No. 07-526

In The
Supreme Court of the United States

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and TOWN OF CHARLESTON, RHODE ISLAND,
Petitioners,

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of Interior, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs,
Respondents.

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

REPLY BRIEF FOR PETITIONER STATE OF RHODE ISLAND

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REPLY BRIEF FOR PETITIONER STATE OF RHODE ISLAND

This case concerns whether the State of Rhode Island will continue to exercise civil and criminal jurisdiction over all its lands. By taking the 31-acre parcel into trust on behalf of the Narragansett Indian Tribe, the Secretary will transfer sovereignty over the territory from the State to an Indian tribe. The legal rules advanced by the United States would allow the Secretary to reduce the State's sovereign jurisdiction over still more land in the State. Its position, however, cannot be reconciled with either the Indian Reorganization Act of 1934 (IRA) or with the Rhode Island Indian Claims Settlement Act (Settlement Act). In the IRA, Congress limited the trust taking authority to "Indians," a term Congress carefully defined to exclude tribes – such as the Narragansetts – that were not "under Federal jurisdiction" in 1934. In the Settlement Act, Congress implemented a negotiated and carefully balanced jurisdictional regime for the Tribe and the State that extinguished the possibility of further sovereign Indian-occupied lands outside the 1,800-acre Settlement Lands. Both statutes prohibit the Secretary from taking Rhode Island land into trust for the Narragansetts and compel rejection of the United States' position.

I. Section 5 of the Indian Reorganization Act of 1934 Does Not Apply to the Narragansett Indian Tribe.

The First Circuit concluded that the Secretary of the Interior may take land into trust under the IRA for members of the Narragansett Indian Tribe because, in

its view, they "are members of any recognized Indian tribe now under Federal jurisdiction." In its opening brief, the State demonstrated that conclusion was based on a misreading of the word "now." Statutes ordinarily are read from the perspective of the members of Congress that enacted them. A member of Congress in 1934 would have read the phrase "recognized Indian tribe *now* under Federal jurisdiction" as meaning "under federal jurisdiction on June 18, 1934," the date of the IRA's enactment. Any other reading would make the phrase superfluous; would render superfluous the word "hereafter" in other provisions of the IRA; and would be inconsistent with the statute's objectives and legislative history.

The United States' principal response is to offer a newly-developed argument, namely, that the definition of "Indian" in Section 19 is irrelevant. According to the United States, Section 5 of the IRA allows the Secretary to take land into trust for any "tribe," and "tribe" is defined without any temporal limitation. For the reasons set out below, that newfangled construction of the statute misreads both Sections 5 and 19. Nor does the United States' defense of the First Circuit's reasoning fare any better. When Congress inserted the words "now under Federal jurisdiction" into Section 19 it did so for a purpose: to limit the statute's benefits to a tightly-conscribed set of persons. The United States' construction of the IRA upsets the balance struck by Congress and should be rejected.

A. The Secretary is authorized to take land into trust only for "Indians" as defined in Section 19 of the IRA.

Section 5 of the IRA, 25 U.S.C. §465, authorizes the Secretary "to acquire . . . any interest in lands . . . for the purpose of providing lands for Indians." Until this case arrived in this Court, the Secretary's authority under this provision was universally understood as being limited by the definition of "Indian" in Section 19, 25 U.S.C. §479. The United States now argues, however, that "[t]he plural term 'Indians' ordinarily connotes tribes as well as individual Indians" (U.S. Br. 12), and that Section 5 therefore authorizes trust acquisitions for "tribes," defined in Section 19 "to refer to *any* Indian tribe, organized band, pueblo, or the Indians residing on one reservation" (emphasis added). That conflation of the terms "Indians" with "tribes" is unsupportable.

First, when the IRA intends to convey the concept of a "tribe," it uses the term "tribe"; when it intends to convey the concept of more than one "Indian," it uses the term "Indians." For example, Section 7 of the IRA authorizes the Secretary to add land to existing reservations, but provides that such lands "shall be designated for the exclusive use of *Indians* entitled by enrollment or by tribal membership to residence at such reservations." 25 U.S.C. §467 (emphasis added). Reading "Indians" to mean "tribes" in this provision would be nonsensical. The same is true of Section 12, which directs the Secretary "to establish standards . . . for *Indians* who may be appointed . . . to various positions maintained, now or hereafter, by the Indian office." 25 U.S.C. §472 (emphasis added). Clearly,

multiple, individual Indians – as defined in the first sentence of Section 19 – will be appointed to BIA positions, not tribes. *See also* 25 U.S.C. §476 (authorizing "[a]ny Indian tribe, or tribes, residing on the same reservation" to adopt a constitution "when ratified by a majority vote of the . . . adult Indians residing on such reservation"); 25 U.S.C. §478 ("This Act shall not apply to any reservation wherein a majority of the adult Indians . . . vote against its application").

So too in Section 5, whose operative provision authorizes the Secretary "to acquire . . . any interest in lands . . . for the purpose of providing lands for *Indians*" – not "tribes." To be sure, the concluding paragraph of the provision speaks of the lands being put "in trust for the Indian tribe or individual Indian." But that paragraph is administrative in nature, and cannot change the meaning of the provision's opening paragraph setting forth the Secretary's trust-acquisition authority.

The Secretary's argument also undermines the very purpose of including a definition of "Indian" in Section 19. Congress did not include all persons of Indian descent or with any quantum of Indian blood in the benefits of obtaining land, BIA employment preferences, and so on. Congress therefore set precise limits on who qualifies as an "Indian" for purposes of the IRA. The first of those limits is that "Indian" includes "all persons of Indian descent who are members of any recognized Indian tribe *now under federal jurisdiction*" (emphasis added) – not "all persons of Indian descent who are members of any recognized Indian tribe." If, however, references in the

statute to more than one "Indian" mean a "tribe," that intentionally inserted limitation would disappear. The United States' newly-crafted reading of the IRA therefore violates of the rule against surplusage.

Finally, the United States' reading of the terms "Indian" and "tribe" in the IRA is contradicted by at least one previous Departmental discussion of the interrelationship between the two terms. The Associate Solicitor for Indian Affairs considered this issue in an opinion issued just two weeks after the land-to-trust regulations, 25 C.F.R. Pt. 151, were published. Memorandum from Hans Walker, Jr., Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs (Oct. 1, 1980) ("*1980 Opinion*"). He concluded that the terms "tribe" and "Indian" "must be read together," that is, "the requirements for Indian status must be read into the definition of 'tribe.'" *Id*. at 2. Reading the terms separately, he found, "would lead to results clearly not intended by Congress." *Id*. That is precisely the flaw in the United States' current position, and why it should be rejected.

B. The Narragansett Tribe is not a tribe "now under Federal jurisdiction" within the meaning of Section 19 of the IRA.

1. The text of the IRA unambiguously excludes the Narragansett Tribe.

a. The Narragansett Tribe asked the Secretary to take the Parcel into trust based on its claim that its members are "members of [a] recognized Indian tribe

now under Federal jurisdiction." Because the Narragansett Tribe was not a "recognized [in 1934] tribe now under Federal jurisdiction," its application should have been denied. As the State explained in its opening brief (R.I. Br. 22-25), statutes are construed based on their meaning on the date of enactment, *i.e.*, as their framers would have understood them. A member of Congress in 1934 reading the words "now under Federal jurisdiction" would have understood that clause as referring to "under Federal jurisdiction" as of 1934. This Court presumably inserted "[1934]" into that clause in *United States v. John*, 437 U.S. 634, 650 (1978), precisely because that is the natural reading of the phrase.

The United States offers no direct response to this argument. It does not dispute that statutes are read from the perspective of their enactors. Nor does it seriously dispute that a person reading the IRA in 1934 would naturally read "now" in Section 19 as referring to 1934. In fact, the United States acknowledges that the word "now" in a statute "'ordinarily refers to the date of its taking effect.'" U.S. Br. 15 (quoting *Black's Law Dictionary* 1262 (3d ed. 1933)). The United States asserts, however, that "now" "sometimes" can "refer 'to a time contemporaneous with something done.'" *Id*. That may be true, but it hardly means that any time a statute uses the word "now," its meaning is ambiguous.

Consistent with the rule that statutes are read from the vantage point of their enactors, the word now means "the date of its taking effect" unless the statutory context unmistakably points in the other

direction. Two good examples are provided by the United States: the Social Security Benefits Amendments of 1984 and the federal statute establishing the Environmental Education Advisory Council. U.S. Br. 18. The former statute uses the word "now" in a provision addressing future benefits based on "new evidence" and on whether "the individual is now able to engage in substantial gainful activity." 42 U.S.C. §423(f). The only possible meaning of "now" in that provision was the time the future benefits were sought.

Likewise, 20 U.S.C. §5508(d)(1)(E) instructs the Environmental Education Advisory Council to conduct biennial reports that "describe and assess the extent and quality of environmental education programs available to senior Americans," which would recommend "coordinat[ion] with" organizations "now in existence." Any member of the 1990 Congress that enacted the statute would have thought it preposterous to direct the Council in, say, 2006, to evaluate the coordination of seniors' environmental organizations with only those environmental institutions that existed in 1990. Absent a context of that sort, however, the word "now" is read like any other statutory term – as of the date of enactment.

b. The statutory context of the IRA not only fails to support reading "now" in Section 19 in a forward-looking manner; it bolsters giving "now" its "ordinar[]y" date-of-enactment meaning. As the United States concedes (U.S. Br. 19), the word "now" is used several times elsewhere in the IRA to mean the date of enactment. And as discussed in the State's opening brief (R.I. Br. 25-26), the United States'

interpretation of "now" cannot be reconciled with 25 U.S.C. §§468 and 472. Section 468 prohibits certain Indian holdings "outside the geographic boundaries of any Indian reservation now existing or established hereafter." Section 472 requires the Secretary to establish standards for appointment "positions maintained, now or hereafter, by the [BIA]." Under the United States' view that "now" means "at the time of the statute's application" (U.S. Br. 15), the words "or established hereafter" and "or hereafter" in §§468 and 472 would be surplusage. In §468, Indian holdings "now existing or established hereafter" would mean the same as Indian holdings "now existing." And in §472, the positions maintained "now or hereafter, by the [BIA]" would mean the same as positions maintained "now by the [BIA]." Of course, that reading violates the basic tenet that statutes should be construed so that "no clause, sentence, or word, shall be superfluous." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

The United States provides no response to this argument, and instead argues merely that Congress did not use the phrase "now or hereafter" in Section because that would have wrongly included members of tribes that were under federal jurisdiction in 1934, but were no longer under federal jurisdiction when the trust application was made. U.S. Br. 19-20. If that were Congress's intent, however, it could have simply delete the word "now." The phrase "members of any recognized Indian tribe under Federal jurisdiction" would have conveyed that very meaning. The United States' position thus violates the rule against surplusage again.

Finally, the United States asserts that the "fluid" nature of the term "now" is shown by Congress's reference to "on June 1, 1934" in §479, and by its reference to "the passage" of the Act in §§474 and 478. U.S. Br. 16. The former example is unavailing; the IRA was enacted on June 18th not June 1, 1934. Only by expressly using the June 1 date could Congress have conveyed its precise intent. The latter two examples merely show that Congress sometimes conveys the same meaning in different ways based on syntax concerns. Section 478, for example, required the Secretary to call an election "within one year after the passage and approval of this Act." It would have been exceedingly awkward to rephrase the sentence to "within one year of now" and hardly means that Congress intended to give "now" in Section 19 something other than its ordinary meaning.

c. As a last resort, the United States argues that even if "now" in Section 19 means 1934, the State's position fails because Section 19 states only that the term "Indian" "shall include" the three listed categories. U.S. Br. 26-27. In the United States' opinion, this means that the listing "is illustrative rather than exclusive" (U.S. Br. 26) and that the Secretary may add any number of additional categories to the definition. That cannot be correct, for it would undermine Congress's carefully crafted effort to temporally limit the scope of the IRA. It may be true that "the word 'includes' is usually a term of enlargement." *Burgess v. United States*, 128 S. Ct. 1572, 1578 n.3 (2008), *quoted in* U.S. Br. 26. But it is not a word of enlargement when the statutory text, context, and legislative history dictate otherwise. *See United States v. Monsanto*, 491 U.S. 600, 607 (1989).

Under the United States' reading of the statute, the IRA must cover "all . . . persons of one-half or more Indian blood," but the Secretary may "fill" a "gap" (U.S. Br. 26) by extending the statute's coverage to "all . . . persons of one-thousandth or more Indian blood." There is, however, no gap to fill. Congress, after careful deliberation, amended the statute so that it no longer covered persons of one-fourth Indian blood. And it likewise amended the statute to cover only members of recognized tribes "now under Federal jurisdiction." Congress surely did not authorize the Secretary to, in effect, delete its amendments. Section 19's definition was not setting forth minimum standards; it was demarcating which persons of Indian descent could avail themselves of the statute's benefits.

2. The background of the IRA confirms that "now" means June 18, 1934.

a. The core purpose of the IRA was to "repudiate[] the practice of allotment," *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n.1 (2001), and to "[r]eturn to the principles of tribal self-determination and self-governance which had characterized the" pre-allotment policy. *County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 255 (1992). It therefore made eminent sense for Congress to limit the first category of "Indians" in Section 19 to members of tribes that had been subjected to the allotment policy. *See* R.I. Br. 29-30.

The United States responds that the IRA as a whole, and Section 5 in particular, had additional goals as well. U.S. Br. 22. That is certainly true, and

explains why the term "Indian" is not limited to members of tribes that were under federal jurisdiction in 1934. Even persons who are not members of such tribes can benefit from the IRA, including Section 5, if they can demonstrate that they possess one-half or more Indian blood. But the statute had to draw lines with respect to the class of individuals who could obtain its benefits. One line was requiring one-half Indian blood, rather than one-quarter Indian blood. Another was allowing persons with less than one-half Indian blood to obtain the act's benefits only if they were members (or descendants of members) of a tribe that had borne the hardships of the allotment policy.

b. The legislative history of the IRA confirms that Congress intended to limit the statute's benefits to (1) members of recognized tribes under federal jurisdiction in 1934, (2) descendents of such members if they resided on the tribe's reservation shortly before enactment of the statute; and (3) "all other persons of one-half or more Indian blood." During the hearing at which the phrase "now under Federal jurisdiction" was added, Senator Thomas asked how the statute would treat groups of Indians that "are not registered; . . . not enrolled; . . . not supervised. They are remnants of a band." *Senate Hearing* 263. Chairman Wheeler responded that "this bill is being passed . . . to take care of the Indians that are taken care of at the present time" and asked "how are you going to take care of them unless they are wards of the Government at the present time?" *Id*.

Chairman Wheeler was concerned, however, that the IRA would also cover "all other Indians who are one-fourth blood. I do not think that should be done.

If they are one-half blood, that is certainly the very limit to which we should go in my judgment." *Id*. at 264. When he added the phrase "now under Federal jurisdiction," Commissioner Collier sought to meet Chairman Wheeler's twin concerns: that the statute be limited to "wards of the Government at the present time" and to half-blood Indians. In Collier's words:

> 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.

Id. at 266. The natural meaning of Commissioner Collier's words, to anyone listening in 1934, is that the statute would be limited to Indians "now" (at that time) "under federal jurisdiction" – not to tribes who only are placed under federal jurisdiction some 50 years later.

3. Until it adopted its trust-acquisition regulations in 1980, the Secretary routinely construed "now" to mean June 18, 1934.

The United States supports its position by asserting that the Secretary has long construed Section 19 consistently with its current position. Of course, the Secretary's course of interpretation cannot undo the unambiguous meaning of the statute. Moreover, the United States' argument fails on its own terms. Prior to its issuance of the trust-acquisition regulations in September 1980, the Department of

Interior almost invariably construed "now" in Section 19 to mean the date of the IRA's enactment.

Most notably, Commissioner Collier himself wrote in a 1936 Circular that "the term 'Indian' as used [in the IRA] shall include – (1) all persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act . . . ." United States Dep't of Interior, Circular No. 3134, *Enrollment Under the IRA* 1 (March 7, 1936). Commissioner Collier then repeated that reading of the statute in the next paragraph of the Circular. *Id*. The United States counters (U.S. Br. 35) that the Circular used the "shall include" language, but Commissioner Collier did not even hint that the three listed categories of Indians could be expanded. This Circular merits particular weight because it provides the official position of the Office of Indian Affairs shortly after passage of the IRA on the administration of the very provision at issue. And it carries far more weight than the fact that several other regulations issued by the Secretary over the years, unrelated to Section 19, use the word "now" in the "fluid" sense. *See* U.S. Br. 30-32.[1]

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[1] *See also* Letter from Acting Secretary of Interior Kent Frizell to David Getches (Oct. 27, 1976), at 8 ("[b]ased on his analysis of the statutory language and legislative history, the Solicitor has some doubts that the Department can take land in trust under 25 U.S.C. §465 for tribes that were not administratively recognized on the date of the act, (June 18, 1934), ..."); *1980 Opinion* 6 ("it is clear that the definition of Indian requires that some type of obligation or extension of services to a tribe must have existed in 1934").

To counter this history, the United States points to several other Solicitor opinions issued in the 1930s and 1940s in which "[t]he Solicitor did not say that 'now' meant the date of the IRA's enactment." U.S. Br. 32-33. In none of those opinions, however, was the meaning of "now" at issue. For example, the 1936 opinion concluded that it was "incorrect" for certain deeds of trust land to "designate[] the grantee as the United States in trust for the Choctaw Tribe of Mississippi." *Solicitor's Opinions* 668, 668. This is so, the Solicitor reasoned, because "there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe." *Id*. Quite obviously, land cannot be taken into trust for an entity that does not exist. The opinion did not even mention that first category of "Indian" in Section 19. *See also Solicitor's Opinions* 706, 706 (1937) (merely parroting the statute's language in stating that "Section 19 defines the word Indians as used therein to include (1) all persons who are members of any recognized Indian tribe now under Federal jurisdiction, (2) . . . .").

Several other opinions cited by the United States involved whether a group of Indians could organize under Section 16 of the IRA – a provision that does not contain a "recognized Indian tribe now under Federal jurisdiction" clause. *See Solicitor's Opinions* 724, 725 (1937) (finding that the St. Croix Indians could not organize under Section 16 of the IRA because they "now present no characteristics entitling them to recognition as a band"); *Solicitor's Opinions* 747, 748 (1937) (similar finding with respect to the Nahma and Beaver Island Indians); *Solicitor's Opinions* 1394, 1394 (1946) (finding evidence insufficient to permit the Burns Paiute Indian Community to adopt a

constitution under Section 16). In the end, the United States is unable to cite to even a single opinion or circular written by the Department prior to its adoption of the trust-acquisition regulation in September 1980 that contradicted Commissioner Collier's 1936 Circular. This history undermines, rather than supports, the United States' claim of ambiguity.

4. Congress did not amend the definition of "Indian" in §479 in later-enacted statutes.

The United States finally argues that some "enactments since the passage of the IRA reinforce the reasonableness of the Secretary's interpretation of his trust acquisition authority." U.S. Br. 36-37. In particular, the United States argues "that Congress legislated on th[e] premise" that the Secretary's construction of the IRA is correct. *Id*. at 39. A closer look at the statutes belies that contention.

a. 25 U.S.C. §§476(f) and (g). In 1994, Congress amended Section 16 of IRA, 25 U.S.C. §476, to prohibit the executive branch from "enhanc[ing] or diminish[ing] the privileges and immunities" afforded to a federally recognized Indian tribe "relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. §§476(f), (g). The United States argues that Congress added these provisions to the IRA in 1994 to "articulate a principle of equality among recognized tribes." U.S. Br. 37. To the contrary, this amendment to Section 16 has nothing to do with and does not mention the definition of "Indian" in Section 19. And its purpose, as revealed in the

legislative history, shows that Congress adopted it for reasons wholly unrelated to Section 19's distinction between tribes that were, and were not, under federal jurisdiction in 1934.

Senators McCain and Inouye introduced the legislation because the Secretary had been distinguishing between tribes that were "created" and those that were "historic." 140 Cong. Rec. S 6146 (1994) (statement of Sen. McCain). Tribes that resided on their "aboriginal homesteads" were considered "historic"; "[t]ribes for whom reservations were established in areas to the west of their traditional lands," although existing for centuries, were considered "created." *Id*. (statement of Sen. Inouye). The Senators objected to the Secretary's view that, under Section 16, "created tribes are only authorized to exercise such powers of self-government as the Secretary may confer." *Id*. (Sen. McCain); *see id*. (Sen. Inouye) (Section 16 properly construed as having "no substantive effect on inherent tribal sovereign authority"). Simply put, §§476(f) and (g) were designed to ensure that *all* recognized tribes be understood as "exercis[ing] powers of self-governance by reason of their inherent sovereignty." 140 Cong. Rec. S 6146 (Sen. McCain). The provisions had nothing to do with the entirely different issue of when the United States would take land into trust for tribes, an action that is distinct from tribe's inherent powers.[2]

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[2] Moreover, a January 4, 1994, letter from the Acting Assistant Secretary of Indian Affairs to the Chair of the House Committee on Natural Resources on the very issue of "created" and "historic" tribes stated (at 3) that "Section 19 of the IRA defined 'Indians' not only as 'all persons of Indian descent who are members of any

b. The List Act, 25 U.S.C. §479a. The List Act merely mandates that the Secretary publish and regularly update a list of all recognized Indian tribes that are "eligible" for "special programs and services." It does not mandate that all tribes be entitled to identical trust acquisition rights; and it does not reference the IRA. The United States argues that the "List Act contemplates that federal benefits extend equally to all tribes on the list, without regard to when the tribe attained federal recognition," but that contention is utterly without foundation. The terms of the Act say nothing about *all* federal benefits extending equally to *all* tribes.

c. IGRA. The United States next argues that the Indian Gaming Regulatory Act, 25 U.S.C. §2701 *et seq*., impliedly assumes that all tribes placed under federal jurisdiction after 1934 may avail themselves of Section 5 of the IRA. U.S. Br. 38-39. The United States points to §2719(B)(1)(B)(ii), which allows gaming on "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgement process." U.S. Br. 39. According to the United States, this "exception presupposes that the Secretary has authority to take land into trust for the benefit of tribes that he first recognized after 1934."

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recognized *[in 1934]* tribe under federal jurisdiction' and all their descendents who then were residing on any Indian reservation, but also 'all other persons of one half or more Indian blood" (emphasis added). Given that representation of the meaning of Section 19, as well as this Court's identical interpretation of Section 19 in *United States v. John*, 437 U.S. 634, 650 (1978), Congress presumably read Section 19 as the State does – yet took no steps to amend that definition in its 1994 legislation.

Id. The United States is correct that the provision "presupposes" that the Secretary may take land into trust for *some* tribes first recognized after 1934. But the United States is incorrect that this somehow supports its construction of Section 19.

Congress has enacted laws that specifically made the IRA applicable to tribes recognized after 1934. For example, in *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States, et al*. 78 F. Supp. 2d 699 (W.D. Mich. 1999), *remanded on other grounds*, 288 F.3d 910 (6th Cir. 2002), the court held that the Secretary properly took land into trust for the Little Traverse Bay Bands of Ottawa Indians and allowed gaming on those lands under §2719(B)(1)(B)(ii). The court reached that conclusion based on 1994 legislation that reaffirmed federal recognition of the bands and specifically provided that the "Secretary shall acquire real property . . . for the benefit of the [bands]." 78 F. Supp. 2d at 702 (quoting 25 U.S.C. §1300k-4(a)); *see also* Hoopa-Yurok Settlement Act, Pub. L. No. 100-580 (1988) (making the IRA applicable to a newly-recognized tribe); Coquille Restoration Act, Pub. L. No. 101-42 (1989) (same). Accordingly, §2719(B)(1)(B)(ii) has operative effect regardless of who prevails in this case. The provision does not, therefore, implicitly amend the IRA or indicate that the 1988 Congress that enacted IGRA read Section 19 differently than this Court did in *United States v. John*.

d. 25 U.S.C. §2202. Lastly, the United States points to federal laws that extended benefits of the IRA "to tribes that voted under Section 18 to opt out of the IRA." U.S. Br. 39 (citing 25 U.S.C. §2202). The United States suggests that "[i]t would be incongruous

to give those tribes a second chance to benefit from those IRA provisions if Congress believed that those provisions did not apply to newly-recognized tribes." *Id*. Not so. As discussed above, Congress sought to restrict some of the IRA's benefits to half-blood or more Indians and to Indians who were *then* wards of the federal government, *i.e*., members of recognized tribes "now under Federal jurisdiction." Providing IRA benefits to tribes who were under federal jurisdiction in 1934, but initially opted out of the IRA, is consistent with that congressional intent. Providing IRA benefits to tribes who were *not* under federal jurisdiction in 1934 is not.

As noted, Congress has sometimes granted tribes the power to take lands into trust as part of an initial reservation or restored lands. To the extent, therefore, that any tribe has relied to its detriment on a mistaken belief that its members qualified as "Indians" under the first category in Section 19, there is a ready remedy: seeking relief from Congress. The remedy is not for this Court to read the phrase "now under Federal jurisdiction" out of the statute.

II. The Settlement Act Extinguished "All Claims" To Further Indian Occupied Trust Land And Indian Country In Rhode Island.

As explained in the State's opening brief, the Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§1701 *et seq*., explicitly and unconditionally extinguished the Tribe's right to claim sovereign regulatory authority over land in Rhode Island outside the Settlement Lands. The Settlement Act did this by expressly declaring that "*all claims* by the Narragansett Tribe of

Indians or any predecessor or successor in interest ... *arising subsequent to the transfer* [of land] and based upon any interest in or right involving such land ... (including but not limited to claims for trespass damages or claims for use or occupancy) shall be regarded as extinguished as of the date of the transfer." 25 U.S.C. §1705(a)(3). This straightforward reading of the statute effectuates its purpose, which was to resolve a dispute over the Tribe's claims to 3,200 acres of land by giving the Tribe 1,800 – but only 1,800 – acres of its former aboriginal lands (the Settlement Lands). And even on those lands, the Tribe was given only limited regulatory authority.

The United States responds by arguing that (1) "the extinguishment provisions settle only claims based on past land transactions, and do not speak to any future land acquisitions" (U.S. Br. 43); (2) "neither the Secretary nor the Tribe is asserting any 'claim' at all" during the trust-acquisition process (U.S. Br. 44); and (3) a comparison to other settlement acts supports its construction of the Settlement Act (U.S. Br. 46-49). None of those arguments has merit. The extinguishment language in §1705(a)(3) is *not* limited to "claims based on past land transactions"; the tribe's request that the land be taken into trust *is* a "claim . . . based upon any interest in or right involving land"; and the other settlement acts upon which the United States relies are distinguishable.

A. The plain language of the Settlement Act extinguished the Narragansetts right to assert land claims in Rhode Island.

1. The Settlement Act deemed all prior Indian land transfers in Rhode Island to have been lawful, 25 U.S.C. §1705(a)(1); extinguished aboriginal title based on such transfers, *id*. §1705(a)(2); and then extinguished all "subsequent" Indian land claims, including "claims for use and occupancy." *id*. §1705(a)(3). Because the entire State of Rhode Island was originally tribal land, these provisions cover the entire State. And they surely cover the 31-acre Parcel, which the Tribe originally owned and sought to regain in the 1975 lawsuit prompting the Act. Accordingly, the Settlement Act bars the Narragansetts from asserting "claims" to "use and occupancy" of Rhode Island land generally and the Parcel specifically.

The United States counters that §1705(a)(3) does not cover *all* "subsequent" Indian land claims. Rather, it covers only "claims arising subsequent to the retroactively-approved transfers *based on* the alleged invalidity of those transfers." U.S. Br. 44 (emphasis in original). The problem with this argument is that the statute says no such thing. Section 1705(a)(3) applies to "subsequent" claims that are "*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 or occupancy)" (emphasis added). The claims do not have to be "based upon" "the alleged invalidity of [the retroactively-approved] transfers." This Court "ordinarily resists reading words or elements into a statute that do not

appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997). The limitation on §1705(a)(3) proposed by the United States does not "appear on" the "face" of the "all claims" extinguishment provisions of the Settlement Act.

2. The United States and the Tribe in its amicus brief further contend that the assertion of a federal trust is not a "'claim' at all" but merely a request for the Secretary to exercise his discretionary trust authority. U.S. Br. 45; Tribe Br. 16–17. Such reasoning blinds itself to the essence of the Tribe's actions. As it acknowledges, "the Secretary's taking 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 . . . or to assert sovereignty over the land." Tribe Br. 19. No one disputes that the Tribe has possessory rights in the 31 acres as a landowner and can build its housing development without a trust conversion. It sought a federal trust to regain "sovereign control over land" and to divest the State of its regulatory jurisdiction.

That effort to gain sovereign authority fits well within the definition of a "claim." That word is defined as "[t]he aggregate of operative facts giving rise to a right enforceable by a court; [t]he assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional; [a] demand for money or property to which one asserts a right." *Black's Law Dictionary* 264 (8th ed. 2004). The Tribe's assertion of "sovereign control over land" is a "claim" for "any interest in or right involving land." The Settlement Act therefore extinguished it.

3. The United States and the Tribe devote considerable energy to the propositions that the Settlement Act did not explicitly repeal the Secretary's trust-acquisition authority and that repeals by implication are disfavored. *See* U.S. Br. 41-43; Tribe Br. 13-15. Section 1705(a)(3), however, *explicitly* bars the Tribe from asserting "use and occupancy" claims in connection with Rhode Island land. The Tribe's claim to sovereignty over the Parcel is precisely such a claim.

It is no doubt true that Congress could have included a specific reference to trust acquisitions in §1705(a)(3). But Congress reasonably used the expansive words "all claims," which by definition encompasses claims arising out of the trust acquisition process. Rules regarding implied repeals have no relevance here. This is a case where Congress has spoken to a specific controversy with an equally specific statute. *See, e.g.*, *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) ("[t]his Court has understood the present canon ('the specific governs the general') as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision"). Likewise, it is true that §1708 speaks only to the Settlement Lands being subject to state regulatory authority. There was no reason, however, to address the remainder of the State because, of the whole, only the Settlement Lands were entitled to *any* form of special treatment in terms of state law applicability.

Nor do the specific limitations on trust acquisitions in other settlement acts offset the explicit extinguishment of claims present in the Rhode Island act. *See* U.S. Br. 46-48 (discussing 1980 Maine

Settlement Act, 25 U.S.C. §§1721 *et seq*; 1983 Mashantucket Pequot Settlement Act, 25 U.S.C. §§1751 *et seq*.; and 1987 Wampanoag Tribal Council of Gay Head Settlement Act, 25 U.S.C. §§1771 *et seq*.). Each of these acts provided federal recognition to the tribe involved; authorized the Secretary to take settlement lands into trust for the tribe in certain specified circumstances; and then prohibited the Secretary to take lands into trust for the tribe when those circumstances were not present. Because the Rhode Island act does not authorize the Secretary to take land into trust for the Tribe in the first place – indeed, the act precludes it – there was no need for specific language defining the contours of that authority. Indeed, these other Settlement Acts demonstrate that, unlike here, when Congress intends to permit trust acquisitions following settlement acts, it says so explicitly.

4. In addition, this Court "presume[s], consistent with well-established principles of statutory interpretation, that Congress [is] aware of the relevant legal context when it passe[s]" legislation." *Lane v. Pena*, 518 U.S. 187, 202 (1996). And, Congress is presumed to be aware of this Court's decisions. *See Whitfield v. United States*, 543 U.S. 209, 216 (2005). This principle bears on the Settlement Act's meaning and strongly supports the proposition that Congress did not intend that any Rhode Island land be taken into trust for Tribe outside the Settlement Lands.

Three months before Congress enacted the Settlement Act, this Court in *United States v. John* construed the phrase "now under Federal jurisdiction" in Section 19 of the IRA as referring only to tribes that

were recognized "[in 1934]." 437 U.S. at 650. The Fifth Circuit reached the same conclusion several years before *John*. *See United States v. State Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974). The Narragansett Tribe, of course, was not recognized in 1934. Accordingly, when Congress enacted the Settlement Act it understood that, even if the Narragansetts later became federally recognized (as contemplated by the Settlement Act), it would not be entitled to use the trust-acquisition process.

5. Finally, ANCSA provided the model for the Rhode Island Settlement Act, and the Solicitor of the Department of the Interior has concluded that ANCSA prohibits trust acquisitions in Alaska. *See* R.I. Br. 43-44. The United States and the Tribe point to various discrete differences between the Settlement Act and ANCSA, but they miss the forest for the trees. Both were comprehensive land claims settlement acts with broad extinguishment provisions. *Compare* 43 U.S.C. §1603 (b), (c) (extinguishing "all claims" based on "aboriginal right, title, use, or occupancy"), *with* 25 U.S.C. §1705(b)(3) (extinguishing "all claims" based upon any interest in or right involving land including claims for "use and occupancy"). Through ANCSA, Congress eliminated Indian country in Alaska. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998). The Settlement Act did the same for Rhode Island.

The United States asserts (U.S. Br. 50-51) that the 1978 Solicitor's Opinion cited by the 1993 Solicitor's Opinion has been rescinded. The United States does not, however, assert that the 1993 Opinion has been rescinded. And *that* opinion concluded "it would be an

abuse of discretion for the Secretary to take lands in trust" in Alaska because ANCSA "left little or no room for tribes in Alaska to exercise governmental authority over land." Outside the Settlement Lands, the same is true in Rhode Island.

B. The United States' position would undermine the jurisdictional bargain struck by the parties and ratified by Congress.

The Settlement Act ratified a carefully measured compromise reached between the State, the Town, and the Tribe. In exchange for transferring 1,800 acres of land to the Tribe, "[f]ederal legislation shall be obtained that eliminates all Indian claims of any kind, whether possessory, monetary, or otherwise, involving land in Rhode Island." J.A. 24a-25a (JMOU ¶6). In this manner, the Tribe attained a specified land base, while the State and Town received assurance that the rest of the State was free from claims of tribal regulatory authority. The avowed purpose of the attempted trust conversion, however, is to "reestablish sovereign authority over" the 31-acre Parcel and create federal Indian country, to the exclusion of state law and jurisdiction. U.S. Br. 43. Such a reestablishment of tribal sovereign authority is incompatible with the purpose of the Settlement Act and JMOU.

The United States asserts that "[t]he State and the private landowners obtained the relief they sought: the clearing of clouds on title to 3200 acres of land." U.S. Br. 52. Likewise, the Tribe contends that "[t]he acquisition of trust land outside the Settlement Lands . . . has no connection to the 'claims' the Settlement Act

resolved." Tribe Br. 25. The sweeping scope of the Settlement Act contradicts those assertions. The Act did far more than resolve title to 3,200 acres. By its undisputed terms, §1705 covers transfers made by the Narragansett Tribe anywhere in the United States; and §1712 extinguishes all tribal claims by any Indian tribe throughout the entire State of Rhode Island. In enacting the Settlement Act, Congress did far more than ratify the disposition of 3,200 disputed acres. It resolved the status of Indian land claims statewide.

Moreover, if the United States and Tribe are correct, the State received very little. It gave up 1,800 acres of Settlement Lands and in return "clear[ed] the clouds" on title to the balance of Rhode Island only up till the point at which the Secretary chooses to convert it to Indian country. "[A]ll Indian claims of any kind . . . involving land in Rhode Island," J.A. 24a, are *not* "eliminate[d]", *id*., if the Tribe may gain "use and occupancy" rights on tens, hundreds, or thousands of acres of land in the State through the trust-acquisition process.

Finally, the United States and the Tribe cannot explain why Congress would have wanted the anomalous result they ask this Court to endorse: restricting state authority dramatically on the 31 acres, but not on the Settlement Lands – the heart of the Tribe's aboriginal home. Even there, however, the Settlement Act provided that state criminal and civil jurisdiction would obtain, except for certain hunting and fishing regulations. 25 U.S.C. §§1706, 1708. By contrast, they would oust state jurisdiction on the 31 acres and other future trust lands. The Tribe and the United States claim that this is the ordinary

consequence of having land taken into trust, U.S. Br. 43-44; Tribe Br. 27, but that misses the point. It is inconceivable that the settling parties and Congress would have intended that the Settlement Lands be the one place in Rhode Island where the Tribe's potential regulatory authority is the least, and where the State's regulatory authority is the most protected.[3]

The Tribe points to two cases – *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005), and *Cass Co. v. Leech Lake Band of Chippewa Indians,* 524 U.S. 101, 115 (1998) – for the proposition that tribes may regain "sovereign control" over land they lost through trust conversion. Tribe Br. 11. There is, however, a fundamental difference between those cases and this one. In *Sherrill*, no federal statute extinguished the tribe's use and occupancy rights; in *Cass County*, neither of the two statutes that made the reservation land alienable (the Nelson Act and the General Allotment Act) purported to extinguish any "claim" related to tribal "use and occupancy" that had or might arise with respect to the lands. Here, Congress expressly extinguished the Tribe's "use and occupancy" rights. Congress thereby eliminated any basis for tribal regulatory authority over land and

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[3] The Tribe asserts that "[w]hen the federal government took the Settlement Lands into trust on behalf of the Tribe, these lands were by their very nature, set aside for the Tribe and thus Indian country. See 18 U.S.C. §1151(a)." Tribe Br. 26. That contention cannot be reconciled with 25 U.S.C. §1708, which expressly declares that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State." The precise implications of the Settlement Lands having been taken into trust are not, of course, before this Court.

denied the Tribe any special land-status rights *in futuro*. The Settlement Act prohibits any further Indian occupied lands in Rhode Island.

Conclusion

For all the foregoing reasons and those advanced in the State's opening brief, this Court should reverse the judgment below.

Respectfully submitted,

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