No. 05-_____

In The Supreme Court of the United States

STATE OF UTAH; UTAH DEPARTMENT OF TRANSPORTATION; ST. GEORGE CITY, a Utah municipal Corporation,

Petitioners,

vs.

SHIVWITS BAND OF PAIUTE INDIANS; KUNZ & CO. dba KUNZ OUTDOOR ADVERTISING, a California Corporation; GALE NORTON, in her capacity as Secretary of the United States Department of the Interior; NEAL McCALEB, in his capacity as Assistant Secretary of Interior, Indian Affairs; WAYNE NORDWALL, in his capacity as Area Director, Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 5 of the Indian Reorganization Act, 42 U.S.C. § 465, authorizes the Secretary of the Interior, "in his discretion," to acquire land "for Indians." Here, the Secretary accepted into trust for the Shivwits Band two parcels along an interstate that were purchased by the Band with a loan from a California company. In exchange, the Band granted the non-Indian company long-term leases allowing billboards that are otherwise prohibited by state and local laws. The question presented is:

> Whether Congress's standardless grant of complete discretion to an Executive branch officer to acquire land "for Indians" is an unconstitutional delegation of legislative power.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the State of Utah, its Department of Transportation, and the City of St. George, Utah, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 428 F.3d 966 and reproduced here in the Appendix ("App.") at 1. The unreported opinion of the district court granting summary judgment to respondents is reproduced at App. 57. The unreported, interlocutory ruling on the constitutional question presented here is reproduced at App. 40.

JURISDICTION

The judgment of the Tenth Circuit was entered on November 9, 2005. App. 2. On January 26, 2006, Justice Breyer extended the time to file a petition for a writ of certiorari to and including March 9, 2006. The jurisdiction of the Tenth Circuit was based on 28 U.S.C. § 1291. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 1 of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 8, clause 3 of the Constitution gives Congress authority "[t]o regulate commerce . . . with the Indian Tribes."

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, provides, in relevant part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interest in lands, water rights, and surface rights, and for expenses incident to such acquisitions, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, that no part of such funds shall be used to acquire additional land outside of the exterior boundaries of the Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> * * *
>
> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

The entirety of 25 U.S.C. § 465 is reproduced at App. 79.

STATEMENT OF THE CASE

This petition raises the thorny question of whether Congress has abdicated its constitutional duty to make laws by delegating to the Executive branch unrestricted power to take lands – any lands – into trust "for Indians." Because such acquisitions deprive state and local governments nationwide of authority to control the lands' use and development, to tax them, and to assert jurisdiction over them, the issue and the resulting intergovernmental frictions will not disappear until this Court provides a definitive resolution.

1. In mid-1993, Kunz and Company ("Kunz") made a shrewd proposal to the Shivwits Band of Paiute Indians. Kunz would provide the Band up-front money to buy land along Interstate 15 within the St. George, Utah, city limits, in an area where state and local laws prohibit billboards. The Band would then transfer the land to the United States to be held in trust for the Band and give Kunz an exclusive, long-term lease on the land, on which Kunz would erect advertising billboards. App. 5.

The impoverished Band, whose total revenues for 1999 were $90,417, accepted the deal. App. 51. The parties identified two empty parcels far from the Band's reservation, totaling about 2,000 feet of interstate frontage, and purchased them on August 9, 1994 with money from Kunz.

The next day, the Band submitted to the Bureau of Indian Affairs ("BIA") a special warranty deed to the land and an application for the United States to take the land into trust under Section 5 of the Indian Reorganization Act ("the IRA"), 25 U.S.C. § 465.[1] App. 5.

On August 31, 1995, the BIA approved the Band's request for approval of the trust acquisition and accepted the properties into trust. Kunz and the Band thereafter signed five separate, exclusive 20-year leases, approved by the BIA, allowing the erection and maintenance of five billboards. App. 5. Under one sample lease, the Band was to be paid $1,800 per billboard, per year, for the first fifteen years of the lease and $2,500 per year for the last five years; however, the up-front purchase money loaned to the Band constituted prepayment of the first 180 months (15 years) of rent due. App. 82. In contrast, Kunz would earn net income of at least $111,000 per billboard, per year, for a 20-year net income of at least $2.22 million. App. 90.

2. The State of Utah and the City of St. George became aware of Kunz's plan once construction of the billboards began. They tried to halt the work as violative of state and local restrictions on billboard permitting and placement.

[1] As noted by the Tenth Circuit, in § 465 of the IRA Congress gave the Secretary of the Interior discretionary general authority to take lands into trust "for Indians." App. 9. The Secretary has redelegated exercise of this discretion to the Commissioner of Indian Affairs, who has redelegated it to the Bureau of Indian Affairs Area Directors. *See* 39 Fed. Reg. 32166-67 (Sept. 5, 1974); 34 Fed. Reg. 637 (Jan. 16, 1969). The BIA, however, is not disinterested in the trust land acquisition process since it is, uniquely, a "governing agency" expected to be responsive to the needs of the Indians and Indian tribes it governs. *See Morton v. Mancari*, 417 U.S. 535, 554 (1974).

See Utah Code Ann. §§ 72-7-503 to -507 (West 2004); St. George Code §§ 9-8-2(Q), -4(B)(4). Kunz and the Band filed an action in federal district court under 28 U.S.C. §§ 1331, 1362, seeking a declaration that the land was lawfully held pursuant to Section 5 of the IRA and an injunction preventing the state and local governments from interfering with construction and operation of the billboards. They claimed that the trust lands were not subject to federal, state, or local laws or regulations concerning billboards. App. 62-63.

In their defense, the State and City counterclaimed against the Band and Kunz and cross-claimed against the impleaded federal officials. They sought, *inter alia*, a declaration that Section 5 is an unconstitutional delegation of legislative power because it contains no limits on the Secretary's discretion and no standards against which a reviewing court could test the exercise of the delegated authority. App. 9, 61, 63-64.

3. The district court summarily rejected this constitutional claim, citing *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 1960 (2000). App. 7, 64. The district court also eventually concluded that the trust land, as Indian country, was not subject to state or local billboard restrictions. App. 8, 45, 55.

4. On appeal, the Tenth Circuit affirmed the district court's ruling on the delegation issue based on its prior decision in *Roberts*. App. 10-13. Defendant Roberts had been convicted of violations of the Major Crimes Act, 18 U.S.C. § 1153, which confers on the United States "exclusive jurisdiction over certain offenses . . . committed in Indian Country. . . ." *Roberts*, 185 F.3d at 1129. The crimes occurred on nonreservation land in downtown Durant,

Oklahoma, containing an office complex, acreage that had been taken into trust by the Secretary for the Choctaw Nation. The tribe eventually used the offices as its administrative headquarters, bingo site, and rental space. *Id.*

Roberts challenged the federal district court's exercise of criminal jurisdiction over him for conduct at the office complex. The Tenth Circuit rejected this claim for two reasons. First, the trust land was "Indian country" under the Major Crimes Act, 18 U.S.C. § 1151. *Roberts*, 185 F.3d at 1129-35. Second, the court concluded § 465 of the IRA did not unconstitutionally delegate legislative authority to the Secretary. *Id.* at 1136-37.[2]

In the instant case, the Tenth Circuit reaffirmed this latter conclusion from *Roberts*, holding that "the statute itself provides standards" for the Secretary's exercise of discretion: the land must be acquired "for Indians" and none of the funds appropriated pursuant to § 465 could be used to provide land for Navajos outside their reservation boundaries. App. 11-12. Moreover, the court noted, the legislative history of the IRA identifies Congress's goals of "rehabilitating the Indian's economic life" and "developing the initiative destroyed by . . . oppression and paternalism" of the prior allotment policy. *Id.* (quoting *Roberts*, 185 F.3d at 1137).[3]

[2] Defendant Roberts, then represented by the current Chief Justice, unsuccessfully petitioned for certiorari review on this issue. Petition for Writ of Certiorari at ii, *Roberts v. United States*, 120 S.Ct. 1960 (2000) (No. 99-1174).

[3] The court also held that the nonconstitutional claims were barred by sovereign immunity or were waived, App. 18, and that the State could not exercise its police powers to regulate billboard placement on these trust lands, which are Indian country. App. 33.

5. In rejecting the constitutional challenge to § 465, the *Roberts* court had uncritically adopted the reasoning of the dissent in *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995) ("*South Dakota I*"), *vacated and remanded*, 519 U.S. 919 (1996). Recently, two other circuits have done the same, including a new panel of the Eighth Circuit in the latest round of litigation after *South Dakota I*. *South Dakota v. United States Dep't of the Interior*, 423 F.3d 790, 796 (8th Cir. 2005) ("*South Dakota II*"), *reh'g and reh'g en banc denied* (Feb. 6, 2006); *Carcieri v. Norton*, 423 F.3d 45, 57 (1st Cir. 2005), *petition for reh'g pending*.

In *South Dakota I*, the Eighth Circuit had held § 465 unconstitutionally delegated legislative authority to the Executive branch. 69 F.3d at 885. The court – dramatically, though not inaccurately – described the provision as a standardless delegation with so few "boundaries" or "intelligible principles" that "it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." *Id.* at 882.

The Secretary petitioned for certiorari review in June 1996 on the question of the constitutionality of § 465. Faced with the Eighth Circuit's adverse ruling, the Secretary adopted a rule that – for the first time – permitted pre-acquisition judicial review of the Secretary's exercise of discretion under § 465.[4] *See United States Dep't of the Interior v. South Dakota*, 519 U.S. 919, 920-21 (1996) (Scalia, J., dissenting). Previously, the Secretary's unwavering position was just the opposite: no judicial review was

[4] The rule was adopted in 1996 (after the trust acquisition in the instant case) and codified at 25 C.F.R. § 151.12(b). *See* 61 Fed. Reg. 18082-83 (April 24, 1996).

available because § 465 gave the Secretary complete discretion. United States' Petition for Writ of Certiorari at 6-7, *United States Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996) (No. 95-1956) (hereafter "U.S. Petition").[5] Citing the new rule, the Secretary asked the Court to grant the petition, vacate the decision below, and remand to the Secretary for reconsideration of the decision to take the subject lands into trust. *Id.* at 15, 24. This Court granted the Secretary's unusual request. 519 U.S. at 919. Justices Scalia, O'Connor, and Thomas dissented. They would have granted the writ to address the constitutional issue. *Id.* at 923 (Scalia, J., dissenting).

REASONS FOR GRANTING THE WRIT

> [T]he most significant development in the law over the past thousand years . . . is the principle that laws should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people.[6]

This principle is embodied in Article I, Section 1 of our Constitution: "All legislative power shall be vested in a Congress of the United States." From this language, the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of government. *Touby v. United States*, 500 U.S. 160, 165 (1991). The doctrine "has developed to prevent

[5] *E.g.*, *Fla. Dep't of Bus. Reg. v. United States Dep't of the Interior*, 768 F.2d 1248, 1256-57 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); 60 Fed. Reg. 32874 (June 23, 1995).

[6] Antonin Scalia, Editorial, *How Democracy Swept the World*, Wall Street J., Sept. 7, 1999, at A24.

Congress from forsaking its duties [to make laws]," *Loving v. United States*, 517 U.S. 748, 758 (1996), but it is also rooted "in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

Although Article I, Section 1 speaks in absolutes, this Court has long recognized that the nondelegation doctrine does not bar Congress from using other branches of government to execute and apply its enactments. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). But, for a delegation of decision-making authority to be constitutionally acceptable, "*Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) (quoting *Hampton*, 276 U.S. at 409).[7]

Aware of the practical impossibility of Congress spelling out in statute every detail of its policies guiding our increasingly complex society, the Court has upheld delegations of power to another branch under broad, general directives. *Touby*, 500 U.S. at 165; *Mistretta*, 488 U.S. at 372. Nonetheless, a delegation is only "'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta*, 488

[7] As the Tenth Circuit recognized here, App. 11-13, *Whitman* clarified that agency regulations that purport to constrain the otherwise unfettered discretion Congress grants an agency cannot save the statute from a constitutional challenge based on Article I, Section 1. 531 U.S. at 472-73. In any event, agency regulations concerning trust land acquisitions can always be waived by the Secretary "in the best interest of the Indians." 25 C.F.R. § 1.2.

U.S. at 372-73 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). Significantly, the degree of discretion granted that is acceptable under the nondelegation doctrine "varies according to the power congressionally conferred." *Whitman*, 531 U.S. at 475 (noting Congress must provide "substantial guidance" on setting air standards that affect the national economy).

Petitioners are well aware that the Court has rarely struck down a federal statute as violating Article 1, Section 1. *See Whitman*, 531 U.S. at 474. But if any statute fails under the nondelegation doctrine, it is Section 5 of the IRA.

As the Secretary told this Court a decade ago, Section 5 is a "central component of the IRA," the cornerstone of modern federal law respecting Indians. U.S. Petition at 16 n.6, 17. Yet Section 5 simply grants the Secretary authority to take land into trust "for Indians." It imposes no other relevant, substantive limits on the exercise of this power. Thus, local BIA officials (as the Secretary's subdelegees) are left with carte blanche authority to acquire lands of any size, of any character, for any purpose, in any location. No other federal officer wields such unilateral power.

The instant case typifies the abuse made possible by such an open-ended grant of legislative authority to the Executive branch. Unconstrained by Congress, the Secretary has acquired nonreservation land within the City of St. George and allowed a non-Indian lessee to install billboards, illegal under State and local restrictions, with impunity. The City can no longer tax the land or, absent the Secretary's permission, protect the public health and safety by enforcing land use restrictions that do apply to properties abutting the trust lands. Sadly, the primary

economic benefit from these trust lands does not even inure to the Band but to a non-Indian business that has bought itself – at bargain prices – a valuable exemption from local governmental regulation.

This case cries out for enforcement of the nondelegation doctrine as a curb on congressional abdication of its duty to make laws, as well as a tool for ensuring appropriate separation of powers between the legislative and executive branches of government. The Tenth Circuit's application of the nondelegation doctrine to Section 5 conflicts with this Court's precedents and ignores the serious impingements on state sovereignty and local authority that trust land acquisitions cause. Although the Court has twice declined to do so,[8] it should seize this opportunity to answer the important and recurring question of whether Section 5 of the IRA violates Article I, Section 1 of the Constitution by giving absolute discretion to the "ruler" and his "ministers" to determine whether, when, how, where, and why to acquire land in trust "for Indians."

I. THE CIRCUIT COURT'S APPLICATION OF THE NONDELEGATION DOCTRINE TO SECTION 5 OF THE IRA CONFLICTS WITH THIS COURT'S PRIOR DECISIONS.

A. *Mistretta* and *Whitman* require Congress to legislate a policy and standards for its implementation, both absent here.

The Tenth Circuit upheld Section 5, reasoning that "the statute itself" provides standards for the Secretary's

[8] *Roberts v. United States*, 120 S.Ct. 1960 (2000); *United States Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996).

exercise of discretion because trust lands must be acquired "for Indians" and appropriated funds cannot purchase off-reservation land for the Navajos. App. 11-12. This conclusion, which the First and Eighth Circuits also recently adopted,[9] is inconsistent with the nondelegation doctrine crafted by the Court, which requires Congress to legislate a general policy and the boundaries of the agency's delegated authority. *Mistretta*, 488 U.S. at 372. In Section 5, Congress has provided neither.

First, although Section 5 prohibits the Secretary from using funds appropriated under it to expand the Navajo reservation, this is no restriction on the Secretary regarding non-Navajos, such as the Band. In any case, this funding provision has no relevance where, as here, the trust lands were purchased by the Indians, not by the Secretary.

Second, the directive to the Secretary to acquire lands in trust "for Indians" is, at best, a declaration of the ultimate congressional goal at which Section 5 aims. Although it surely precludes the Secretary from acquiring trust lands "for Italian-Americans," it does not state a "policy," in the usual sense, i.e., "a definite course or method of action selected . . . from among alternatives and in the light of given conditions to guide and usu[ally] determine present and future decisions." *Webster's Third New Int'l Dictionary* 1754 (1993).

Even if the phrase "for Indians" were charitably viewed as stating a general policy of increasing the quantity of lands held by the United States "for Indians,"

[9] *Carcieri*, 423 F.3d at 57-58; *South Dakota II*, 423 F.3d at 797.

neither Section 5 nor the rest of the IRA supplies "an intelligible principle to which [the Secretary] is directed to conform" in doing so, required by *Whitman*. 431 U.S. at 472. Congress has set no boundaries on the Secretary's exercise of discretion to acquire lands "for Indians"; thus, the Secretary is free to fill in the blanks and acquire any land, anywhere, for any purpose as long as it is for an Indian tribe or individual Indian. The acquisition could be of one city lot in a subdivision, ten acres along Main Street in downtown Salt Lake City, or the entire State of Iowa. If § 465 can be used, as here, to circumvent local billboard laws, it can be used to circumvent other local restrictions, such as those limiting siting of sexually explicit businesses. As the Eighth Circuit aptly summarized it in *South Dakota I*, "[t]he result is an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free of judicial review. It is hard to imagine a program more at odds with separation of powers principles." 69 F.3d at 885.

Importantly, Section 5 of the IRA is very different from other statutes upheld by the Court as constitutional delegations of legislative power. *Mistretta*, for example, upheld a delegation to "an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines" consistent with the "significant statutory direction" provided by Congress. 488 U.S. at 412. In contrast, acquiring land for Indians is not a subject that requires the expertise of an elite corps of civil servants to provide detailed standards. In addition, there are no statutory terms in Section 5 that can be narrowly construed to avoid unconstitutionality, *see id.* at 373 n.7, or that have established meanings in another context that can be imported into Section 5, *see, e.g.*, *Am. Power & Light*

Co., 329 U.S. at 104 ("Even standing alone, standards in terms of unduly complicated corporate structures and inequitable distributions of voting power cannot be said to be utterly without meaning, especially to those familiar with corporate realities."). Nor would greater specificity by Congress be insignificant or impossible, as in *Whitman*. 531 U.S. at 473-74 (upholding a delegation to EPA to set ambient air quality standards, "allowing an adequate margin of safety," that are "requisite to protect public health"); *see also Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) ("[P]ublic interest, convenience, or necessity" standard is "'as concrete as the complicated factors for judgment in such a field of delegated authority permit.'").

Instead, Section 5 is like the statutes held to violate the nondelegation doctrine in *Pan. Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In *Panama Refining Co.*, the offending statute empowered the Executive to prohibit transport of petroleum produced or withdrawn from storage in excess of the amounts permitted by state laws. 293 U.S. at 415. In *Schechter Poultry*, the Live Poultry Code authorized the Executive to approve a code of fair competition for an industry in order to rehabilitate it. 295 U.S. at 541-42. Both statutes, enacted by the same Congress as the 1934 IRA, were struck down because, as this Court recently put it, "Congress had failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 374 n.7; *see Pan. Refining Co.*, 293 U. S. at 430; *Schechter Poultry*, 295 U.S. at 541-42. Section 5 suffers from the same glaring deficiencies.

B. *Whitman* precludes resort to legislative history, which, in any event, does not supply the requisite "intelligible principle" guiding the Secretary's discretion.

To fortify its conclusion that the statute itself provides limiting standards against which the Secretary's Section 5 acquisitions can be assessed, the Tenth Circuit noted that the legislative history of the IRA identified Congress's goals: rehabilitating the Indian's economic life and developing Indian initiative. App. 11-12 (quoting *South Dakota I*, 69 F.3d at 887-88 (Murphy, J., dissenting) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73rd Cong., 2d Sess., at 6 (1934))). Other circuits have used the same cases and language to support their decisions upholding Section 5. *Carcieri*, 423 F.3d at 57-58; *South Dakota II*, 423 F.3d at 797-98.

This Court made it clear in *Whitman*, however, that it is inappropriate to look to legislative history to provide the intelligible principle guiding and limiting an agency's exercise of delegated power. "*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 (quoting *Hampton*, 276 U.S. at 409). Congressional reports and statements from the floor of the House or Senate do not constitute a "legislative act."

Even if the cited legislative history of the 1934 IRA were an appropriate source for nondelegation doctrine analysis, it still provides no standards to guide the Secretary's exercise of discretion in acquiring land "for Indians." It simply restates the purpose of Congress in enacting the

IRA.[10] Thus, it would be fair to say that Section 5 broadly empowers the Secretary to acquire trust lands "for Indians" in order to achieve the congressional purpose of acquiring land for Indians. But this tautology imposes no meaningful constraints on the Secretary, as every acquisition under Section 5 is "for Indians," regardless of who else is benefitted or harmed by it.

To be sure, if Congress had enacted standards in Section 5 or elsewhere, they could be fleshed out by reference "to the purpose of the [IRA], its factual background, and the statutory context in which they appear." *Am. Power & Light Co.*, 329 U.S. at 104. In *Mistretta*, for example, the Court looked to legislative history to add content to the numerous factors, *provided in the statute itself*, that were to guide the Sentencing Commission's adoption of sentencing guidelines. 488 U.S. at 376 n.10. Here, however, there are no statutory standards to be fleshed out. There is only Congress's wholesale abdication of its law-making authority to the Secretary, who is simply authorized to take lands into trust "for Indians."

[10] Ironically, the legislative history specifically addressing Section 5 – which the Tenth, Eighth, and First Circuit panels have chosen to ignore – shows that Congress's original intent was to acquire rural lands in trust for landless Indians, to be used by them for agrarian purposes (farming, grazing, and logging). *See* H.R. Rep. No. 1804, 73rd Cong., 2d Sess., 6-7; 78 Cong. Rec. 11729-30 (June 15, 1934) (discussed in *South Dakota I*, 69 F.3d at 883-85). But these narrow purposes were not incorporated into the statute as enacted.

II. THE EXECUTIVE BRANCH'S UNBRIDLED POWER TO ACQUIRE NONRESERVATION LAND "FOR INDIANS," IMMUNIZING IT FROM LOCAL REGULATION, IMPOSES SIGNIFICANT HARDSHIPS ON STATE AND LOCAL GOVERNMENTS NATIONWIDE.

It is hard to overstate the adverse impacts of the Secretary's exercise of her broad, uncabined discretion under Section 5. Every time the Secretary's BIA subordinates take land into trust pursuant to Section 5, a state loses the sovereign power to enforce its laws consistently within its own boundaries.

As this case exemplifies, the Secretary's unfettered ability to acquire trust lands anywhere creates scattered trust land "islands" where tribal or federal law, not state or local law, applies. The Court has already recognized the practical problems that result from such fragmentation: "A checkerboard of alternating state and tribal jurisdiction . . . would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." *City of Sherrill, N.Y. v. Oneida Nation of N.Y.*, 544 U.S. 197, ___ (2005) (quoting *Hagen v. Utah*, 510 U.S. 399, 421 (1994)).

Trust lands determined to be Indian country, like those here, are removed from state criminal jurisdiction for some serious crimes committed there by or against Indians. *E.g.*, *Roberts*, 185 F.3d at 1133 (federal court has jurisdiction over Indian defendant where serious crime covered by Major Crimes Act was committed on trust

lands held to be Indian country).[11] For other crimes in Indian country, either the federal government, the tribe, or both have criminal jurisdiction. *See* 18 U.S.C. §§ 1152, 1153.

A property's status as Indian country is also the touchstone for determining if a state can assert civil jurisdiction over Indians. *See DeCouteau v. Dist. County Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 427 n.2 (1975) (§ 1151 expressly addresses criminal jurisdiction, but generally applies as well to questions of civil jurisdiction).[12] And local governments' ability to regulate civilly the activities of non-Indians in Indian country is determined using a discrete pre-emption analysis that balances competing tribal and governmental interests. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

Even if trust lands are not, as here, held to be Indian country, placement of land into trust puts it largely beyond the control or oversight of local authorities. The Secretary has already sweepingly legislated that trust lands are not subject to "the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights," 25 C.F.R.

[11] This is not so as to Indian country over which a state has taken jurisdiction pursuant to Public Law 280, 18 U.S.C. § 1162.

[12] *But see* 28 U.S.C. § 1360(a) (enumerating several states that have been granted jurisdiction over civil causes of action to which Indians are parties, notwithstanding that they arose in identified areas of Indian country and providing that general civil state laws apply there). Even this grant does not permit encumbrance, state taxation of trust lands, or local regulation that conflicts with federal law. *See id.* § 1360(b).

§ 1.4.(a), unless the Secretary decides they should be, *see id.* § 1.4.(b). Local communities are thus stripped of the ability to enforce needed land use and development restrictions uniformly on trust lands within their borders, to the detriment of the health, safety, and welfare of all citizens, Indian and non-Indian, and to the benefit of trust land lessees like Kunz.

In this way, the Secretary allows Indians to market to non-Indians their exemption from state and local government regulation. This practice has already been prohibited by the Court in the context of state taxes of on-reservation cigarette purchases by non-Indians: "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Washington v. Confed. Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980).

There are also financial ramifications for local governments, as Section 5 itself renders trust lands tax-exempt. 25 U.S.C. § 465 ("lands or rights shall be exempt from State and local taxation"); *see also Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) (Section 5 sets forth "procedure by which lands held by Indian tribes may become tax exempt"). States and local communities may thus lose significant revenues when lands are taken into trust.[13]

[13] Despite their loss of authority over, and revenue from, trust lands, state and local governments may still be held responsible for providing services to these tax-exempt properties. *See, e.g., Chase v. McMasters*, 573 F.2d 1011, 1019 (8th Cir.) (Indian plaintiff stated § 1983 damage claim for violation of § 465 against municipal officials who

(Continued on following page)

It is no consolation that the Secretary, after the acquisition here, adopted rules requiring the BIA to notify state and local governments of a proposed trust land acquisition, 25 C.F.R. § 151.11,[14] to postpone the actual taking of title to the property until the end of a 30-day comment period, *id.* § 151.12(b), and to no longer oppose judicial review of its final acquisition action under the Administrative Procedures Act during that limited period, *see* 61 Fed. Reg. 18082 (April 24, 1996) (summary).

Even if Petitioners had been given prior notice and the opportunity for judicial review under the APA, nothing prevents the Secretary from taking title at the close of the comment period, notwithstanding timely opposition from local governments based on the proposed acquisition's violation of local or federal laws or even on the BIA's failure to follow its own acquisition process rules. And once the United States takes title in trust, as the Tenth Circuit has held and the Secretary has consistently maintained, the remedies of divestiture of the United States or invalidation of the conveyance of title to it become unavailable under the APA because of the exemption of trust lands

refused to connect city water and sewer lines to her land, held in trust by United States), *cert. denied*, 439 U.S. 965 (1978); *Fallon Paiute-Shoshone Tribe v. City of Fallon*, 174 F. Supp. 2d 1088, 1091-93 (D. Nev. 2002) (tribe alleging city refused to provide services to trust land stated § 1983 claim).

[14] At the time of the acquisition here, notice to the state and local governments was not expressly required by the Secretary's regulations. App. 19. The BIA sent the City a letter about the Band's intent to purchase the properties, with no mention of the planned advertising purpose. The State, however, was not notified, *see* App. 4, even though 25 C.F.R. § 151.10(e) then required the Secretary to consider the impact that removing the lands from the tax rolls would have on the State and its political subdivisions.

from the waiver of the federal government's immunity in the Quiet Title Act, 28 U.S.C. § 2409a(a). App. 15; *see United States Dep't of the Interior*, 519 U.S. at 921 (Scalia, J., dissenting).

The Tenth Circuit's scant nondelegation analysis of Section 5 ignores the nationwide scope and impact of the power this provision confers on local BIA bureaucrats. *See Mistretta*, 531 U.S. at 475. The unbounded authority of the Executive branch to stockpile lands "for Indians" under Section 5 and insulate them from state and local control is important across the country, not just to a few states in the West. At the end of 1997, more than 56 million acres in 36 states were already held in trust by the Secretary. *See* U.S. Dep't of the Interior, "Lands under the Jurisdiction of the Bureau of Indian Affairs as of December 31, 1997." In 1999, the Department of the Interior estimated that it receives 7,000 trust and acquisition applications annually. 64 Fed. Reg. 17574-75 (April 12, 1999).

There are no signs that the glut of applications is subsiding. On the contrary, it will likely grow as non-Indian enterprises like Kunz recognize how easily Section 5 can be exploited to avoid legitimate state laws and land use or development restrictions. There is no shortage of opportunities: three years ago, there were 560 federally-recognized Indian tribes in the United States and hundreds more tribal recognition petitions pending at the BIA. 67 Fed. Reg. 46328 (July 12, 2002). Likewise, as long as the Secretary wields unconstrained and unreviewable power to alter local tax bases and jurisdictional boundaries by taking lands into trust "for Indians," there is no reason to expect that tensions between state and local governments on the one hand and tribes and the BIA on the other – evidenced by decades

of litigation in this case, *Carcieri*, and *South Dakota I* and *II* – will do anything but increase.

Trust land acquisitions under Section 5 can disturb the balance of power between the State and the federal governments, as well as that between the State and local governments and the tribes within their borders, creating chaotic jurisdictional checkerboards. Moreover, unconstrained by any meaningful congressional limits on the Secretary's authority under § 465, the Tenth Circuit has given Indians the green light to market their exemption from state and local regulation. If such circumvention of the laws is permitted by § 465, then certainly there are no "boundaries of this delegated authority," required by the "intelligible principle" standard, sufficient to satisfy Article I, Section I of the Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2006

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SHIVWITS BAND OF PAIUTE INDIANS and KUNZ & COMPANY, d/b/a KUNZ OUTDOOR ADVERTISING,

Plaintiffs-Counterclaim Defendants-Appellees,

v.

STATE OF UTAH; UTAH STATE DEPARTMENT OF TRANSPORTATION; ST. GEORGE CITY, a Utah Municipal corporation,

Defendants-Counterclaim Plaintiffs-Appellants,

GAYLE NORTON, in her capacity as Secretary of the United States Department of the Interior; NEAL A. McCALEB, in his capacity as Assistant Secretary of the Interior Indian Affairs; WAYNE NORDWALL, in his capacity as Area Director of the Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS,

Third-Party Defendants-Appellees.

No. 03-4274