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.,

*Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

**BRIEF OF THE NARRAGANSETT INDIAN TRIBE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**


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## INTEREST OF *AMICUS CURIAE*

This case presents important questions concerning (i) the application of the Indian Reorganization Act to Indian tribes that were not formally acknowledged by the Government until after 1934, and (ii) whether the Rhode Island Indian Claims Settlement Act's (Settlement Act) extinguishment of the Tribe's pending and potential land "claims" precludes the Secretary of the Interior from exercising his discretion to accept land into trust for the Tribe. The Narragansett Indian Tribe (Tribe) has a vested interest in the Court's resolution of those questions. Indeed, the Settlement Act was enacted for the specific purpose of settling the Tribe's land claims against Rhode Island and other parties. The questions presented thus directly implicate the Tribe's interests under the Settlement Act, and its ability to exercise the rights preserved for it through the compromises and balancing that underlay the settlement. This Court's resolution of the questions presented thus will have a direct impact on the ability of the Tribe to maintain and exercise its sovereignty and cultural identity, as contemplated by the Act. [1]

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[1] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

## STATEMENT

### I. STATUTORY FRAMEWORK

1. Congress enacted the Indian Reorganization Act (IRA), 25 U.S.C. 461 *et seq*., in 1934 to end the alienation of tribal land and to aid tribes in the acquisition of additional acreage. Section 465 of the IRA authorizes the Secretary, "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, * * * for the purpose of providing land for Indians." The IRA further provides that "[t]itle to any lands or rights acquired * * * shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." 25 U.S.C. 465. Rather than serving as a temporary measure, Congress envisioned the IRA to serve as a permanent force for tribes to have land placed in trust.

To initiate the trust land acquisition process, an individual Indian or tribe need only file a written request that "set[s] out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part." 25 C.F.R. 151.9. For on-reservation acquisitions, the Secretary must weigh (i) the existence of statutory authority for the acquisition and any limitations contained in such authority; (ii) the need of the individual Indian or the tribe for additional land; (iii) the purpose for which the land will be used; (iv) the impact on the State and its political subdivisions resulting from the removal

of the land from the tax rolls; and (v) jurisdictional problems and potential conflicts of land use which may arise. *Id.* § 151.10. For off-reservation acquisitions, the Secretary also considers the location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation. *Id.* § 151.11.

2. The Rhode Island Indian Claims Settlement Act (Settlement Act), 25 U.S.C. 1701 *et seq.*, was enacted to settle the Tribe's then-pending lawsuits against Rhode Island and various landowners alleging violations of the Indian Trade and Intercourse Act (Non-Intercourse Act), 25 U.S.C. 177. Federal legislation was necessary to render the conveyances consistent with the Non-Intercourse Act's requirement of congressional approval for such transactions involving Indian land. To resolve the Tribe's claims and "remove all clouds on titles * * * including lands not involved in the lawsuits," *Id.* § 1701, the Settlement Act ratified the earlier invalid transfers at issue in the lawsuit and any other transfers by or on behalf of the Tribe within the State, extinguished aboriginal title to those lands, and extinguished any claims based on those now-ratified transfers or on now-extinguished aboriginal title. *Id.* § 1705(a)(1)-(3).

In return, the Tribe received 1800 acres of "Settlement Lands," composed of 900 acres purchased with federal funds and 900 acres provided by the State, that were to be held by a State chartered corporation created by the Settlement Act. While the Settlement Act did not itself confer federal acknowledgment of the Tribe, the Act specifically contemplated that the Secretary could "subsequently acknowledge[] the existence of the Narragansett Tribe

of Indians," and provided that, if it did, "then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary." 25 U.S.C. 1707(c).

Finally, the Settlement Act provided that the Settlement Lands would be subject to "the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. 1708. The Settlement Act was amended in 1980 to clarify that the Settlement Lands and any income produced from them were immune from federal, state and local taxation. 25 U.S.C. 1715. In 1996, Congress exempted the Settlement Lands from the Indian Gaming Regulatory Act. 25 U.S.C. 1708.

## II. FACTUAL BACKGROUND

1. The Narragansett Indians are direct descendants of the original inhabitants of what is now Rhode Island. *See Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1336 (D.C. Cir. 1998). From time immemorial, the Tribe has occupied aboriginal territory in Rhode Island, including the area around Charlestown, Rhode Island. Once one of the most powerful Indian tribes in all of New England, escalating hostilities and war with colonists left the Tribe decimated. As a result, in 1709, the Tribe ceded to the Colony all of the Tribe's territory, except for 64 square miles around Charlestown. William G. McLoughlin, *Rhode Island* 5 (1978). In 1880, Rhode Island's legislature authorized the "purchase from the Narragansett tribe of In-

dians [of] all their common tribal lands * * * for a sum not exceeding five thousand dollars." 1800 R.I. Acts & Resolves 101.

The subsequent sale violated the Non-Intercourse Act, 25 U.S.C. 177, because it lacked the necessary federal approval. That same state law provided that "the tribal authority of the Narragansett tribe of Indians shall cease * * * and all persons who may be members of said tribe shall cease to be members thereof." R.I. Acts 1879-1880, c. 800. Although stripped of their land and officially "detribalized" by Rhode Island, the Narragansetts maintained their traditional tribal government. *See* Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177, 6178 (Feb. 10, 1983).

Following *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), the Tribe sued Rhode Island and individual landowners to recover 3200 acres of public and private land that were improperly alienated in 1880. *See Narragansett Tribe v. Southern Rhode Island Land Dev. Corp.*, 418 F. Supp. 798, 802 (D.R.I. 1976). Because the alienation of these lands violated the Non-Intercourse Act, the Tribe claimed that its title to those lands was superior to any title held by the State, its subdivisions, and private landowners. At the time of its lawsuits, the Tribe was not federally acknowledged, but had been incorporated since 1934 as a Rhode Island non-business corporation known as the Narragansett Tribe of Indians.

In 1978, the parties entered into a settlement the terms of which were memorialized in a Joint Memo-

randum of Understanding (Memorandum). J.A. 25a. The settlement provided the Tribe 900 acres of state-owned land and federal funds to purchase an additional 900 acres of privately-owned land. *Id.* at 25a-26a. The Memorandum transferred those Settlement Lands to a corporation formed to "acquir[e], manag[e] and permanently hold[]" the lands for the descendants of those Narragansetts listed on the 1880 tribal roll. *Id.* at 25a. The Memorandum further provided that the Tribe had the same right as other Indian groups to petition for federal acknowledgment. *Id.* at 29a. In exchange, the Tribe agreed to dismiss with prejudice its pending claims, to release any other Non-Intercourse Act claims the Tribe may have had, and to extinguish its aboriginal title throughout the State. Congress subsequently passed the Settlement Act to implement the settlement. 25 U.S.C. 1701.

2. In 1983, the Secretary formally acknowledged the Narragansett Tribe as a federally recognized tribe. Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177, 6178 (Feb. 10, 1983). Federal "acknowledgement" or "recognition" does not create an Indian tribe. Instead, it reflects the federal government's formal acknowledgment that a particular Indian group is a bona fide Indian tribe that has exercised tribal governmental power and has been recognized as a distinct Indian community since at least first contact with Europeans. 25 C.F.R. 83.7. That acknowledgment rendered the Tribe "eligible for the services and benefits from the Federal government that are available to other federally recognized tribes" and "entitled [it] to the privileges and immunities available to other federally recognized historic

tribes by virtue of their government to government relationship with the United States." 25 C.F.R. 83.12(a). Two years later, Rhode Island transferred the Settlement Lands to the Tribe, and the corporation was dissolved. R.I. Gen. Laws 37-18-12 to 18-14. The Tribe subsequently requested that the Settlement Lands be taken into trust by the federal government, as authorized by the IRA, 25 U.S.C. 465. The United States accepted the Settlement Lands in trust for the Tribe in September 1988.[2]

Of the 1800 acres of Settlement Lands, only 225 acres are suitable for development. *Town of Charlestown v. Eastern Area Director,* 35 IBIA 93, 95 (2000). The 900 acres provided by the State may only be used for conservation purposes, J.A. 28a, while several hundred other acres are sensitive wetlands or are cultural resource areas containing human remains. Admin. Record, Vol. II, Tab D, p. 4. The Tribe used the remaining acreage for its administrative, governmental, and community services buildings, which left very little land for tribal housing and community living. *See Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.*, 89 F.3d 908, 911 (1st Cir. 1996).

Given the severe practical constraints of the remaining Settlement Lands and to provide the housing necessary for members to live together as a tribal community, the Tribe's housing authority purchased

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[2] The State lodged no objection to that transfer. The Town of Charlestown's administrative challenge to the decision was rejected. *Town of Charlestown v. Eastern Area Director,* 18 IBIA 67 (1989).

thirty-one acres of land adjacent to the Settlement Lands from a private developer in 1991. The Tribe then commenced construction on the first eighteen homes but Rhode Island and Charlestown filed suit to prevent the development as inconsistent with state and local law. *See Narragansett Electric Co.*, 89 F.3d at 910-11.[3]

3. In October 1993, the Tribe applied to the Secretary of the Interior to have the Housing Parcel taken into trust by the United States. Admin. Record Vol. I, Tab D. That application was renewed in July 1997, following the conclusion of the *Narragansett Electric* litigation. *Id.*, Vol II, Tab D. The renewed application explained that the housing development was essential to remedy the "lack of decent, safe, and affordable housing available to Narragansett Indian Tribal members." *Id.* at p. 5.

After specifically considering the objections raised by Rhode Island and Charlestown, the Area Director of the BIA approved the trust acquisition of the land "acquired for the express purpose of building much needed low-income Indian Housing via a contract between" the Tribe's housing authority and the U.S. Department of Housing and Urban Development. J.A. 46a. Rhode Island's and Charlestown's administrative appeal of the decision was denied. *Id.* at 71a.

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[3] While the Tribe planned to develop fifty units of elderly and low-income housing, local regulation requires that each homesite be at least two acres, which would limit the Tribe to fifteen housing units. 89 F.3d at 911.

Petitioners then filed suit under the Administrative Procedure Act against the Secretary of the Interior and the Area Director of the BIA, alleging that the trust acquisition was contrary to law. The district court affirmed the BIA's decision. Pet. App. 84-136. The en banc First Circuit unanimously affirmed the Secretary's decision to take the land into trust. *Id.* at 1-81. The First Circuit held that Interior's interpretation of the IRA as permitting tribes acknowledged after 1934 to acquire land in trust was reasonable and entitled to deference under *Chevron U.S.A., Inc. v. NEDC*, 467 U.S. 837 (1984). *Id.* at. 17-37. The court further 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.

## SUMMARY OF ARGUMENT

Petitioners' entire argument is an effort to obtain from this Court special benefits and limitations on tribal sovereignty that it did not obtain from the Narragansett Tribe in settlement negotiations or from Congress in implementing legislation. This Court's duty, however, is to implement the law as written and to respect congressional choices about what limitations to include – and which ones to omit – in legislation. If petitioners are dissatisfied with the bargain they struck, their proper recourse is to seek an amendment by Congress (which has twice already demonstrated its responsiveness to legitimate governmental concerns), rather than judicial interpolation of unwritten and unenacted legislative conditions.

Petitioners' attempt to proscribe the Secretary from taking land into trust for the Tribe runs headlong into the plain text of the Settlement Act, which imposes no restrictions of any kind on the Secretary's discretion to place land into trust. Nor does anything in the text of the Settlement Act support the petitioners' central contention that the Settlement Act "explicitly" repealed the IRA in Rhode Island. Neither the statute nor its legislative history mentions the IRA, let alone repeals it, and this Court will not lightly imply an unwritten and unexpressed congressional intent to repeal a law, especially when, as here, the two statutes are fully capable of coexistence. What is more, the Settlement Act itself expressly contemplated that the Tribe could apply for and obtain the status of a federally recognized tribe. If Congress had intended to limit the Tribe's ordinary rights under the IRA upon obtaining such status, Congress logically would have appended such limitations to the statutory provision addressing tribal recognition. It did not and, given Congress's explicit contemplation that the Tribe could acquire the attributes of federal recognition, Congress's decision not to qualify that status must be given effect.

Petitioners' alternative argument – that the Settlement Act's extinguishment of any remaining Tribal "claims" to land forever foreclosed the Tribe from seeking to have land placed into trust by the Secretary – cannot survive a plain reading of the term "claim." By long-established usage, both elsewhere and within the Settlement Act itself, the term "claim" refers to assertions of an independent and pre-established *right* to land, not to requests for an agency's prospective exercise of statutory discretion.

Indeed, the Congress that enacted the Settlement Act was well aware of the nature and extent of the many Eastern Indian Land "claims" pending in the federal courts in the 1970s and thus knew exactly the kind of "claim" it was settling. Congress accordingly made clear in the Settlement Act that the harm – the "claims" – it sought to eliminate were those that clouded title to thousands of acres of land based on assertions of aboriginal title or violations of the Non-Intercourse Act. The Tribe's request to have the Housing Parcel placed in trust, pursuant to administrative and statutory law, thus is not a claim, but a request to the Secretary to exercise discretion to confer trust status on the Tribe's housing lands—which, if granted, reflects a normal attribute of federally recognized tribal status, rather than an assertion of aboriginal title or rights under the Non-Intercourse Act. And, contrary to petitioners' argument, nothing in the IRA or regulations predicate the decision to take land into trust on the existence of a tribal possessory right in the land. In fact, this Court itself has explained that the land-into-trust process is the preferred mechanism for Indian tribes to acquire land and assert sovereign control over it when Indian tribes *do not* have any unilateral possessory right to do so. *See, e.g., City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005); *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998). Petitioners' argument thus turns both precedent and the ordinary meaning of statutory language on their head.

Similarly flawed is petitioners' isolated focus on the Settlement Act's claims-extinguishment language, which violates the cardinal rule that statutory

language must be read in context. When the statute is read as a whole, relevant text reflects the Settlement Act's purpose to extinguish only existing claims of right based on aboriginal title or the Non-Intercourse Act, which is fully consistent with the continued operation of the IRA and the Secretary's quite distinct discretionary authority under that statute to place land into trust.

Finally, petitioners' effort to judicially import unwritten restrictions into the Settlement Act collapses in the face of the statutory language Congress employed in other land claim settlement acts. In stark contrast to those other statutes, the Settlement Act omitted the limitations statutorily adopted in other laws and urged by the petitioners here. Of particular relevance, Congress left out of the Settlement Act the language restricting the IRA found in other settlement acts, and that omission must be respected. Indeed, the deliberateness with which Congress acted is underscored by the fact that Congress selectively picked and chose which language from the Alaska Native Claims Settlement Act it included in this Settlement Act (*i.e.*, the "claim" extinguishment language) and which language it did not (every other restriction). Congress, in other words, knows how to say it when it wants to restrict the land-into-trust process. And it did not say so here.

## ARGUMENT

The central question in this case is whether legislation settling land "claims" under the Non-Intercourse Act should be read to extend beyond such

possessory land "claims" to reach all prospective questions of land regulation by the Tribe within the State and, thereby, to divest the federal government of the authority to accord the Tribe the ordinary attributes and protections of tribal status. The plain text, design, and purpose of the Settlement Act foreclose that reading. If petitioners wish to revamp the settlement that was legislatively struck in 1978 and return the Tribe to the functional equivalent of a State chartered Indian corporation, wholly subservient to the State in every meaningful way, the proper route for doing so is through Congress, not judicial amendment of statutory law.

## I. THE SETTLEMENT ACT CONTAINS NO RESTRICTIONS ON THE SECRETARY'S DISCRETION TO PLACE LAND INTO TRUST FOR THE TRIBE

### A. The Land "Claims" That The Settlement Act Resolved Do Not Include Applications To Take Land Into Trust

#### *1. Only Legally Actionable "Claims" Under The Non-Intercourse Act or Aboriginal Title Were Extinguished*

Petitioners' common refrain is that the Settlement Act "explicit[ly]" repealed the IRA in Rhode Island – and thus the Secretary's authority to take land into trust – because the Settlement Act extinguished all Indian "claims" within the State. Gov.'s Br. 35-42; State's Br. 38-57; Town's Br. 48-57. That argument confounds ordinary principles of statutory construction in three critical respects.

First, nothing in the text of the Settlement Act bears out petitioners' reading. When Congress wants one federal law to repeal application of another law it knows how to say so. But "[t]here is simply nothing in the text of the Settlement Act * * * that accomplishes such a repeal or curtailment of the Secretary's trust authority." Pet. App. 37. Neither the statute nor its legislative history mentions the IRA, let alone repeals it. *See Preseault*, 494 U.S. at 12 (no repeal where other statute is not "mention[ed]"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984) (no repeal where the "interaction between" two statutes is never discussed)*; Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 136 (1974) (no repeal where federal law not considered or addressed in the legislation); *Morton v. Mancari*, 417 U.S. 535, 549 (1974)(no repeal where subsequent statute was silent as to IRA's Indian preference provisions).

That silence was no oversight. The Settlement Act expressly contemplated that the Tribe could apply for and obtain the status of a federally recognized tribe. 25 U.S.C. 1707(c). If Congress intended to limit the Tribe's rights under the IRA (or otherwise) upon obtaining such status, Congress logically would have said so there. It did not and, given Congress's explicit contemplation that the Tribe could acquire the attributes of federal recognition, Congress's decision not to qualify that status must be given effect.

Nor is there any basis for finding that the IRA was impliedly repealed. The starting point, of course, is that "repeals by implication are disfavored." *Blanchette*, 419 U.S. at 133. Accordingly, congressional intent to effect such a repeal must be "clear and manifest." *National Ass'n of Home Builders v.*

*Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) There is no such unambiguous indication here. Nor is there any "irreconcilable conflict" between the operation of the two statutes that could support implicit repeal. *Branch v. Smith*, 538 U.S. 254, 273 (2003). The Settlement Act resolved a particular species of tribal land claims – those asserting violations of the Non-Intercourse Act – in order to remove the substantial clouds on title on both the land within the area claimed by the Tribe in the lawsuit and any land that might be subject to future claims that the Non-Intercourse Act was violated by prior acquisitions of tribal land. *See* 25 U.S.C. 1701(b) ("[T]he pendency of these lawsuits has resulted in severe economic hardships * * * by clouding the titles to much of the land in the town, *including lands not involved in the lawsuits*.") (emphasis added). The IRA, by contrast, governs one of the ordinary attributes of federal recognition of an Indian tribe by providing a mechanism for the establishment or enhancement of a tribal land base. Those two schemes are fully "capable of coexistence," as evidenced by the Secretary's decision to take the Settlement Lands themselves into trust. Accordingly, it is "the duty of the courts * * * to regard each as effective." *Blanchette*, 419 U.S. at 133-34.

Second, the Settlement Act extinguished only actionable "claims" to land, such as those based on the Non-Intercourse Act or aboriginal title. 25 U.S.C. 1705. The term "claim," however, cannot naturally be read to encompass either the Tribe's application for an exercise of Executive Branch discretion to take land into trust, or the Secretary's discretionary judgment to grant or deny such a request. The word

"claim" means not an application for favorable discretionary action, but "[a] demand for money, property, or a legal remedy to which one asserts a right." Black's Law Dictionary 264 (8th ed. 2004); *see also* Webster's New International Dictionary 493 (2d ed. 1959) ("a title to any debt, privilege, or other thing in possession of another; also, a title to anything which another should give or concede to, or confer on, the claimant").

That is also how Congress used the term "claim" in the Settlement Act itself. For example, Section 1705 refers to demands for money or property to which the Tribe asserted a right based on aboriginal title or the invalidity of nineteenth century land transfers that violated the Non-intercourse Act. *See infra* at Section I, Part 2. Indeed, by the late 1970s "land claims" litigation had been filed in several of the original thirteen colonies, including Rhode Island, based on prior Indian land cessions negotiated by those States in violation of the Non-Intercourse Act. *See* Clinton and Hotopp, *supra Judicial Enforcement of the Federal Restraints on Alienation of Indian Lands: The Origins of the Eastern Land Claims*, at 78 (noting the progression of cases filed by the Oneida, Passamaquoddy, Penobscot, Mashpee, and Narragansett Tribes). In those cases, as here, "[t]he most immediate problem in all of the claims [wa]s the cloud on property title resulting from pending or potential litigation." Reynold Nebel, Jr. Comment, *Resolution of Eastern Indian Land Claims: A Proposal for Negotiated Settlements*, 27 Am. U.L. Rev. 695, 699, 727 (1978) ( "Real estate markets in affected areas have been paralyzed as a result of the tribes' lawsuits. Most title insurance companies re-

fuse to insure property titles in these areas, viewing the claims as a 'cloud on title' sufficient to withhold the necessary certification of marketability of title."); *see also* Clinton, *supra*, at 89 (same). Thus, those are the land "claims" that the Settlement Act resolved and extinguished. Nothing in the ordinary meaning of the term "claim" or the problem to which the legislation responded supports petitioners' effort to extend the Act to proscribe prospective tribal requests for discretionary Executive Branch protection.[4] And "it is not up to [courts], in construing the scope of this [statute], to identify a problem that did not trouble Congress, or to attempt to correct it." *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 322 (1985).

Accordingly, the Congress that enacted the Settlement Act was well aware of the nature and extent of Eastern Indian Land claims and thus knew exactly the kind of "claim" it was settling. *Cf. Beck v. Prupis*, 529 U.S. 495, 500-01 (2000) (when Congress uses a

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[4] Congress has long used the term "claims" in statutes to refer to the illegal taking of Indian land. For instance, the Indian Claims Commission Act provides that:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President * * * (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant * * *.

60 Stat. 1049, 25 U.S.C. 70a (1976 ed.)

word or phrase with a settled meaning at common law, it is presumed to know and adopt that meaning unless the statute indicates otherwise); *Neder v. United States*, 527 U.S. 1, 21 (1999). Congress thus made clear in the Settlement Act that the harm it sought to eliminate was the clouding of land titles to thousands of acres of land. 25 U.S.C. 1701(b).

Third, contrary to petitioners' argument, an application to have land taken into trust does not rest upon or require an assertion of a possessory right to the land or unextinguished aboriginal title. Gov.'s Br. 39-40; State's Br. 41; Town's Br. 43-44. Neither the IRA nor the Secretary's IRA implementing regulations require a tribe to demonstrate unextinguished aboriginal title or an actionable possessory land claim in its trust application. The Secretary has identified by formal regulation the criteria to be considered in taking land into trust, and a supervening claim of aboriginal right or possessory tribal right is not one of them. 25 C.F.R. 151.10.[5] Rather, the request need only identify the parties, describe the land, and set out other qualifying information. 25 C.F.R. 151.9. *See supra* A.1 (listing the qualifying criteria). In fact, the regulations expressly disprove petitioners' reading because they permit the Secretary to place land into trust either "[w]hen the tribe already owns an interest in the land; *or* * * * [w]hen the Secretary determines that the acquisition of the land is necessary

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[5] The regulations carefully balance state, local and tribal interests and "are sensitive to the complex jurisdictional concerns that arise when a tribe seeks to regarding sovereign control over territory." *City of Sherrill,* 544 U.S. at 220.

to facilitate tribal self-determination, economic development, or *Indian housing*." 25 C.F.R. 151.3 (emphasis added).

This Court too has explained that the Secretary's taking of land into trust is the preferred mechanism for Indian tribes to acquire land and assert sovereign control over it when they lack the unilateral ability to gain possessory rights (such as through an action at law) or to assert sovereignty over the land. Indeed, in *Cass County*, 524 U.S. at 115, this Court held that, even after Congress formally disestablished a tribe's reservation, the IRA was still available to that Tribe to repurchase the land on the open market and render it immune from state and location taxation. *Id.* at 115 ("In § 465 * * * Congress has explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt."); s*ee also City of Sherrill*, 544 U.S. at 221 (IRA was the "proper avenue" for the Oneida Nation to re-establish sovereign authority over land which it last held over two hundred years ago).

In sum, the Secretary's decision to take the land into trust properly weighed the relevant criteria and was not predicated on a finding that the Tribe had aboriginal title or another form of possessory right. That determination, reflected both in the formal regulations and the administrative decision in this case, merits substantial deference. *See S.E.C. v. Zandford*, 535 U.S. 813, 819-20 (2002)(agency's interpretation of a statute in formal administrative proceeding merits deference); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (deferring to agency position first articulated in litigation).

*2. Congress's Extinguishment of Subsequently Arising Claims for Trespass Damages Did Not Repeal the IRA*

Petitioners' contention that the Settlement Act repealed the IRA's provision for taking land into trust rests centrally on the language of 25 U.S.C. 1705(a)(3), which provides:

> by 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 * * * by the Indian Corporation or * * * the Narragansett 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.

Petitioners assert that 1705(a)(3) extinguished all land-related *claims* arising "subsequent to" the ratified transfers, and prospectively extinguishes any *claims* the Tribe might make on the basis of its Indian status or its aboriginal occupancy of land, including any current *claim* to territorial sovereignty in Rhode Island. Gov.'s Br. 40-41; State's Br. 45-49; Town's Br. 54-56. Their reliance on that language in isolation, however, "violat[es] the cardinal rule that statutory language must be read in context." *Lopez v. Gonzales*, 127 S. Ct. 625, 631 (2006). When read, as it should be, in conjunction with the preceding sections that specifically define the "approval[s] of a

transfer of land" and "extinguishment of aboriginal title" "by virtue of" which subsequent "claims" are extinguished, the statutory text is fully consistent with preserving the IRA and the Secretary's quite distinct discretionary authority under that statute to place land into trust.

Section 1705(a)(1) identifies the approved transfers of land as those that had previously occurred in violation of the Non-Intercourse Act and through which the Tribe had been divested of its aboriginal homeland. Congress "hereby approved" "any transfer of land * * * by, from, or on behalf of * * * the Narragansett Tribe" and "deemed [it] to have been made in accordance with the Constitution and all laws of the United States." 25 U.S.C. 1705(a)(1). "Extinguishment of the Indian claims," both the House and Senate Committees explained, "is accomplished by approving for purposes of this legislation *prior* conveyances of land from the tribe to non-Indians effective as of the date of such transfers." S. Rep. No. 95-972, at 12 (1978) (emphasis added); H.R. Rep. No. 95-1453, at 10 (1978) (emphases added); *see* H.R. Rep. No. 95-1453, at 15 (1978) (the Act "is intended to resolve once and for all the claims *being asserted* by the Narragansett Indians to lands * * * on the ground that *past* transfers of those lands may have been made in violation of the Indian Nonintercourse Act") (emphasis added). In practical terms, the Tribe and Rhode Island had negotiated a settlement, but they needed congressional action to remove the legal predicate for the Tribe's superior title by "deem[ing]" what had been an unlawful transfer to now be "in accordance with" the law. 25 U.S.C. 1705(a)(1); s*ee*

*County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

Section 1705(a)(2) similarly identifies the land for which aboriginal title was extinguished as the land involved in previous transfers for which the Tribe had claimed or could, in the future, claim a violation of the Non-Intercourse Act. Indeed, the statutory text expressly cross-references the same land for which transfer was approved in the preceding Section, providing that, "to the extent that any transfer of land or natural resources described in subsection (a) of this section may involve land * * * to which * * * the Narragansett Tribe * * * had aboriginal title, subsection (a) of this section shall be regarded as an extinguishment of such aboriginal title *as of the date of said transfer*." 25 U.S.C. 1705(a)(2) (emphasis added).

The Settlement Act's legislative history confirms what the statutory text indicates. Congress limited subsections (a)(1) and (a)(2) to prior transfers because of the Administration's concern that the ratification and extinguishment language be unmistakably retroactive. The Administration offered a substitute bill with language ensuring that, "under the just compensation clause of the 5th amendment, the potential liability for extinguishment by the United States would be measured by the value of the claim as of the prior conveyance (1790–1880) rather than present day values." S. Rep. No. 95-972, at 10 (1978); *see also* H.R. Rep. No. 95-1453, at 11 (1978) (same). "This is an important point," explained the Solicitor of the Department of the Interior, "since with the extinguishment language we need to provide as much assurance as possible to the United States that the

bill—or any future bill modeled on this one—will not form the basis for a claim of a taking as of the date of enactment." H.R. Rep. No. 95-1453, at 15 (1978). The use of explicitly retroactive language thus was deliberately designed to effect "both extinguishment and ratification as of the date of the original transfers." S. Rep. No. 95-972, at 16 (1978); *see also* H.R. Rep. No. 95-1453, at 15 (1978) (same). The enacted text is identical to the Administration's proposed language – language that was purposefully designed to accomplish the purely retroactive extinguishment of all Non-Intercourse claims that had been or could have been asserted. *Compare* Pub. L. No. 95-395, § 6, 92 Stat. at 815, *with* S. Rep. No. 95-972, at 18–24 (1978) (presenting the Administration's substitute bill), *and* H.R. Rep. No. 95-1453 18–23 (1978) (same).

Thus, with Section 1705(a)(3)'s reference to claims "arising subsequent to the transfer," Congress captured any claims that might have remained, both (i) claims for trespass against third parties arising from occupation of land held under aboriginal title after it was invalidly transferred, and (ii) claims against the United States for authorizing such transfer in violation of its fiduciary duties to the Tribe. Indeed, in crafting Section 1705(a)(3), the House Report explained that the Section was introduced "to avoid the legal problems with respect to assertion of trespass claims which have arisen under [the Alaska Native Claims Settlement Act (ANCSA)]." S. Rep. No. 95-972, at 12 (1978); *see also* S. Rep. No. 95-972, at 6, 12 (1978). "While it might ordinarily be assumed," the Solicitor of the Department of Interior explained, "that extinguishment and ratification as of the date of the original transfers would necessarily

preclude assertion of trespass claims, recent court decisions involving [ANCSA] suggest that it is important for Congress to use the most explicit language possible when it deals with Indian claims." *Id.* at 16. Beyond that, the text reflects that the Administration also had reason to worry about claims arising from the illegality of the original transfers based on forms of title other than aboriginal title. *See Aleut Community of St. Paul Island v. United States*, 480 F.2d 831, 833, 838 (Ct. Cl. 1973) (recognizing potential right to compensation based on fee title acquired under the law of Czarist Russia, and explaining that ANCSA had not extinguished claims for breach of the government's obligation to deal fairly and honorably with the Aleuts).

Accordingly, when read as an integrated whole (as courts must do), Section 1705(a)(3)'s reference to the extinguishment of "subsequent" claims "by virtue of" Sections 1705(a)(1) and (a)(2) pertains only to legally actionable claims, such as those arising out of the prior Non-Intercourse Act or aboriginal title violations, and does not reach forward to divest either the Secretary of his statutorily conferred discretion or the Tribe of the ordinary attributes of tribal status with respect to land newly acquired following the Settlement Act. The aim, instead, was to extinguish any rights "based upon any interest in or right involving" the transferred land, 25 U.S.C. 1705(a)(3), or "an extinguishment of aboriginal title effected thereby,"*Id.,* regardless of whether those rights had already been asserted or instead were asserted "subsequent to" Congress's approval of the prior land transfers.

### B. The Terms Of The Settlement Act Reflect The Bargain That Was Struck

Petitioners insist that the Settlement Act flatly precludes the Secretary from placing *any Rhode Island land* into trust for an Indian tribe on the theory that they did not bargain for "mere temporary extinguishment of aboriginal title and Indian country in the State." State's Br. 38-39. That is wrong on multiple levels.

First, that argument simply begs the question of what lands were bargained over. The Settlement Act resolved a specific dispute between the Tribe, the State and various landowners. The acquisition of trust land outside the Settlement Lands is a distinct and separate acquisition that has no connection to the "claims" the Settlement Act resolved. With respect to the lands subject to the "claims" that the Settlement Act settled, there is no question that petitioners obtained the very permanent extinguishment for which they bargained. But with respect to the acquisition of future land – land not subject to any "claim" of possessory right – and the Tribe's exercise of the ordinary attributes of federal recognition, the statute was noticeably silent. It expressly contemplated the prospect of federal recognition (which includes the acquisition of additional trust lands) – but then, having flagged that prospect, the statute left all the normal attributes that flow from recognition unaddressed. Petitioners' effort to shoehorn express limitations on tribal rights with respect to one category of land into a wholly distinct category is an effort to amend, not enforce, the original bargain simply because petitioners failed to anticipate the conse-

quences of the federal recognition that the Settlement Act expressly contemplated as a possibility.

Second, petitioners' argument fails to come to grips with the fact that the Secretary took the Settlement Lands themselves into trust – and did so without any objection from the State. *See Narragansett Elec. Co.*, 89 F.3d at 913. The only difference is that, pursuant to the express terms of the Settlement Act, the Settlement Lands remain "subject to the civil and criminal laws and jurisdiction of the State of Rhode Island," notwithstanding their trust status. 25 U.S.C. 1708(a). As an initial matter, that proves that the Settlement Act did not repeal the IRA in Rhode Island. More importantly, the Secretary's near contemporaneous construction of the Settlement Act as consistent with the IRA's trust provision is entitled to significant deference. *BankAmerica Corp. v. United States*, 462 U.S. 122, 130 (1983) (giving "great weight to the contemporaneous interpretation of a challenged statute by an agency charged with its enforcement").

Petitioners' argument that "[s]overeign Indian territory has never existed in the State of Rhode Island" fares no better. Gov.'s Br. 47. When the federal government took the Settlement Lands into trust on behalf of the Tribe, those lands were, by their very nature, set aside for the Tribe and thus constitute Indian country. *See* 18 U.S.C. 1151(a); *see also Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) (Congress meant to include within "Indian country" any lands that "have been set aside by the Federal Government for the use of the Indians as Indian land" and are "under federal superintendence."). The Settlement Act thus did not

strike a bargain that there would never be any Indian country in Rhode Island.

Nor is there anything anomalous about allowing the Secretary to take non-settlement lands into trust. Petitioners protest that "the Tribe would be free to exercise territorial sovereignty over land *anywhere* in the State, *except* on the Settlement Lands—which are the heart of the Tribe's ancestral home." Gov's Br. 44-45; *see also* State's Br. 19. That argument forgets that the Tribe also exercises territorial sovereignty over the Settlement Lands. The Settlement Act merely extended concurrent state jurisdiction onto the Settlement Lands, it did not displace tribal jurisdiction. *See Narragansett Elec. Co.*, 89 F.3d at 913 ("the Tribe * * * has 'concurrent jurisdiction over, and exercise[s] governmental power with respect to [the Settlement Lands].'").

What petitioners object to is not the exercise of tribal jurisdiction, but the displacement of state jurisdiction. But that is commonplace in every State that is home to federally recognized Indian tribes. Nor is it an anomaly that the State would lack jurisdiction over the Housing Parcel. Petitioners again fail to recognize a key point—that the Settlement Act and the Housing Parcel involve two distinct parcels of land at two different periods of time and with tribal authority grounded on two very different bases. As such, the State's jurisdiction over the Settlement Lands—which was reached through negotiation—does not extend to the Housing Parcel because the right to exclusive tribal sovereignty arises from the Tribe's unrestricted federal acknowledgment subsequent to the Settlement Act.

In effect, the petitioners are attempting to obtain from this Court the same concurrent jurisdictional status accorded to other States under Public Law 280, Pub. L. No. 83-280, 67 stat. 588 (1953), *codified as amended at* 18 U.S.C. 1162 and 28 U.S.C. 1360. *See Bryan v. Itasca County*, 426 U.S. 373, 379-83 (1976) (acknowledging the predominant purposes of Public Law 280 were to provide reservation Indians with access to state courts and to authorize the application of state law to disputes arising in Indian country). The short answer to that argument, however, is that the Settlement Act neither cross-references that law nor incorporates its language, and this Court is not free to write it in for petitioners. "[T]he proper theater for such arguments * * * is the halls of Congress." *Keene Corp. v. United States*, 508 U.S. 200, 217 (1993) (internal quotation marks omitted). "[I]t is not for [courts] to fill any *hiatus* Congress has left in this area." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 579 (1979) (internal quotation marks omitted). *See also* Pet. App. 9-10 (Although "the State apparently failed to anticipate this particular problem at the time of the settlement, * * * [w]e are not free to reform the Act. If aggrieved, the State must turn to Congress.").[6]

[6] Congress has amended the Settlement Act twice already to deal with issues that were not covered by the statutory text. First, Congress clarified that the Settlement Land "shall not be subject to any form of Federal, State, or local taxation while held by the State Corporation." 25 U.S.C. 1715(a). Second, Congress amended the Settlement Act to prohibit the Tribe from gaming on the Settlement Lands. *See* 25 U.S.C. 1708(b).

### C. Congress Knows How To Limit Application Of The IRA And To Limit Indian Country Status When It Wants To, But It Did Not Enact Any Such Limitations In This Settlement Act

#### *1. The Statutory Text Of Other Settlement Acts Confirms That The Rhode Island Settlement Act Means Only What It Says And Does Not Repeal IRA Authority*

The Settlement Act at issue in this case is just one of numerous settlement acts passed by Congress. Each of those Acts is the unique product of the particular problems and compromises that gave rise to each of those separate Acts. Those other Acts are of particular relevance here, however, because they demonstrate that, when Congress intends to withdraw the Secretary's authority to place land into trust, it knows how to say so and it says so directly. The absence of similar language here forecloses petitioners' effort to have an extratextual limitation judicially interpolated.

In the Maine Indian Claims Settlement Act, Congress explicitly provided that land the Secretary acquires within an eligible area for the tribes in question shall be held in trust, while land outside that area is to be held in fee by the tribe or nation. "Except for the provisions of this subchapter, the United States shall have no authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine." 25 U.S.C. 1724(e) (1980). The Settlement Act at issue here contains no comparable language.

The Connecticut Indian Claims Settlement Act draws an explicit distinction between "lands or natural resources . . . within the settlement lands" purchased with settlement funds to be held in trust by the United States, and those lands outside the settlement lands purchased with settlement funds to be held only in fee by the Tribe. 25 U.S.C. 1754(b)(7). For those lands held in fee by the tribe, the United States has no further trust responsibility and Congress mandated that the land "shall not be subject to any restriction against alienation under the laws of the United States." *Id.* § 1754(b)(8). Again, the Settlement Act at issue here contains no such language.

For its part, the Massachusetts Indian Land Claims Settlement Act specifically limits subsequent tribal acquisitions to those areas "contiguous to the private settlement lands." 25 U.S.C. 1771d(c). In contrast to petitioners' attempt to impute atextual limitations on the ordinary attributes of tribal sovereignty, the Massachusetts Act made clear that "any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, an jurisdiction of the Commonwealth of Massachusetts." 25 U.S.C. 1771g. The Settlement Act at issue here lacks any such textual counterpart.[7]

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[7] Also unlike the Settlement Act here, which only provides that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island," 25 U.S.C. 1708(a), the Massachusetts Act goes further, directing that the Wampanoag Tribe "shall not exercise any jurisdiction over any part of the settlement lands in contraven-

Against that backdrop, petitioners' contention that their bargain silently included similar, yet unwritten, restrictions rings hollow. If the Settlement Act contained such restrictions, they would have been reflected in the same language Congress employed in the settlement acts of petitioners' neighboring States of Maine, Connecticut, and Massachusetts. Petitioners, moreover, have never made any effort to have the Settlement Act amended either to withdraw the Secretary's established statutory power to place land into trust or to deny the Tribe the established attributes of tribal sovereignty. That omission is particularly telling because Congress has revisited the Settlement Act twice already for purposes of amendment, 25 U.S.C. 1708 & 1715, and the second amendment postdated both the Secretary's decision to take the Settlement Lands into trust and the Tribe's application for similar trust status for the Housing Parcel. Had Congress shared petitioners' view that the Secretary's action unraveled the bargain underlying the Settlement Act, that would have been the logical time for Congress to react. That Congress did the opposite and left the Secretary's action "untouched" thus legislatively ratifies the Secretary's position that its authority under the IRA remains intact, *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965), and there is no reason for this Court to give petitioners what Congress has withheld.

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tion of this subchapter, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable federal laws." *id*. § 1771e(a).

### *2. Congress Borrowed ANCSA's Claims And Extinguishment Language But None Of The Other Aspects Of That Statute*

Petitioners contend that the Settlement Act was modeled on the Alaska Native Claims Settlement Act (ANCSA) and that, accordingly, this Court should overlay the Settlement Act with ANCSA's comprehensive scheme governing the relations between the State of Alaska and hundreds of Native villages. Gov.'s Br. 45-47; State's Br. 43-44; Town's Br. 57, n. 19. The problem for petitioners is that the language of extinguishment in ANCSA is wholly absent from the Settlement Act, and those language differences disprove, rather than support, petitioners' argument.

First, ANCSA expressly ended the reservation system in all of Alaska (with the narrow exception of the Metlakatla Indian Reservation). 43 U.S.C. 1601(b) (settling the claims "without creating a reservation system"). That stands in sharp contrast to the Settlement Act, which restored to the Tribe a portion of its historical land base which, when taken into trust by the Secretary in 1988, became the Tribe's reservation and Indian country.

Second, ANCSA provided no federal superintendence over Native corporation lands, which are at all times freely alienable. 43 U.S.C. 1601(b)(settling the claims "without creating * * * wardship or trusteeship"). The Settlement Act, in contrast, said nothing about foreclosing federal superintendence and, in fact, the Settlement Lands became subject to the federal restrictions against alienation *pursuant to the Settlement Act* upon the Tribe's federal acknowl-

edgement in 1983. 25 U.S.C. 1707(c) (emphasis added).

Third, ANCSA established perpetual Native shareholder-controlled corporations and provided for the eventual alienability of ANCSA corporate stock. By comparison, the Settlement Act expressly anticipated that the Secretary could "subsequently acknowledge[] the existence of the Narragansett Tribe of Indians," 25 U.S.C. 1707(c) (which dissolved the corporation) and thus textually preserved the well-established predicate for trusteeship under the IRA.

Relying on a 1993 opinion of the Interior Department's Solicitor, petitioners' insist (Gov.'s Br. 45) that ANCSA repealed the trust provisions of IRA in Alaska. Even were that a correct view of ANCSA, it would avail petitioners nothing given the substantial differences between ANCSA and the Settlement Act.

But their view of ANCSA is not correct. That 1993 Solicitor opinion rested on a 1978 Solicitor opinion, which stated that the intent and purpose of ANCSA was to prohibit trust acquisitions by the Secretary. That view, however, has long since been rescinded. In January 2001, the Department officially withdrew the 1978 Opinion, and the Department's official position is that "ANCSA did not expressly repeal the 1936 IRA provision authorizing the Secretary to take Alaska land in trust." Defendants' Mem. in Support of Cross-Motion for S. J'ment at 8, *Akiachak Native Cmty. v. Dep't of the Interior*, No. 1:06-cv-00969 (D.D.C. June 13, 2008). That means that the very foundation for the memorandum on which petitioners rely has crumbled. At a minimum, that memorandum would be a thin reed on which to hang

an entirely atextual, judicial homogenization of the very differently written ANCSA and Settlement Act.

*3. Petitioners' Policy Arguments Are Based On An Inaccurate Interpretation Of Indian Country Jurisdiction And Greatly Overstate The Secretary's Discretion To Place Land Into Trust*

Confounded at every turn by the statutory text, petitioners advance two main policy reasons why, in their view, this Court should rewrite the Settlement Act. Neither is persuasive and, in any event, their arguments are aimed at the wrong audience.

First, the Governor claims (Gov.'s Br. 44) that "creating enclaves of Indian country within the densely populated State would create significant administrative problems for the State and greatly complicate efforts to enforce its laws within its territorial boundaries." But that does not make Rhode Island different from any of the numerous other States that, because of the presence of Indian lands, function with mixed jurisdictional sovereignty. Indeed, this Court has often recognized that "checkerboard jurisdiction is not novel in Indian law." *Washington v. Confederated Tribes and Bands of the Yakima Indian Nation,* 439 U.S. 463, 502 (1979). The State insists (States Br. 56) that it should be treated differently because it is a small state. But Rhode Island has been small for more than two hundred years – a fact of which Congress presumably was aware when it passed the Settlement Act.

Second, the State expresses fear (State's Br. 57) that the Secretary could "take hundreds or thousands

of additional acres of land into trust in the future." Perhaps. But, like all such slippery-slope arguments, the State's contention baselessly presumes the agency's wholesale abandonment of the careful balancing of interests required by the Secretary's own regulations and a willful imperviousness to the interests and needs of Rhode Island's citizens, not to mention the substantial political checks such extraordinary action would trigger. Tellingly, reality has proven otherwise. Speculation unhinged from reality provides no excuse for this Court to preempt Congress's legislative role.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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