purchase the Empire State Building in trust for a tribal chieftain as a wedding present" or to "provide a lake home for a politically faithful tribal officer." State Br. at 68 (quoting 69 F.3d at 882). Tested against the text and history outlined above, such acquisitions already prohibited by the Secretary's regulations fall far outside the scope of § 465.

delegation that was interlinked with Executive's independent authority in foreign affairs). See generally American Trucking, 517 U.S. at 476.

These principles control here. Although Congress has substantial power under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, the Executive Branch has independent power over Indian affairs pursuant to both the treaty-making and war powers, id. art. II, § 2, cls. 1-2. See, e.g., Morton v. Mancari, 417 U.S. at 552 ("Article II, § 2, cl. 2, [which] gives the President the power, by and with the advice and consent of the Senate, to make treaties . . . has often been the source of the Government's power to deal with the Indian tribes."); see also Board of Comm'rs v. Seber, 318 U.S. 705, 715 (1943).

This expansive independent authority of the Executive Branch in Indian affairs is no doubt why broad delegations to the Executive Branch of authority in Indian affairs have existed since the early days of the Nation,[8] and why the Supreme Court has repeatedly approved the exercise of that authority without ever suggesting that the delegation might be unconstitutional. The delegation here is thus easily sustained.

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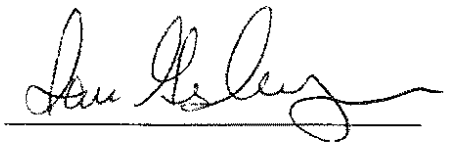
[8] See 25 U.S.C. § 2 (Commissioner of Indian Affairs to have "management of all Indian affairs and of all matters arising out of Indian relations") (originally enacted in the Acts of July 9, 1832, ch. 174, § 1, 4 Stat. 564; July 27, 1868, ch. 259, § 1, 15 Stat. 228); id. § 9 ("President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs . . . .") (originally enacted in the Act of June 30, 1834, ch. 162, § 17, 4 Stat. 738); see also id. § 81.

Finally, the State's nondelegation challenge overlooks that § 465 involves the acquisition of land, which inevitably requires substantial executive discretion. The Supreme Court has repeatedly approved congressional statutes vesting broad discretion in Executive Branch officials to execute land transactions. In United States v. Carmack, 329 U.S. 230 (1946), for example, the Supreme Court upheld the federal government's condemnation of certain land pursuant to statutes that gave the executive "the fullest possible authority of Congress in selecting cities and sites," and imposed no express limitations "upon the authority of the officials designated by Congress to exercise its power of condemnation in procuring sites for public buildings deemed necessary by such officials to enable the Government to perform certain specified functions." Id. at 236 & n.5. Indeed, the Court noted that the relevant statutes were the "natural means for Congress to adopt in putting its constitutional powers into use." Id. at 236; accord Chappell v. United States, 160 U.S. 499, 510 (1896). That same approach applies here and compels rejection of the State's nondelegation challenge.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,



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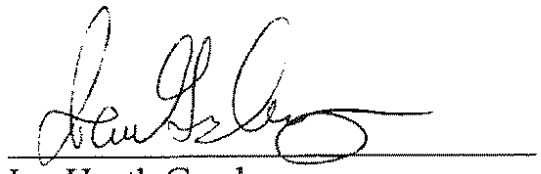
CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7) that the attached Brief for Amici Curiae National Congress of American Indians, Individual Indian Tribes, and Tribal Organizations in Support of Defendants-Appellees is proportionately spaced, has a typeface of 14 points or more, and contains 6942 words, as counted by WordPerfect 9.0.



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CERTIFICATE OF SERVICE

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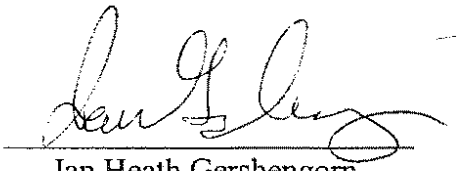

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ADDENDUM

Senator THOMAS of Oklahoma. Some of them are practically white. They have 500 acres of the poorest land in South Carolina. The Indians always get the poorest land.

Commissioner COLLIER. Are they living on it?

Senator THOMAS of Oklahoma. They are living on it, and that is all they are doing, in the State of South Carolina. The Government has not found out they live yet, apparently.

The CHAIRMAN. They would not be affected unless they are half-blood Indians. If they are half-blood Indians they would have to take them over under this act.

Senator THOMAS of Oklahoma. Some of them presumably are half bloods, but most of them are not.

Senator O'MAHONEY. You are sure about that, Mr. Chairman? The first sentence of this section says, "The term 'Indian' shall include all persons of Indian descent who are members of any recognized Indian tribe"—comma. There is no limitation of blood so far as that is concerned.

Senator FRAZIER. That would depend on what is construed membership.

Senator O'MAHONEY. "The term 'tribe' wherever used in this act"—and that means up above—"shall be construed to refer to any Indian tribe, band, nation, pueblo." Now, the Catawbas certainly are an Indian tribe.

The CHAIRMAN. You would have to have a limitation after the description of the tribe.

Senator O'MAHONEY. If you wanted to exclude any of them you certainly would in my judgment.

The CHAIRMAN. Yes; I think so. You would have to.

Senator O'MAHONEY. But I know of no reason why the benefits of the act, if they are benefits, should not be extended.

The CHAIRMAN. Providing that they are half-blood Indians.

Senator O'MAHONEY. Why, if they are living as Catawba Indians, why should they limit them any more than we limit those who are on the reservation?

The CHAIRMAN. But the thing about it is this, Senator; I think you have to sooner or later eliminate those Indians who are at the present time—as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called "tribes" there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.

Senator O'MAHONEY. If I may suggest, that could be handled by some separate provision excluding from the benefits of the act certain types, but must have a general definition.

Commissioner COLLIER. Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

Senator THOMAS of Oklahoma. Mr. Chairman, I suggest that the Commissioner be requested to submit to us the briefs on the various points we have raised and that we have another meeting in executive session to consider the briefs and then approve this bill.

The CHAIRMAN. How soon can you have that to us?

Commissioner COLLIER. This afternoon or tomorrow morning at latest.

The CHAIRMAN. I do not believe you can have it to us or have any kind of a brief on the subject until you learn——

Commissioner COLLIER (interposing). This is pretty much briefed already.

The CHAIRMAN. You say you can have it tomorrow morning?

Commissioner COLLIER. We can have it tomorrow morning.

The CHAIRMAN. All right then; you get those briefs out to us tomorrow morning, and suppose we call a meeting for tomorrow morning, then, at 10:30. That will be an executive meeting.

(Accordingly, at 12:23 p.m., an adjournment was taken until 10:30 a.m. of the following day, Friday, May 18, 1934.)