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 CHARLESTOWN, 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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, CONNECTICUT, FLORIDA, IDAHO, ILLINOIS, IOWA, KANSAS, MASSACHUSETTS, MISSOURI, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The *amici curiae* States (the "*Amici* States"),[1] through their Attorneys General, submit this brief in support of the Petition for a Writ of Certiorari filed by the State of Rhode Island.[2]

The *Amici* States have a vital interest because the First Circuit's decision misinterprets the Indian Reorganization Act of 1934 ("the IRA")—which grants the Secretary of the Interior ("the Secretary") unfettered discretion to take land within any State into trust "for Indians"—and the Rhode Island Indian Claims Settlement Act ("the Settlement Act"), which contains provisions mirrored in settlement acts nationwide. Land taken into trust is removed from state authority in several respects (including taxation, land use restrictions and certain environmental regulations), thereby limiting the State's ability to exercise its police powers to protect the public both on the trust land and in the surrounding communities. 25 C.F.R. § 1.4(a). Thus, the result of taking land into trust is the creation of an area largely controlled by a competing sovereign within a State's borders without its consent.

The Secretary has already taken into trust several million acres nationwide pursuant to 25 U.S.C. § 465 (an area approximately twice the size

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[1] Alabama, Alaska, Arkansas, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Massachusetts, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota and Utah.

[2] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

of Connecticut and Rhode Island combined) and receives a large number of applications annually to take additional land. The *Amici* States have a compelling interest in having this Court define the proper application of the IRA, particularly in conjunction with settlement acts, and determine whether Congress' delegation of the trust power in § 465 is constitutional.

SUMMARY OF THE ARGUMENT

This petition centers on the limits on the Secretary's authority to take land into trust for Indian tribes, thereby removing it from state jurisdiction in many critical respects. Congress intended that there be some limits and the Constitution requires them. The First Circuit, however, dismantled those limits to expand the Secretary's authority at the States' expense, contrary to this Court's precedents, Congress' intent and the Constitution.

The first check on the Secretary's authority that the First Circuit dismantled is the IRA's requirement that the Secretary take land into trust only on behalf of "any recognized tribe *now* under federal jurisdiction." 25 U.S.C. § 479 (emphasis added). This Court's precedents—and those of every circuit court to previously address the issue—establish that the "now" limitation unambiguously refers to tribes recognized as of the IRA's 1934 enactment. *See United States v. John,* 437 U.S. 634, 650 (1978); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004); *United States v. State Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974). Despite the weight of authority correctly finding

the IRA unambiguous, the First Circuit improperly injected ambiguity into the IRA where there is none to defer to the Secretary's claim that "now" means whenever the Secretary decides to act.

Having surmounted the first obstacle, the First Circuit moved on to interpreting the Settlement Act, which was negotiated between Rhode Island and the Narragansett Tribe ("the Tribe") and codified by Congress. The Settlement Act was intended to maintain state jurisdiction on the Tribe's settlement lands and extinguish all land claims on behalf of the Tribe that could be "raised by *Indians qua Indians*," including trust claims, to protect the State's jurisdiction beyond the settlement lands. *Pet. App.*, 74 (Howard J., dissenting) (quotation marks omitted) (emphasis in opinion). The First Circuit, however, read the Settlement Act in a manner that rendered the bargain between Rhode Island and the Tribe effectively meaningless by allowing the Secretary to remove lands outside the settlement area from Rhode Island's jurisdiction.

That result was inconsistent with the intent of the parties and Congress, prompting both Judge Selya and Judge Howard to write powerful dissents. Judge Selya characterized the majority's interpretation as "error of the most deleterious kind" on an issue "of paramount importance to both the State and the Tribe." *Id.*, 80-81 (Selya, J., dissenting). In light of that importance, he pointed out that review by this Court "is a consummation devoutly to be wished." *Id.* The *Amici* States agree. The First Circuit's interpretation will have ramifications far beyond Rhode Island. Congress

has codified fifteen settlement acts and more are on the horizon. The States and others negotiating such agreements need this Court's guidance as to how they will be interpreted.

The First Circuit's removal of the barriers Congress imposed on the trust power leads into the third question presented, whether § 465 is an unconstitutional delegation of legislative authority. In making that determination, courts must consider the scope of the power being delegated when assessing whether Congress has set forth a sufficient intelligible principle. *Whitman v. Am. Trucking Assocs., Inc.*, 531 U.S. 457, 475 (2001). The First Circuit failed to do so. If it had, it would have been clear that § 465 is unconstitutional in light of the trust power's infringement on state sovereignty and the limited guidance Congress provided to control its exercise.

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT MISAPPLIED *CHEVRON* DEFERENCE TO VASTLY EXPAND THE SECRETARY'S AUTHORITY TO LIMIT STATES' JURISDICTION OVER LANDS WITHIN THEIR BORDERS

The first question presented—whether the IRA authorizes the Secretary to acquire land for the Narragansett Tribe—is both simple and dispositive. By its terms, the IRA allows the Secretary to take land into trust "for the purpose of providing land for Indians," 25 U.S.C. § 465, and defines "Indian" to "include all persons of Indian

descent who are members of any recognized tribe *now* under federal jurisdiction." 25 U.S.C. § 479 (emphasis added). That unambiguously limits the IRA's application—and the Secretary's trust authority—to tribes under federal jurisdiction as of the IRA's 1934 enactment.

Prior to the decision below, every court to address the issue—including this Court—agreed with that reading. *See John,* 437 U.S. at 650; *Kahawaiolaa*, 386 F.3d at 1280; *State Tax*, 505 F.2d at 642. Those decisions were consistent with this Court's prior holdings that the plain meaning of the statutory term "now" includes only individuals who were citizens "*on* . . . the effective date of the . . . statute." *Montana v. Kennedy*, 366 U.S. 308, 311 (1961) (emphasis in original). Despite the weight of that authority, the First Circuit held that the IRA was ambiguous and upheld the Secretary's reading—which renders the "now" limitation surplusage—based on *Chevron* deference. That decision directly conflicts with at least three of this Court's decisions (*John, Montana* and *Chevron*) and their progeny—as well as several circuit court decisions—and should be reversed. More importantly, it expands the Secretary's authority to take land into trust far beyond the limits intended by Congress, with negative impacts on States and their citizens.

The framework for reviewing the Secretary's interpretation of the IRA is clear. "First, always, is the question whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "If the intent of Congress is

clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Where several courts have construed the statute and reached the same conclusion, that "consensus [can be] . . . enough to rule out any serious claim of ambiguity." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 594 (2004).

Here, the First Circuit improperly stretched "to read ambiguity into a clear statute." *Massachusetts v. EPA*, 127 S. Ct. 1438, 1461 (2007). Put simply, "now" unambiguously means at the time of the enactment, not whenever in the future the Secretary may choose to act. This Court and every other appeals court to address the issue has understood that. Specifically, this Court noted that "[t]he 1934 Act defined 'Indians' as [*inter alia*] . . . 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under federal jurisdiction.'" *John,* 437 U.S. at 650 (latter bracketed material in original) (quoting 25 U.S.C. § 479). The circuit courts stated their views even more definitively. The Ninth Circuit concluded that the IRA "by its terms" did not apply to tribes not under federal jurisdiction in 1934[3] and the Fifth Circuit held that the statute "positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words any recognized Indian tribe *now* under Federal jurisdiction and the additional language to like effect." *State Tax*, 505 F.2d at 642 (emphasis in original) (quotation marks omitted).

[3] *Kahawaiolaa*, 386 F.3d at 1280.

The First Circuit declined to address the conclusions of its fellow circuit courts and brushed off this Court's statement in *John* by concluding that it "seems to fall short even of being dicta." *Pet. App.*, 23. Even if that were true—Petitioners persuasively argue that it is not, *Pet.*, 17-18—the First Circuit missed the point. Whether or not the unanimous conclusions of this Court and other circuit courts are binding, they strongly support the conclusion that the IRA's text unambiguously limits its application to tribes recognized in 1934. *Cline*, 540 U.S. at 594.

This Court's decision in *Montana* is instructive. *Montana* involved the interpretation of statutes governing citizenship. The Seventh Circuit held that "a fifty-five year old man who has resided in this country since he was an infant" could not validly claim citizenship under those statutes and could be deported. *Montana*, 366 U.S. at 309-10. This Court "granted certiorari to review that conclusion in view of the apparent harshness of the result entailed." *Id.* at 309. It nonetheless held that it was bound by the clear language of the statutes and affirmed the decision below. *Id.*

There, as here, the outcome of one of the petitioner's claims hinged on the meaning of the term "now." This Court held that the statute—which applied to "children of persons who *now* are, or have been, citizens of the United States"—encompassed only individuals who were citizens "*on* . . . the effective date of the . . . statute" and that the statute "had no prospective application." *Id.* at 310-311 (first emphasis added; second in original). Therefore, the petitioner's claims had to

fail. That reading was consistent with the view of commentators and this Court's decisions issued prior to the IRA's enactment. *Id.* at 312 (citing *inter alia Weedin v. Chin Bow*, 274 U.S. 657 (1927)). Thus, this Court has consistently made clear that "now" means at the time of enactment.

The First Circuit could not challenge this Court's holdings and, indeed, acknowledged that "[o]ne might have an initial instinct to read the word 'now' in the statute as the State does, to mean the date of enactment of the statute, June 18, 1934." *Pet. App.*, 19. Nor could the First Circuit dispute that every court to address the IRA's use of the term "now" read it to unambiguously refer to the date of enactment. Nor could it address other circuit court decisions interpreting the term the same way. *See, e.g.*, *Taylor v. Monroe County Bd.*, 421 F.2d 1038, 1041 (5th Cir. 1970). The First Circuit nonetheless declined to construe the IRA according to its plain language.

In so doing, it stretched to find any authority that could somehow support an ambiguity. The best it could find was a circuit court decision concerning disability benefits and two state court decisions, all of which post-dated the IRA's enactment by at least 45 years. *Pet. App.*, 20. Those decisions have little, if any, value in determining what Congress intended when it enacted the IRA in 1934 and they are insufficient to establish ambiguity in light of the overwhelming authority to the contrary.

Given that the IRA's text unambiguously applies only to tribes that were under federal

jurisdiction in 1934, the First Circuit should have ended its analysis with the text and ruled in Rhode Island's favor. Instead, after straining to find an ambiguity in the clear text, the court went on to "look to context" and concluded that it too is "equivocal." *Pet. App.*, 20. It is not.

The IRA itself shows that the 1934 Congress was capable of drafting language that applies both before and after the IRA's enactment. Rather than using the phrase "now," as it did in 25 U.S.C. § 479, it used the phrase "now or hereafter" or something similar. That distinction is demonstrated elsewhere in the IRA. For example, § 465 itself refers to "measures *now* pending in Congress," which, of course, means measures pending at the time of the IRA's enactment. (emphasis added). By contrast, § 468 encompasses both past and future by referencing land outside the boundaries "of any Indian reservation *now existing, or established hereafter*." (emphasis added). § 472 further illustrates the point, referring to "positions maintained, *now or hereafter*, by the Indian Office." (emphasis added). Thus, if the plain meaning of the text alone was not enough, viewing it in context makes the point pellucid—by using "now" in § 479, Congress unambiguously encompassed only tribes under federal jurisdiction in 1934.

Again faced with overwhelming evidence of Congress' intent, the First Circuit sought another way to circumvent it and defer to the Secretary. It did so by adopting the Secretary's argument that there was ambiguity because § 479 "specifies the date of June 1, 1934 as the relevant date for determining eligibility based on 'residing within

the present boundaries of any Indian reservation.'" *Pet. App.*, 20. That argument fails on its face. There simply is no inconsistency in Congress' use of "now" to refer to the IRA's effective date—June 18, 1934—and its use of "June 1, 1934" to measure certain individuals' status.

The First Circuit's finding of ambiguity in the IRA's text and context was error. That error led the court to make "too quick a turn" to legislative history and further err by interpreting that history to favor the Secretary despite substantial evidence indicating that Congress intended that the IRA encompass only 1934 tribes. *Lamie v. United States Tr.*, 540 U.S. 526, 536 (2004).

Contrary to the First Circuit's decision, the IRA's legislative history demonstrates that § 479's "*now* under federal jurisdiction" language was inserted into the statute for the precise purpose of limiting the reach of the IRA to then-existing tribes. (emphasis added). Specifically, an early draft IRA defined "Indian" to *inter alia* "'include all persons of Indian descent who are members of any recognized Indian tribe.'" *Pet. App.*, 23-25. Senators expressed concern about whether that definition would sufficiently ensure *bona fide* status and, in response, Commissioner Collier proposed the "now" limitation, which Congress ultimately adopted. *Id.*

As if to provide an object lesson for this Court's warnings of "the difficulty of relying on legislative history" to establish ambiguity "and the advantage of" resting holdings "on the statutory

text," the First Circuit took that exchange and twisted it into a source of ambiguity. *Lamie*, 540 U.S. at 542. Specifically, the court concluded that "although none of the parties have raised this, it may well be that the phrase 'now under federal jurisdiction,' was intended to modify not 'recognized Indian tribe,' but rather 'all persons of Indian descent.'" *Pet. App.*, 25. This is the ultimate stretch to find ambiguity where none exists. The statute applies to "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. It strains credulity to claim that the "now" was intended to modify "members." *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (reversing statutory reading contrary to "the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows"). That is presumably why the federal respondents did not make the argument below and why the First Circuit was forced to create it out of whole cloth.

Put simply, the First Circuit failed "to adhere to [its] . . . constitutional role[] . . . [to] determine intent from the statute before [it]." *Lamie*, 540 U.S. at 542. Faced with clear expressions of congressional intent at every turn, it strained to find some basis to conclude there is ambiguity that would allow it to defer to the Secretary. In so doing, it contravened the text of the statute, several lines of this Court's authority, several circuit court decisions and, indeed, the proper balance of power between Congress and the Executive Branch. As a consequence, it has vastly

expanded the Secretary's power by allowing him to take land into trust on behalf of not only all tribes now in existence, but also any tribes the Secretary uses his regulatory authority to recognize in the future. This incorrect decision has national importance and should be reversed.

II. THE STATES NEED GUIDANCE AS TO HOW SETTLEMENT ACTS WILL BE INTERPRETED

Before the First Circuit's decision, it appeared that federal law provided Rhode Island two separate levels of protection from having land within its borders taken into trust on behalf of the Narragansett Tribe. The first was the IRA, which unambiguously does not permit the Secretary to exercise the trust power on behalf of the Tribe. The second was the Settlement Act—negotiated between Rhode Island and the Tribe through the court process and codified by Congress—which was intended to extinguish all land claims on behalf of the Tribe that could be "raised by *Indians qua Indians*." *Pet. App.*, 74 (Howard J., dissenting) (quotation marks omitted) (emphasis in opinion). The First Circuit dismantled both of those barriers to the Secretary's trust power, contrary to Congress' intent. That was an error of national importance and this Court should correct it.

Like the First Circuit's analysis of the IRA, its analysis of the Settlement Act improperly strains to find a way to avoid Congress' apparent intent curtailing the Secretary's power. If allowed to stand, that error may have repercussions

nationwide. Congress has codified sixteen settlement acts, impacting land in at least eleven States. *See App.,* 1. More are on the horizon.[4] Several of those Acts include provisions that mirror the Rhode Island Settlement Act, including provisions extinguishing aboriginal title.

The First Circuit vitiated such provisions by concluding that Congress' extinguishment of the Tribe's aboriginal title for all lands outside the settlement area did not preclude the Secretary from later acquiring such land and restoring the Tribe's regulatory authority over it. That is inconsistent with this Court's precedent and the intent of Congress and the parties. Although "only a right of occupancy," *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974), the understanding that "aboriginal title" includes tribal jurisdictional authority over land has long been imbedded in this Court's decisions. Aboriginal title included the right of tribes "to use [the soil] according to their own discretion." *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 574 (1823). Tribes had "territorial boundaries, within which their authority [was] exclusive." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). They enjoyed "any and all beneficial uses of the land." *Shoshone Tribe of Indians v. U.S.*, 299 U.S. 476, 496 (1937). Within their lands, tribes "possessed rights with which no state could interfere," *Worcester*, 31 U.S. at 559, including the right to exclude non-Indians. Id. at 561. When they possessed unfettered aboriginal

[4] Two land claim settlement bills are currently pending in Congress. *See* H.R. 2176, 110th Congress (2007); H.R. 3048, 110th Congress (2007).

title, "[t]he Indians had *command* of the lands . . . *command* of all their beneficial use . . . ." *Winters v. U.S.*, 207 U.S. 564, 576 (1908) (emphasis added). "Command" necessarily includes the ancient equivalent of tribal jurisdiction over lands in which aboriginal title has not been extinguished.

The broad scope of aboriginal title means that treaties between tribes and the United States are "not a grant of rights to the Indians, but a grant of right from them." *U.S. v. Winans*, 198 US. 371, 381 (1905). Reserved tribal treaty rights are "a remnant of the great rights [tribes] possessed" before their aboriginal title was extinguished. Id. at 384. Thus, "'Indian tribes within 'Indian country' . . . possess[] attributes of sovereignty over both their members *and their territory*." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (quoting *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added)), a sovereignty that includes "an inherent power necessary to tribal . . . territorial management." *Merrion*, 455 U.S. at 141. Indeed, "there is a significant geographical component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980).

Tribal sovereignty to regulate the use of land continues where that aboriginal right has not been terminated. *See e.g.*, *Montana v. U.S.*, 450 U.S. 544, 557 (1981) (confirming that a tribe's reserved aboriginal right to regulate hunting and fishing by non-Indians continues undisturbed on those portions of its reservation remaining in tribal ownership or in trust.). Thus, the "geographic component to tribal sovereignty" *White Mountain*, 448 U.S. at 151, is derived from an aboriginal title

that includes the exercise of tribal governmental authority over tribal land, a governmental authority that continues until extinguished.

It is this aspect of extinguished aboriginal title—tribal governmental authority over land—that the First Circuit ignored. It recognized that taking land into trust grants "primary jurisdiction" to "the federal government and the Indian tribe inhabiting [the trust land], not . . . the state." *Pet. App.* at 5. It also acknowledged that "the Tribe abandoned its claims of aboriginal title" and that "Congress approved and codified that agreement in the Settlement Act." *Id.* at 23. The Settlement Act extinguished the Tribe's aboriginal title to "any [past] transfer of land or natural resources located anywhere within the United States," extinguished all tribal claims against Rhode Island involving those lands, and rendered the settlement lands subject to Rhode Island's jurisdiction. 25 U.S.C. §§ 1705(a)(1), (a)(2) and (a)(3), 1708(a).

Yet, incongruously, the First Circuit ruled that—despite Congress' extinguishment of aboriginal title and the constituent tribal authority over land subsumed within it—the Secretary may take additional Rhode Island land into trust, displacing state jurisdiction on a piecemeal basis and reinvigorating a primary aspect of the tribe's congressionally-extinguished aboriginal title. The First Circuit's failure to appreciate that the extinguishment of aboriginal title extinguishes the tribe's right to exercise regulatory authority over land completely undermines the State's reason for entering into the settlement (the preservation of state jurisdiction) and upsets the delicate balance

negotiated by the Tribe and State, a result that allows the Tribe "to walk away from an arrangement that it helped to fashion and from which it has benefited over the years." *Pet. App.*, 81 (Selya, J., dissenting). In sum, the First Circuit ignored a core ingredient of the Rhode Island land settlement: to identify with certainty and finality the scope of those lands which were, or could be, set aside for tribal occupation and to address with equal clarity the jurisdictional consequences of that set aside.

This Court has not yet definitely spoken as to how a settlement act's extinguishment provision impacts the Secretary's authority under § 465. Nor has it spoken to the broader issue of whether, and how, the Indian canon and other rules of construction should apply to modern settlement acts. The circuits are split on that issue, with the Ninth Circuit concluding that the Indian canon does not apply with force to such acts and the Second Circuit, and now the First Circuit, indicating to the contrary. *Compare United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1139 (9th Cir. 1980) (Kennedy, J., on panel) *with Connecticut v. DOI*, 228 F.3d 82 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001). It is difficult to overstate the issue's importance in light of the growing wealth of many Indian tribes nationwide. *See, e.g.*, *Connecticut*, 228 F.3d at 85 (noting that "[i]n less than a decade the . . . Mashantucket Pequot Tribe developed one of the most profitable casinos in the United States . . . grossing nearly $1 billion annually"). As the Second Circuit recognized after construing Connecticut's settlement act in favor of the tribe:

> Motivating all of plaintiffs' arguments is their final claim that a decision today in defendants' favor would theoretically make it possible for the Secretary to take into trust virtually all of southeastern Connecticut. And indeed, we find nothing in the Settlement Act itself that would prevent such a result.

Id. at 94. That illustrates how crucial the interpretation of settlement acts is to States—unfettered, the trust power has the capacity to change the character of an entire State.

In contrast to treaties and compacts, settlement acts represent the culmination of an adversary process during which the parties operate under the watchful eye of a federal judge.[5] There is no evident reason why courts should construe them—as the First Circuit did—to make every inference in favor of the Tribe and the Secretary's power even where that leads to the bizarre result that the Secretary can unilaterally undo the bargain administratively decades after the fact. *Pet. App.*, 75-76 (Howard, J., dissenting).

The First Circuit's decision tells States that have negotiated—or will negotiate—settlement acts

[5] Modern settlement acts' genesis in the adversary process and concomitant oversight by a court—both of which serve to ensure the Tribe's interests are protected—distinguish such agreements from other treaties and statutes ratifying agreements with Indians and tribes. *See, e.g.*, *Antoine v. Washington*, 420 U.S. 194, 200 (1975).

that, no matter what the understanding is between the State and the Tribe or the circumstances, those acts will be construed against the State and interpreted so as to impose as little restraint as possible on the Secretary's power. The *Amici* States agree with the dissenters and Petitioners that the First Circuit's message is wrong both as a matter of law and of policy. Even if this Court disagrees, it is important to clarify how settlement acts nationwide should be construed—at the very least, States need to know the ground rules in order to protect their interests now and in the future.

III. THE FIRST CIRCUIT APPLIED INCORRECT ANALYSIS TO REACH THE WRONG RESULT ON PETITIONER'S NONDELEGATION CLAIM

This case stands at the intersection of two core constitutional principles: state sovereignty and the nondelegation doctrine. This Court has not definitively spoken on the level of guidance Congress must provide an agency exercising a power—such as the trust power—that directly and negatively impacts state sovereign interests. In the absence of guidance, lower courts have treated all agency powers the same: in their view, Congress need provide no more guidance to the Secretary concerning when he can take land into trust and impact state jurisdiction than Congress must provide the Administrator of the EPA "regarding the manner in which [the agency] is to define 'country elevators.'" *Whitman*, 531 U.S. at 475. Such a result is inconsistent with this Court's

decisions and our constitutional framework and this Court should correct it.

Whitman reasserted the viability of the nondelegation doctrine and provided valuable guidance as to how courts should apply its principles, instructing that the "scope of the power congressionally conferred" is a critical part of the inquiry: where Congress confers a power that has broad scope, the statute must provide "substantial guidance" to the agency. *Id.* *Whitman*'s guidance failed to register with the First Circuit, just as it has with the other circuit courts to uphold § 465 against a nondelegation challenge.[6] That was error. If the nondelegation doctrine means anything, it must mean that Congress is required to provide more substantial guidance when delegating to the Secretary the expansive authority to take land into trust.

The trust power is unique both in its constitutional sensitivity and its practical scope. Its exercise directly encroaches on a State's right to territorial integrity, a right recognized in several constitutional provisions and decisions of this Court. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 918-19 (1997). Where such "fundamental aspects of state sovereignty" are concerned, mere "administrative convenience" is not sufficient to overcome the States' interests. *FMC v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002).

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[6] *See, e.g.*, *South Dakota v. Department of Interior*, 423 F.3d 790 (8th Cir. 2005), *cert. denied*, 127 S. Ct. 67 (2006); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005), *cert. denied*, 127 S. Ct. 38 (2006).

The trust power's broad practical scope vividly illustrates why substantial Congressional guidance is necessary to control its exercise. The trust power allows the Secretary to take land anywhere—no matter how far removed from the tribe's reservation—into trust, thereby severely limiting the State's ability to protect its citizens' health, safety, and welfare. Beyond that, the Secretary's exercise of the trust power creates an area controlled by a competing sovereign within the State's borders without the State's consent, either directly or through congressional guidance and direction. Few, if any, other powers have such direct, fundamental and negative impacts on state sovereignty. The Secretary has already taken into trust several million acres nationwide pursuant to § 465 and receives a large number of applications annually to take additional land into trust. Each of those potential trust acquisitions has substantial reverberations for the impacted States and their local communities.

That scope and impact were common to the prior circuit court decisions and to the First Circuit's decision and was ignored by each of the courts that upheld § 465. However, the First Circuit expanded the scope of the trust power to a degree never seen by any court by interpreting the term "Indian" to encompass all tribes regardless of when they are federally recognized. In so doing, the court substantially expanded the trust power's scope, and magnified § 465's already significant constitutional infirmity. No State is safe from the Secretary's authority under the First Circuit's reading. Even those that presently have no

recognized tribes or Indian land are at risk that the Secretary will use his regulatory authority to recognize tribes in the future and then take land into trust on their behalf. The threat is real: there are hundreds of non-federally recognized tribes nationwide, many of which are seeking federal recognition.

When the trust power's nationwide scope and direct impact on state sovereign interests are considered, it becomes evident that the nondelegation doctrine requires that Congress provide "substantial" guidance to control the Secretary's exercise of that authority, if Congress can delegate it at all. *Whitman*, 531 U.S. at 472; *see also id.* at 487 (Thomas, J., concurring) (concluding that certain decisions are simply too important to be delegated). The First Circuit failed to even address that question. If it had, it would have been clear that the IRA does not provide a sufficient intelligible principle.

The "guidance" the IRA's text provides is extremely limited and provides effectively no limit on how the Secretary exercises the trust power. § 465. As the Eighth Circuit initially recognized, the IRA by its terms, "would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." *South Dakota v. DOI*, 69 F.3d 878, 882 (8th Cir. 1995), *cert. granted and decision vacated at*, 519 U.S. 919 (1996). No other court has challenged this conclusion, or found any significant limitation on the trust power in the text of the IRA. Consequently, the First Circuit—and other circuits to address the issue—have been forced to rely on §

465's legislative history to provide the constitutionally required intelligible principle. *Pet. App.* 57. That is improper.

Allowing the Secretary to exercise such far-reaching power guided only, or even primarily, by legislative history is problematic. This Court recognized as much in *Whitman*, providing that "[w]hen Congress confers its decision-making authority on agencies Congress must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman*, 531 U.S. at 472 (emphasis added; quotation marks omitted). This Court has "repeatedly held" that legislative history is not a "legislative act." *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005). Nor does it provide meaningful guidance upon which to base the exercise of substantial power. "[L]egislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'" *Id.* (citation omitted).

This case is an excellent example of why statutory text, rather than legislative history, must provide the guidance the Constitution requires. The legislative history at issue here is contradictory. *See, e.g.*, *South Dakota v. DOI*, 423 F.3d 790, 798 (8th Cir. 2005) (noting that "the legislative history frequently mentions landless Indians" and citing examples). The Secretary has, however, chosen to apply the statute much more broadly than those portions of its legislative history would indicate. In

so doing, the Secretary has picked out his "friends" and discarded the inconvenient information. *See Exxon*, 545 U.S. at 568.

The Secretary has taken advantage of the vacuum left by the lack of congressional guidance to seize unfettered power. Although he has promulgated rules that contain factors for the consideration of whether lands are located "outside of and noncontiguous to the tribe's reservation" when taking land into trust, 25 C.F.R. § 151.11, those rules do not actually limit his discretion. He has retained the ability to "waive or make exceptions" to the regulations "where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indian." 25 C.F.R. § 1.2. Thus, the end result is an agency fiefdom, with the Secretary wielding extraordinary power constrained only by his discretion and without any real congressional guidance. That may be sufficient to avoid an unconstitutional delegation in some situations, but it is not here. The trust power is unique and has a national scope. Congress cannot constitutionally delegate such a power without imposing more meaningful limitations on how the agency exercises it.

CONCLUSION

For the foregoing reasons, the *Amici* States respectfully request that the Court grant the Petition for a Writ of Certiorari.

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LIST OF SETTLEMENT ACTS

Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, 25 U.S.C. § 941 *et seq.*

Rhode Island Land Claims Settlement, 25 U.S.C. § 1701 *et seq.*

Maine Indian Claims Settlement, 25 U.S.C. § 1721 *et seq.*

Florida Indian (Miccosukee) Land Claims Settlement, 25 U.S.C. § 1741 *et seq.*

Connecticut Indian Land Claims Settlement, 25 U.S.C. § 1751 *et seq.*

Massachusetts Indian Land Claims Settlement, 25 U.S.C. § 1741 *et seq.*

Florida Indian (Seminole) Land Claims Settlement, 25 U.S.C. § 1772 *et seq.*

Washington Indian (Puyallup) Land Claims Settlement, 25 U.S.C. § 1773 *et seq.*

Seneca Nation (New York) Land Claims Settlement, 25 U.S.C. § 1774 *et seq.*

Mohegan Nation (Connecticut) Land Claims Settlement, 25 U.S.C. § 1775 *et seq.*

Crow Land Claims Settlement, 25 U.S.C. § 1776 *et seq.* (impacting lands in Montana).

Santo Domingo Pueblo Land Claims Settlement, 25 U.S.C. § 1777 *et seq.* (impacting lands in New Mexico).

Torres-Martinez Desert Cahuilla Indians Claims Settlement, 25 U.S.C. § 1778 *et seq.*

Cherokee, Choctaw and Chickasaw Nations Claims Settlement, 25 U.S.C. § 1779 *et seq.* (impacting lands in Oklahoma).

Pueblo De San Ildefonso Claims Settlement, 25 U.S.C. § 1780 *et seq.* (impacting federal land); *Alaska Native Claims Settlement Act*, 43 U.S.C. § 1601 *et seq.*