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.*,
Plaintiff-Appellants,

v.

GALE A. NORTON, in her
capacity as Secretary of the Department of the Interior, *et al.*,
Defendant-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 SUPPORTING DEFENDANT-APPELLEES AND OPPOSING REHEARING EN BANC

(full listing of *Amici Curiae* inside)

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June 15, 2005

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
Oglala Sioux 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.[1]
Washoe Tribe of Nevada and California
Yomba Shoshone Tribe

[1] 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 National 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 inter-tribal 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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

LEGISLATIVE MATERIAL

MISCELLANEOUS

INTEREST OF *AMICI*

Amici and their interest in the outcome of this case are fully described in their April 20, 2004 brief supporting Defendant-Appellees.[1] That brief was cited in the Court's May 26, 2005 Order calling for a response to State Appellants' petition for rehearing en banc, much of which addresses issues that were the focus of *Amici*'s earlier brief.

ARGUMENT

State Appellants' rehearing petition asks this Court to hold that the word "now" in the Indian Reorganization Act's definition of the term "Indian" so unambiguously refers to June 18, 1934 (the date of the IRA's enactment) that this Court should ignore binding regulations issued by at least four Secretaries of the Interior and should overrule decades of practice by the Interior Department. Doing so not only would impact scores of trust acquisitions that at least a dozen Secretaries of the Interior have made for Tribes over the last 70 years, but also would threaten the IRA's application to dozens of Tribes, calling into question the governmental organization of those Tribes and the extension of the IRA's protections and responsibilities to them. It is not an overstatement to say that rewriting Indian law here would have the potential to wreak havoc throughout Indian country. The Court should deny State Appellants' petition.

[1] *Amici* are submitting this Brief with a Motion for Leave to File.

I. Over the Last 70 Years, Secretaries of the Interior Consistently Have Interpreted the Indian Reorganization Act as this Court Did, Resulting in Scores of Trust Acquisitions for Dozens of Tribes Recognized Since 1934.

The Court's May 26, 2005 Order focused on two related questions: (1) whether Secretaries of the Interior for the last 70 years have consistently read the word "now" in Section 19 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 479, to mean "today" rather than "in 1934"; and (2) whether scores of trust acquisitions for Tribes would be implicated by State Appellants' contrary reading of the statute. The answer to both questions is Yes.

Since Congress enacted the IRA in 1934, seventeen Secretaries of the Interior have overseen Indian affairs. *Amici* have been unable to find any evidence that any of these Secretaries adopted or applied the statutory interpretation that State Appellants once again propose here. To the contrary, *Amici*'s research shows that the Secretaries of the Interior consistently have interpreted the IRA as did this Court and repeatedly have exercised their trust-acquisition authority according to that interpretation.

Perhaps the clearest evidence comes from an official report of the United States General Accounting Office ("GAO"), entitled *Indian Issues: Improvements Needed in Tribal Recognition Process*, GAO-02-49 (Nov. 2001) [hereinafter "GAO Report"]. The report's Appendix I, attached to this Brief as an Addendum,

lists the Tribes that were federally recognized from 1961 to 2000.[2] By GAO's count, during that period Congress recognized 16 Tribes and the Department of the Interior recognized 31 Tribes. Of the 31 administratively recognized Tribes, only one — the Jamul Indian Village of California, recognized in 1981 — was "established as a 'half-blood community' as defined under provisions of [the] IRA." GAO Report, at 24. To borrow State Appellants' terminology, the Jamul Indians therefore fell within the IRA's scope under the "'Indian blood' test." By contrast, the other 30 administratively recognized Tribes qualify for the protections and responsibilities of the IRA, including trust acquisitions, under the IRA's "'recognized tribe' test" — even though not one of them was "recognized" or "under Federal jurisdiction" in 1934.

Moreover, pursuant to the Secretary's authority under Section 5 of the IRA, 25 U.S.C. § 465, the United States has acquired land and placed it in trust for these Tribes, notwithstanding that every one of them was federally recognized *after* 1934. Many of these 30 Tribes have benefited from multiple trust acquisitions; for example, in the 25 years since the Interior Department first recognized the Grand Traverse Band of Ottawa and Chippewa Indians, the United States has acquired for the Band no fewer than 20 parcels of land in Michigan. All told, more than

[2] GAO's list appears to be under-inclusive, omitting, for example, several California Tribes that the Department of the Interior recognized in response to judicial decisions. *See, e.g., Tillie Hardwick v. United States*, No. C-79-1710SW (N.D. Cal. Dec. 22, 1983) (stipulated judgment).

150,000 acres are now held in trust for these 30 Tribes alone[3] — and that total does not include the Tribes that were recognized between 1934 and 1961 (which therefore were not covered by the GAO's list).[4] Thus, the Court was absolutely correct in stating that "to change [the accepted] reading of the statute here would impact scores of trusts created for the benefit of Indians over the last 70 years." 398 F.3d at 30.

The following list, arranged in reverse chronological order and stretching back nearly half a century, shows the Tribes that were administratively recognized (on some basis other than "half-blood" status) under each Secretary of the Interior.[5]

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[3] This figure was derived from the U.S. Department of Commerce, Economic Development Administration, *American Indian Reservations and Indian Trust Areas* (1995), *available at* http://12.39.209.165/xp/EDAPublic/Research/AmerIndianRes.xml, and *Tiller's Guide to Indian Country: Economic Profiles of American Indian Reservations* (Veronica E. Velarde Tiller ed., CD-ROM 2d ed. 2005).

[4] *Amici*'s research indicates that at least 40 Tribes have been administratively recognized since 1934 that were not subject to the IRA's half-blood provision and are not covered by the GAO Report. In the limited time available, however, *Amici* have not been able to unearth the official government documents demonstrating the post-1934 recognition and trust acquisitions for each of these Tribes, and hence are not citing them to the Court in this Brief. Adding in that data would substantially increase the total acreage of land that the United States has taken into trust for post-1934 Tribes. But ultimately the point is the same: The argument that State Appellants advance again on rehearing runs directly counter to the consistent interpretation of the IRA adopted by the Department of the Interior since the IRA's passage and, if accepted, could be enormously destructive to Indian country.

[5] Names and dates of service for each Secretary of the Interior come from the Department's website, http://www.doi.gov/anniversary/secretaries.html. Official names of each tribe come from U.S. Department of the Interior, Bureau of Indian Affairs, *Indian Entities Recognized and Eligible to Receive Services from the*

Gale A. Norton — January 2001 to present
Cowlitz Indian Tribe, Washington (federally recognized on 1/4/02)

Bruce Babbitt — January 1993 to January 2001
Lower Lake Rancheria, California (12/29/00)
King Salmon Tribe, Alaska (12/29/00)
Shoonaq' Tribe of Kodiak, Alaska (12/29/00)
Snoqualmie Tribe, Washington (10/6/99)
Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan (8/23/99)
Delaware Tribe of Indians, Oklahoma (9/23/96)
Samish Indian Tribe, Washington (4/26/96)
Huron Potawatomi, Michigan (3/17/96)
Jena Band of Choctaw Indians, Louisiana (8/29/95)
Mohegan Indian Tribe of Connecticut (5/14/94)
Ione Band of Miwok Indians of California (3/22/94)

Manuel Lujan, Jr. — February 1989 to January 1993
San Juan Southern Paiute Tribe of Arizona (3/28/90)

Donald P. Hodel — February 1985 to January 1989
Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts (4/11/87)

William P. Clark — November 1983 to February 1985
Poarch Band of Creek Indians of Alabama (8/10/84)

James G. Watt — January 1981 to November 1983
Narragansett Indian Tribe of Rhode Island (4/11/83)
Death Valley Timbi-Sha Shoshone Band of California (1/3/83)
Tunica-Biloxi Indian Tribe of Louisiana (9/25/81)
Jamestown S'Klallam Tribe of Washington (2/10/81)

Cecil D. Andrus — January 1977 to January 1981
Grand Traverse Band of Ottawa and Chippewa Indians, Michigan (5/27/80)
Karuk Tribe of California (1/15/79)

United States Bureau of Indian Affairs, 68 Fed. Reg. 68180 (Dec. 5, 2003); tribes recognized since 2003 are not included here. Dates of federal recognition come from GAO Report, at 25-26.

Thomas S. Kleppe — October 1975 to January 1977
Stillaguamish Tribe of Washington (10/27/76)

Stanley K. Hathaway — June 1975 to October 1975
none

Rogers C. B. Morton — January 1971 to April 1975
Coushatta Tribe of Louisiana (6/27/73)
Sault Ste. Marie Tribe of Chippewa Indians of Michigan (9/7/72)
Penobscot Tribe of Maine (7/14/72)
Passamaquoddy Tribe of Maine (6/29/72)
Sauk-Suiattle Indian Tribe of Washington (6/9/72)
Upper Skagit Indian Tribe of Washington (6/9/72)
Nooksack Indian Tribe of Washington (8/13/71)

Walter J. Hickel — January 1969 to November 1970
none

Stewart L. Udall — January 1961 to January 1969
Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon (11/16/67)
Miccosukee Tribe of Indians of Florida (11/17/61)

Because the GAO report does not cover the period from 1934 to 1960, *Amici* were unable in the limited time available to gather equivalent information for the five Secretaries of the Interior preceding Secretary Udall. But we do know that Harold L. Ickes, who served as Secretary of the Interior for nearly half that period (from 1933 to 1946) and whose staff was responsible for drafting much of the IRA, followed the same approach as his above-listed successors. As reported in greater detail in *Amici*'s prior brief, for example, Secretary Ickes exercised his IRA trust authority to acquire more than 1,000 acres for the Port Gamble Band of S'Klallam Indians in Washington State in the late 1930s, even though — as of 1934 — the

Band had no trust land, had no reservation, was not under federal jurisdiction, and had many members of less than one-half Indian blood. *See* Amici Br. at 22-23.

Thus, from the beginning of the IRA era, there has been a continuous history of Secretaries of the Interior recognizing, and then acquiring trust lands for, Tribes that were not federally recognized in 1934, were not under federal jurisdiction in 1934, and were not considered to be half-blood communities under the IRA. These facts provide powerful support for the Court's opinion and cannot possibly be squared with State Appellants' efforts on rehearing to substitute for that opinion a far more cramped interpretation of the IRA.

II. The Court's Conclusion that the Indian Reorganization Act Applies to the Narragansett Indian Tribe Is Correct and Creates No Conflict Meriting En Banc Review.

The nub of the current dispute is whether the word "now" in the IRA's definition of the term "Indian" so unambiguously refers to June 18, 1934 (the date of the IRA's enactment) that this Court should ignore binding regulations issued by the Secretary of the Interior and overrule decades of practice by the Interior Department. The IRA's definition of "Indian" encompasses "all persons of Indian descent who are members of *any recognized Indian tribe* ***now*** *under Federal jurisdiction*" and "all other persons of one-half or more Indian blood." 25 U.S.C. § 479 (emphasis added). Even assuming for argument's sake that the IRA's definition of "Indian" — as opposed to the IRA's separate definition of "Indian

tribe," *id.* — controls the question whether the IRA applies to the Narragansett Indian Tribe, *see* Amici Br. at 8-10, State Appellants are flatly incorrect in claiming again on rehearing that Congress's "'unambiguously expressed intent'" was that the word "now" means "on June 18, 1934," when the IRA was enacted. Reh'g Pet. at 14 (citation omitted). When the Code invokes 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"). Moreover, the very next clause in Section 19's definition of "Indian" incorporates a specific date — "June 1, 1934." *Id.* § 479. If Congress had intended the relevant date of federal recognition to be June 18, 1934, it certainly knew how to do so. At a minimum, Congress's use of the term "now" is far from sufficiently unambiguous to foreclose the Secretary's long-standing regulations.[6]

With their argument severely undercut by the statute's plain text, State Appellants again turn to the same decisional law discussed in their original brief, conjuring up a series of supposed "conflicts" with decisions of the Supreme Court and sister circuits. But far from meeting the demanding standards for rehearing en

[6] *Cf.* Comment to Unif. Child Custody Jurisdiction Act § 14(a)(1), 9 U.L.A. 580 (1999) (explaining that the term "now" in the phrase "does not now have jurisdiction" means "at the time of the petition," not at the time the legislature enacted the statute); Amici Br. at 10 (citing cases where the statutory term "now" did not refer to the time of the statute's enactment).

banc set forth in Federal Rule of Appellate Procedure 35(b)(1) and called for by this Court's practice, the alleged conflicts are illusory.

At the outset, State Appellants do not contend (nor could they) that any court has denied the Secretary authority to take land into trust for Tribes recognized after 1934. This Court would be the first.

The State must therefore rely on dicta (and worse) from opinions in unrelated contexts. State Appellants mistakenly suggest that this Court's decision is inconsistent with *United States v. John*, 437 U.S. 634, 649-50 (1978). As this Court noted, although the Supreme Court inserted the parenthetical "[in 1934]" for the word "now," the Court "did not give further explanation for the inclusion of the parenthetical," and "it does not appear that the reading of this particular term in the IRA was before the Supreme Court for consideration." 398 F.3d at 31. That is entirely correct. The Choctaws' land at issue in *John* was taken into trust between 1939 and 1944 and made a reservation pursuant to Section 7 of the IRA in December 1944. *See John*, 437 U.S. at 646 & n.14. But the Choctaws were not federally recognized until April 1945, when they adopted an IRA constitution. *See id.*; *see also* Brief *Amicus Curiae* of the Mississippi Band of Choctaw Indians, at 1-4 (noting that land was taken into trust between 1934 and 1944 but that the Mississippi Choctaws were not recognized until 1945). Because the Band was not federally recognized before 1945, the validity of the Secretary's actions before that

date could not be justified on the basis of federal recognition, and that is true regardless of whether or not "now" means "in 1934."

The only basis under the IRA for justifying the Secretary's actions was thus the "half-blood" provision — that was the sole IRA issue before the Supreme Court, and that was the issue the Court addressed. This Court's decision is thus entirely consistent with *John*.

Nor is there any conflict meriting en banc review with respect to *United States v. State Tax Commission*, 505 F.2d 633 (5th Cir. 1974). *First*, the Fifth Circuit used the language cited by State Appellants to justify the conclusion that the Choctaws were not "Indians" under the IRA. That, of course, is the very result that the Supreme Court reversed in *John* when it held that the IRA did apply to the Mississippi Choctaw, as this Court correctly observed. *See* 398 F.3d at 31 ("However, just two years later, the Supreme Court disagreed with the Fifth Circuit and held in [*John*] that the IRA does apply to the Mississippi Choctaws."); Reh'g Pet. at 10 n.6 (conceding that "the Supreme Court held that the Choctaws were within the IRA"). *Second*, the Fifth Circuit stated expressly that its discussion of the IRA was an alternative holding, relevant only "if we are mistaken in our first holding that the United States is not a real party in interest in the efforts of the corporation to avoid paying the taxes against it." 505 F.2d at 642; *see also* Brief *Amicus Curiae* of the Mississippi Band of Choctaw Indians, at 10 n.3.

Finally, the Ninth Circuit's decision in *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), *cert. denied*, 545 U.S. ___, 2005 WL 275254 (June 13, 2005) (No. 04-1041), is irrelevant. That case involved a constitutional challenge to the Secretary's decision to exclude Native Hawaiians from the federal acknowledgement process. The Ninth Circuit was thus considering a situation in which an alleged Tribe — the Native Hawaiians — had *never* been federally recognized. The decision has nothing to say about the issue that divides the parties here — namely, what is the IRA status of a Tribe that *is* federally recognized, but was not so recognized in 1934.

Unpersuaded by the State Appellants' weak reliance on caselaw, this Court correctly recognized that the Interior Department's long-standing interpretation of the word "now" in the IRA "should be accorded particular deference." 398 F.3d at 30 (citing *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 522 n.12 (1982); *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 274-75 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)). Thus, the facts described above in Point I of this Brief should definitively resolve this case in favor of the Secretary and the Narragansett Indian Tribe.

Indeed, the Court need not rely solely on the Interior Department's *informal* construction of the IRA, as Secretaries of the Interior, down through the decades, have codified their shared interpretation in *formal regulations*. *See Chevron,*

U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984) (requiring substantial deference to formal regulations). Tellingly, in 1978, Secretary Andrus promulgated a regulation granting employment preference to all "persons of Indian descent who are . . . [m]embers of any recognized Indian tribe ***now*** under Federal Jurisdiction." 43 Fed. Reg. 2393 (Jan. 17, 1978) (emphasis added), *codified at* 25 C.F.R. § 5.1(a). This language, borrowed verbatim from the IRA, makes sense only if "now" means "today." The word "now" cannot simultaneously mean "in 1934" and "in 1978" — and in any event, no one has ever interpreted the word "now" in the regulation to mean either 1934 or 1978. Furthermore, as described in detail in *Amici*'s prior brief, *see* Amici Br. at 19-22, the Code of Federal Regulations is replete with regulations treating Tribes recognized after 1934 no differently from Tribes recognized before 1934 — including regulations that apply specifically to trust acquisitions under the IRA. *See, e.g.*, 25 C.F.R. §§ 5.1(a), 81.1, 83.6(b), 83.12(a), 151.2(b), 151.2(c), 163.1; *see also* 25 U.S.C. §§ 1773c, 1779d(b)(1)(A) (expressly endorsing regulations), *cited in* Amici Br. at 21-22. These regulations, found in five separate Parts of the Code, were originally promulgated under four different Secretaries (Andrus, Watt, Hodel, and Babbitt). State Appellants' bald assertion that "there is no administrative regulation" supporting the Court's interpretation, Reh'g Pet. at 14-

15, is thus flatly incorrect, and the deeply inscribed principles of *Chevron* deference provide ample warrant for the Court's opinion.

Moreover, this Court properly observed that Congress itself has repeatedly given the IRA the same interpretation that this Secretary and her many predecessors have given it. In addition to the two 1994 statutes that the Court discussed, *see* 398 F.3d at 31-32 (citing 25 U.S.C. §§ 479a and 476(f)-(g)),[7] the Indian Land Consolidation Act ("ILCA"), Pub. L. No. 97-459, Title II, 96 Stat. 2517 (1983), refutes State Appellants' position and would render a granting of their petition an exercise in absurdity. Tellingly, State Appellants do not even mention ILCA in that petition.

Section 203 of ILCA states that "[t]he provisions of section 465 of this title shall apply to *all tribes* notwithstanding [whether the Tribe voted for or against the IRA's application]." 25 U.S.C. § 2202 (emphasis added). Section 201 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).

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[7] Contrary to State Appellants' repeated assertions, *see* Reh'g Pet. at 12-14, 13 n.9, this Court did not hold that these 1994 enactments "amend[ed]" or "effected an implied repeal" of the IRA's definition of "Indian." Rather, the Court cited the 1994 statutes because they "clarify" a key provision of the 1934 statute that might otherwise be unclear. 398 F.3d at 32.

ILCA is critical here in two respects. *First*, ILCA further refutes State Appellants' notion that Congress intended rigid lines between the exercise of Section 5 trust-acquisition authority for Tribes recognized on June 18, 1934, and the exercise of that authority for Tribes recognized thereafter. Congress made crystal clear in ILCA that Section 5's trust-acquisition authority extends to all recognized tribes without regard to State Appellants' arbitrary June 18, 1934 dividing line. *See* H.R. Rep. No. 97-908, at 7 (1982) (noting that ILCA would render Section 5 of the IRA "automatically . . . applicable to any tribe, reservation or area excluded from [the IRA by virtue of a Tribe's prior decision to opt out of the IRA]").

Second, even if State Appellants' interpretation of the original IRA had any merit — which it does not — ILCA would still mandate a ruling against the State Appellants. The Narragansett Indian Tribe has 1800 acres of land (apart from the 31 acres at issue here) held in trust by the United States, and thus squarely falls within ILCA's definition of "tribe." *See* 25 U.S.C. § 2201(1), (2). Under ILCA, therefore, the exercise of the Secretary's trust-acquisition authority for the Narragansett Indian Tribe was clearly proper. So granting the petition could not affect the proper resolution of this case.

Rather than address the federal statute — ILCA — that would be dispositive here, State Appellants raise a different, and largely irrelevant, statute — the Quiet

Title Act, 28 U.S.C. § 2409a. They argue that "the Secretary takes the position that the federal Quiet Title Act prevents the undoing of any trust conversion that has already taken place." Reh'g Pet. at 15. Their argument falls flat, for two reasons.

First, State Appellants refuse to concur with "the Secretary['s] . . . position." *Id.* They are thus plainly reserving the possibility of challenging those transactions if the Court were to rule for the State. Although both the United States and *Amici* believe those challenges are without merit, there is no doubt that they would be tremendously destabilizing.

Second, as State Appellants concede, the Quiet Title Act could only help "with respect to any Indian land *previously* taken into trust." *Id.* at 15 (emphasis added). Any attempt by any of the dozens of Tribes recognized since 1934 to expand its land base through further trust acquisitions — as well as any attempt by any Tribe currently awaiting federal recognition to build a secure land base in the future — would be stymied by State Appellants' interpretation of the IRA, regardless of the Quiet Title Act's impact.

III. A Reversal of the Court's Opinion Would Wreak Havoc in Indian Country.

Ultimately, what is most striking about State Appellants' petition is that it completely ignores the sweeping effects that their statutory interpretation would have throughout Indian country. The definition of "Indian" in Section 19 of the

IRA triggers eligibility not only for trust acquisitions under Section 5 of the IRA, but also for the very fact of reorganization for scores of tribal governments under the IRA. And the statutory definition of "Indian" also drives eligibility for an enormous array of federally administered or federally funded benefits and services, including Indian schooling, preference in employment within the Bureau of Indian Affairs and the Indian Health Service, and billions of dollars in annual grants, contracts, and compacts that form the backbone of the government-to-government relationship that the United States currently honors with nearly 600 American Indian Tribes.

As the Court considers State Appellants' rehearing petition, the Court must keep in view not only the scores of trust acquisitions referred to in its May 26, 2005 Order, but also these other federal Indian programs that are rooted in the IRA's 70-year-old definitions of "Indian" and "Indian tribe" and in the long-standing, consistent interpretation of those definitions by more than a dozen Secretaries of the Interior. The Court's opinion is both legally correct and pragmatically wise. It should not be disturbed.

CONCLUSION

Accordingly, the Court should deny the State Appellants' petition for rehearing en banc.

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 Supporting Defendant-Appellees and Opposing Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more, and contains 3,943 words, as counted by WordPerfect 9.0.

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CERTIFICATE OF SERVICE

I, Ian Heath Gershengorn, hereby certify that on June 14, 2005, I served copies of the Brief for *Amici Curiae* National Congress of American Indians *et al.* Supporting Defendant-Appellees and Opposing Rehearing En Banc on the following parties and *amici* by way of U.S. mail:

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