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**

## REPLY BRIEF


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## REPLY BRIEF

Two acts of Congress and a constitutional doctrine preclude the Secretary from taking land into trust in Rhode Island for the Narragansett Indian Tribe. First, the Indian Reorganization Act (IRA) – enacted in 1934 – only authorizes land to be taken into trust for "any recognized Indian tribe *now* under Federal jurisdiction." 25 U.S.C. § 479 (emphasis added). As every court to have construed the provision has concluded – until the First Circuit's opinion below – "now" means "now," not "later" or "now or hereafter." This Court's opinions and the other provisions of the IRA make that clear. The IRA does not authorize land to be taken into trust for an Indian tribe, like the Narragansetts, that was neither federally recognized nor under federal jurisdiction until decades after the IRA's passage.

Second, the Rhode Island Settlement Act expressly extinguished the Narragansett's aboriginal title. By taking land into trust for the Tribe, however, the Secretary would return to the Tribe a significant aspect of aboriginal title – sovereign authority over land. A clearer violation of the Settlement Act is hard to imagine. Finally, the Secretary's trust authority comes from a statute that provides no guidance whatsoever to limit his discretion. The IRA therefore violates the non-delegation doctrine. In disregarding these three barriers to trust, the First Circuit incorrectly decided three issues of nationwide importance – and, as to the first two issues, in conflict with other federal courts of appeals.

Sixteen states from Alaska to Florida filed an amicus brief supporting this petition for certiorari, attesting to its far-reaching importance. While Indian tribes and organizations have declined to participate at the certiorari stage (no doubt in a strategic attempt to downplay the importance of this case), the National Congress of American Indians, over sixty Indian tribes, and other Indian organizations participated in briefing and argument below. Tribes across the country, like the states, believe that the issues presented by this petition are of national significance. This Court's review is warranted.

## I. "Now" Does Not Mean "Later"

The Secretary, like the court below, claims that the word "now," as used in Section 479 of the 1934 Act, is ambiguous; it could mean at "the time a provision was enacted" or "a later time at which a provision is applied." Opp.7. The Secretary cannot cite any opinion of this Court interpreting the word "now" in a statute to mean "later." On the contrary, in *Montana v. Kennedy*, 366 U.S. 308, 311 (1961), this Court held that the plain meaning of the word "now" is to temporally limit application to persons who meet the statutory test "on . . . the effective date of the . . . statute," and "had no prospective application." *Id.* at 310-11. Moreover, as State Amici point out, there are several examples elsewhere in the 1934 Act showing that when Congress meant "later," as opposed to at the time of passage of the Act, it said so. St.Amici 9 (noting, for example, Section 472's use of "now or

hereafter"). Indeed, if the 1934 Congress that enacted the IRA intended "now" to mean far in the future, the inclusion of the term would be mere surplusage – contrary to the basic precept that "statutory terms" should not be treated "as surplusage in any setting." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

It is not surprising, therefore, that every court prior to the First Circuit has read "now" in the IRA to refer to its date of enactment (1934). *See United States v. John,* 437 U.S. 634, 649 (1978) (the IRA is limited to "any recognized [in 1934] tribe now under Federal jurisdiction") (bracket by Court); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004);[1] *United States v. Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974) (Section 479 "positively dictates that tribal status is to be determined as of June, 1934"). The Secretary's extensive reliance on *National Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), to counter these opinions misses the point.

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[1] The Secretary claims that the Ninth Circuit's quotation of Section 479 of the 1934 Act and its conclusion that "[t]here were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934 . . . ," was nothing more than a "passing observation." Hardly. Had there been no temporal limitation found, the analysis would have been very different. Indeed, the district court, which was affirmed, went through a detailed discussion of the text and history of the 1934 Act before concluding that Section 479 was clearly limited to tribes under federal jurisdiction at the time of the Act's passage. Pet.16-17.

*Brand X* concerned an administrative interpretation of an *ambiguous* portion of a statute, *id*. at 985, not a clear and unambiguous provision, like the IRA's temporal limitation. The precise question was whether prior judicial precedent could trump a later agency interpretation of an ambiguous statute. *Brand X* held it could not. *Id*. at 983 ("*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative.").

*Brand X*'s relevance to this case is its confirmation of prior Supreme Court rulings concerning the interpretation of an *unambiguous* statute: "a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction," *id*. at 982-83. Such displacement occurs when a court "determine[s] a statute's *clear* meaning." *Id*. at 984 (quoting case; emphasis in original). This Court and the Fifth and Ninth Circuits all read the term "now" in Section 479 as plainly meaning 1934; none of these courts expressed any doubt about that self-evident conclusion. The ambiguity posited by the Secretary and accepted by the First Circuit is insupportable and contrary to all precedent. *See, e.g., Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 594 (2004) (noting that where several courts have construed a statute and reached the same conclusion, that "consensus [can be] . . . enough to rule out any serious claim of ambiguity"). The unambiguous meaning of the term "now" in

Section 479 is at the time of passage of the Act. An agency does not, of course, receive deference for an erroneous interpretation of an unambiguous statute. *Brown v. Gardner*, 513 U.S. 115 (1994).

For four decades after passage of the IRA, the Secretary took not a single acre of land into trust for a non-1934 Act tribe. *See* Pet.15n.6. The 1981 regulation upon which the Secretary now relies followed that period. The regulation itself, 25 C.F.R. 151.2, moreover, does not purport to construe the term "now"; it merely authorizes trust for any tribe "recognized by the Secretary as eligible for the special programs and services of the Bureau of Indian Affairs." The Secretary and the First Circuit rely on Part 151.2(b), not because it affirmatively rejects the temporal limitation expressed in the term "now," but because it "does not distinguish between tribes recognized before June 18, 1934 and those recognized thereafter." Pet.App.31.

The Secretary's newly-hatched, counter-historical effort to create ambiguity where there is none has vastly expanded the scope of the IRA. If this Court allows the First Circuit decision to stand, the number of Indian tribes for whom land can be taken into trust – and the number of states where this can occur – will be greatly expanded. As more groups press for tribal recognition, the scope of the IRA will expand still further. This Court's intervention is needed to reaffirm the intent of Congress in limiting the reach of the IRA.

## II. The Circuit Split Over Aboriginal Title Affects Numerous Settlement Acts and Must be Addressed

Even though the Settlement Act expressly extinguished the Narragansett's aboriginal title to all land in Rhode Island, the Secretary seeks to take land into trust under the IRA for the Tribe. If successful, he will restore a significant aspect of the Tribe's aboriginal title – its sovereign authority over land. The Secretary does not dispute that aboriginal title includes a sovereignty interest in land. Nor does he dispute that a tribe gains a sovereignty interest in land held in trust for it under the IRA. Indeed, the Secretary acknowledges the Supreme Court's observation that Section 465 establishes Indian sovereignty over land. Opp.17. In the face of these basic facts, the Secretary responds by ignoring the thrust of Petitioners' argument and by changing the topic. These efforts fail. The First Circuit's flawed reading of the Settlement Act cannot be reconciled with decisions of the Second and Ninth Circuits and undermines the Settlement Act. The question presented is one of importance to settlement act states nationwide.

***Circuit Split.*** On the critical issue of the scope of aboriginal title, the circuits are split. *See* Pet.27-29. The First Circuit rejects the notion that aboriginal title includes a sovereignty interest, dismissing aboriginal title as a mere "traditional property interest." Pet.App. 43. The Second and Ninth Circuits, on the other hand, regard aboriginal title as inclusive of a sovereignty interest. *Native Village of Eyak v.*

*Trawler Diane Marie, Inc.*, 154 F.3d 1090 (9th Cir. 1998); *Northern Mariana Islands v. United States*, 399 F.3d 1057, 1061-62 (9th Cir. 2005); *Western Mohegan Tribe v. Orange County*, 395 F.3d 18 (2nd Cir. 2004); *accord Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 220-21 (2005) (reaffirming that when the Secretary converts land to trust under Section 465 of the IRA, he "reestablishes [Indian] sovereign control over territory"); Cohen's Handbook of Federal Indian Law §15.04 [2], at 969 (N.J. Newton *et al.*, eds. 2005) ("aboriginal title, refers to land claimed by a tribe by virtue of its possession and *exercise of sovereignty*") (emphasis added).

The Secretary tries to avoid review by claiming that, whereas the holdings of the Second and Ninth Circuits establish what interests make up aboriginal title, the First Circuit's holding merely establishes what interests are terminated when aboriginal title is extinguished. Opp.14-16. That distinction cannot withstand scrutiny. A determination of what rights and interests make up the aboriginal estate is a necessary predicate to determining what rights and interests are foreclosed by an extinguishment of that estate. There can be no serious dispute that the circuits are at odds on this keystone issue.

***Undermines the Settlement Act.*** The First Circuit's decision undermines the Settlement Act by permitting the Secretary to give back to the Narragansetts the very sovereignty interests that Congress extinguished in the Act. The Secretary makes several

arguments in indirect response, none of which are availing.

First, the Secretary argues that a settlement act repeals a tribe's ability to reestablish Indian territorial sovereignty through trust only if Congress uses express language to that effect. Opp.13-14. This argument, however, begs the question of what rights are included within the aboriginal title estate. If, as the Ninth and Second Circuits both hold, aboriginal title includes a sovereignty interest, then Congress *does* use express language to foreclose the reestablishment of tribal territorial sovereignty when it extinguishes aboriginal title. By contrast, if, as the First Circuit holds, a sovereignty interest is *not* part of the aboriginal estate, then a congressional extinguishment of aboriginal title does not limit a tribe's ability to reestablish territorial sovereignty through trust.

The Secretary is not telling the entire story when he asserts that Congress specifically precludes the application of Section 465 when it wishes to prohibit trust acquisitions in a settlement act. Opp.14. For support, he cites Section 1724(e) of the Maine Settlement Act and Section 1754(b)(8) of the Pequot Settlement Act. Neither settlement act supports the Secretary's argument and neither cited provision even mentions the IRA, let alone Section 465. While the cited sections do preclude the Secretary from holding certain land in trust for tribes, the sections immediately preceding specifically *require* the Secretary to hold other land in trust for tribes. *See* Maine

Indian Claims Settlement Act, 25 U.S.C. § 1724(d) (requiring certain lands to be held in trust by the Secretary); Pequot Settlement Act, 25 U.S.C. § 1754(b)(7) (same). The Secretary's invocation of these settlement acts adds nothing.[2]

Second, the Secretary asserts that *Sherrill* "endorses a Tribe's ability to reestablish 'sovereign control over territory' (*i.e.*, restore sovereign control that has lapsed)." Opp.17 (quoting *Sherrill*, 544 U.S. at 220-21). That fundamentally misreads *Sherrill*'s relevance to this case. In *Sherrill,* this Court concluded that where the Oneida's aboriginal title to its ancient reservation had lapsed by virtue of the passage of time and tribal inaction, the Oneida could not regain sovereign control over that territory merely by purchasing land in fee. Instead, the Court suggested, the Oneida's sovereign control over its former territory could only be regained through Section 465. *Id.*

[2] The Secretary claims that our position is that Congress has "effectively extended the provisions of Section 1708(a) of the Settlement Act to all lands in Rhode Island, thereby implicitly limiting the authority of the Secretary as set forth in the IRA." Opp.13. We make no such claim. Section 1708(a) merely establishes the State's civil and criminal jurisdiction over the Settlement Lands. Two other sections – Sections 1705(a) and 1712(a) – extinguish aboriginal title and all other Indian interests in land throughout Rhode Island, and thereby limit the Secretary's trust authority. These extinguishment provisions guarantee the continued application of state law and jurisdiction outside the Settlement Lands by withdrawing Indian territorial sovereignty in Rhode Island and, as a result, prohibit the Secretary from reestablishing that sovereignty through trust.

at 219-21. There is a world of legal difference, however, between a tribe's loss of aboriginal title through laches and a tribe's loss of aboriginal title through an act of Congress. A tribe losing its ability to exercise sovereign control over land through laches may reestablish that control through the trust process, as *Sherrill* notes. A tribe losing its ability to exercise sovereign control over land through an act of Congress may only regain that control by a subsequent act of Congress. *Sherrill* does not concern whether a tribe can somehow reestablish sovereign control over land in the face of a congressional extinguishment of aboriginal title to (and sovereignty over) that land.

***Importance.*** The Secretary argues it is "obvious" that "the question about construing the Settlement Act is not one of general national significance." Opp.17-18. To the contrary, the question is of extraordinary importance. Rhode Island's Settlement Act is one of at least nine settlement acts with congressional extinguishments of Indian interests in land – none of which differ from Rhode Island's in any way material to this Court's review. Millions of acres are subject to these extinguishment provisions. To take just one example, the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, *et seq*., extinguishes Native Alaskan aboriginal title over millions of acres – practically the entire state of Alaska – using language that is legally indistinguishable from the Settlement Act. 43 U.S.C. § 1603(b) ("All aboriginal titles, if any, and claims of aboriginal title in Alaska

based on use and occupancy . . . are hereby extinguished").

Moreover, the Secretary has received thousands of requests to convert land to trust for tribes, many from tribes whose land tenure is governed by these settlement acts. An answer by this Court to the second Question Presented will have a profound impact on the allocation of state and tribal territorial sovereignty far into the future.

## III. Section 465 of the IRA Violates the Non-Delegation Doctrine

The Secretary concedes that "the level of direction required of Congress" to inform agency discretion "will vary depending upon the nature of the power conferred." Opp.20 (citing *Whitman v. American Trucking Assn.*, 531 U.S. 457, 475 (2001)). He then defends the delegation in Section 465, claiming that where "the Executive has historically exercised expansive authority, such as the supervision of lands occupied by Indians, broader authorizations are especially appropriate," and suggesting that any limitations should be "less stringent where the entity exercising delegated authority possesses independent authority over the subject." Opp.20-21. The Secretary, however, completely ignores the other side of the trust coin.

Converting land to trust does not involve merely the "supervision" by the Secretary of lands occupied by Indians, it also involves the divestiture by the Secretary of a state's civil and criminal jurisdiction –

certainly something over which the Secretary has no "independent authority." While certain supervisory functions may properly be delegated to executive branch administrators with minimal direction, the power to divest a state of its jurisdiction is not one of those functions.

This Court requires that Congress "must provide substantial guidance," especially where, as here, the conferral of authority has significant scope and dimension. *Whitman*, 531 U.S. at 475. Glaringly absent from the Secretary's defense is any reference to the text of the IRA, and for good reason – it contains no "substantial guidance" to direct the Secretary. Indeed, the Secretary nowhere disputes the lack of guidance provided by Section 465 – whose only "limit" is that land be taken into trust "for Indians."

The Secretary implicitly recognizes the omission of "substantial guidance" when arguing that his own regulations cure any constitutional defect in Section 465. Opp.21. In *Whitman,* however, this Court held that it has "never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." 531 U.S. at 472. The Secretary also looked to the legislative history of the IRA for guidance (a legislative history that even the First Circuit found "does not clearly resolve the issue," Pet.App.23). Opp.22. *Whitman,* however, requires that "Congress must 'lay down by legislative act an intelligible principle to which'" the Secretary is "directed to conform." 531 U.S. at 472. Neither the Secretary's

regulations nor the legislative history can provide the "substantial guidance" necessary.

The Secretary's construction of the term "now" in Section 479 would greatly expand the reach of the IRA, thereby magnifying the states' concerns. Pet.4n.2. The awesome authority conferred by Section 465 to divest state sovereignty without any guidance from Congress is unconstitutional and warrants this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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