No. 05-1160

# In The Supreme Court of the United States

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

*Petitioners,*

v.

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**

## BRIEF OF THE STATES OF CONNECTICUT, RHODE ISLAND, ALABAMA, ARKANSAS, COLORADO, IDAHO, IOWA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEVADA, NEW YORK, NORTH DAKOTA, OHIO, SOUTH DAKOTA AND WYOMING, AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS


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## INTEREST OF THE *AMICI CURIAE*

The *amici curiae* States of Alabama, Arkansas, Colorado, Connecticut, Idaho, Iowa, Kansas, Louisiana, Michigan, Missouri, Nevada, New York, North Dakota, Ohio, Rhode Island, South Dakota and Wyoming (the "*Amici* States"), by and through their Attorneys General, respectfully submit this brief in support of the Petition for a Writ of Certiorari filed by the State of Utah.

The *Amici* States have a vital interest in this case because it concerns the constitutionality of 25 U.S.C. § 465 ("§ 465"), which grants the Secretary of the Interior ("the Secretary") unfettered discretion to take land within any State into trust on behalf of Indian tribes. Land taken into trust is immediately removed from state authority in many respects, limiting the impacted State's ability to exercise its fundamental police powers to protect the welfare of the public both on the trust land and in the surrounding communities. Specifically, the Secretary has taken the position that trust land is exempt from land use restrictions and possibly environmental regulations. Moreover, trust land is immediately removed from the taxing authority of state and local governments, thereby depriving them of substantial revenue. Thus, the end result of taking land into trust is the removal of land from the State's jurisdiction in many respects – without the State's consent – and the creation of an area controlled by a competing sovereign within that State's borders.

The Secretary has already taken into trust several million acres nationwide pursuant to § 465 (an area approximately twice the size of Connecticut and Rhode Island combined) and receives a large number of applications annually to take additional land into trust. Despite

the expansive scope of those acquisitions and their substantial impacts on the States and their sovereign interests, this Court has not yet determined whether or not § 465's delegation of the trust power to the Secretary comports with the nondelegation doctrine and is therefore constitutional. Even more troubling, lower courts that have considered the issue – including the Tenth Circuit here – have failed, contrary to this Court's precedent, to even consider the trust power's negative impacts on state sovereignty and, instead, have reflexively upheld § 465 based on cases that did not implicate such interests. The States have a compelling interest in having the trust power's impacts on their sovereignty properly considered and the constitutionality of § 465 determined by this Court.

## SUMMARY OF THE ARGUMENT

This case presents the question whether the nondelegation doctrine – which this Court has previously characterized as rooted in the principles underlying our entire system of government – still has any meaning. Consistent with this Court's pronouncements, the *Amici* States believe it does and that it mandates reversal of the Tenth Circuit's decision.

In this Court's most recent decision addressing the nondelegation doctrine, *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), this Court reaffirmed the nondelegation doctrine's continued viability. Although the Court upheld the statute at issue in that case, it reiterated that delegations of legislative power are unconstitutional and made explicit that whether a grant of authority by



Congress is an unconstitutional delegation depends on two things: the "degree of agency discretion" Congress allows and "the scope of the power congressionally conferred." *Id.* at 475. Thus, Congress must provide "substantial guidance" when it grants an agency power that has a national scope and impact and need only provide limited guidance when giving an agency power to control more prosaic matters. *Id.*

As self-evident and solidly grounded in constitutional fundamentals as this Court's guidance was, the Tenth Circuit deliberately refused to follow it. Instead, that court explicitly ignored *Whitman*, going so far as to indicate that *Whitman* did nothing substantial to inform the lower courts' nondelegation analysis and conclude that it was bound by a pre-*Whitman* panel decision. Pet. App. 13. In neither that prior panel decision nor the decision below did the Tenth Circuit analyze the discretion Congress afforded the agency in light of the expansive scope and impact of the trust power on the States' sovereign interests, as *Whitman* requires. The Tenth Circuit not only treated the nondelegation doctrine as dead, it treated *Whitman* as a ghost. As a result, it failed to consider the trust power's national scope and profoundly negative impacts on state sovereign interests in assessing the constitutionality of § 465.

When the trust power's national scope and its direct and substantial encroachment on core state interests are considered, it is evident that § 465 does not provide sufficient guidance. The statute allows the Secretary to take land anywhere nationwide into trust, removing it from state and local tax rolls and, by regulation, exempting it from land use restrictions. The end result is the creation of

a "jurisdictional island" within the borders of a sovereign state.

It can be questioned whether Congress can delegate such expansive and constitutionally significant power at all. *Whitman*, 531 U.S. at 487 (Thomas, J., concurring). If it can, this Court has made clear that it must, at the very least, provide "substantial guidance" to direct the agency's exercise of that power. *Id.* at 475. Section 465 provides no real guidance and is, therefore, unconstitutional.

## REASONS FOR GRANTING THE WRIT

### I. THE TENTH CIRCUIT'S DECISION EFFECTIVELY IGNORES CRITICAL ASPECTS OF THIS COURT'S DECISION IN *WHITMAN*

Although this Court has not held a statute unconstitutional on nondelegation grounds since 1935 – when it struck down two statutes enacted by the same Congress that enacted § 465 – it made clear in *Whitman* that the nondelegation doctrine was not a dead letter. *Whitman v. Am. Trucking Assocs., Inc.*, 531 U.S. 457, 474 (2001) (discussing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). This Court reiterated the fundamental principles that the Constitution vests all legislative power in Congress, that the constitutional "text permits no delegation of those powers" and that "when Congress confers decisionmaking authority upon agencies [it] 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 (quotation marks omitted).



In addition to recently reaffirming its commitment to the constitutional principles underlying the nondelegation doctrine, this Court provided valuable guidance as to how lower courts should apply them, instructing that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Id.* at 475. For example, "[w]hile Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' . . . it must provide substantial guidance on setting air standards that affect the entire national economy." *Id.* Thus, *Whitman* establishes that the nondelegation doctrine remains viable and that the "scope of the power congressionally conferred" is a critical part of the inquiry – where Congress confers a power that has a broad scope, the statute must provide "substantial guidance" to the agency. *Id.*

Remarkably, the Tenth Circuit chose to completely ignore that guidance. Indeed, it not only failed to consider the exceedingly expansive scope of the § 465 trust power and its incursions on state sovereignty in rejecting the nondelegation challenge, it went so far as to expressly conclude that *Whitman* did not significantly inform the nondelegation analysis. Pet. App. 13 (concluding that court remained bound by a pre-*Whitman* panel decision upholding § 465 against a nondelegation challenge); *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999) (prior panel decision). As a result, the scope of the trust power was never considered as part of the nondelegation inquiry below – the Tenth Circuit simply focused on the putative "limitations" imposed by the statute and required Congress to provide only minimal guidance. In so doing, the Tenth Circuit treated the trust power – which gives the Secretary the ability to create islands "for Indians" within

a State, adversely affecting state jurisdiction and regulatory authority[1] – as no different from the regulation of "country elevators." *Whitman*, 531 U.S. at 475. That is nonsense.

Unfortunately for the States and citizens impacted by the unfettered exercise of the trust power by the Secretary, the Tenth Circuit is not alone in its complete disregard of the scope of the trust authority in assessing the constitutionality of § 465's standardless discretion. Indeed, every circuit court to address § 465's constitutionality post-*Whitman* has disregarded the fundamental impacts of the trust power on state sovereignty. *See South Dakota v. Department of Interior*, 423 F.3d 790, 796 (8th Cir. 2005) (Petition for Writ of Certiorari Pending No. 05-1428) (*see infra* footnote 7); *Carcieri v. Norton*, 423 F.3d 45, 49 (1st Cir. 2005) (petition for rehearing *en banc* pending)[2]; *see also* Pet. App. 14 (noting that although the First Circuit cited *Whitman* in *Carcieri*, it "made no mention of it having altered or 'modernized' the non-delegation principles that were in place when *Roberts* was decided").

[1] Of course, the affected State will make every effort to limit the impact of the trust acquisition on its sovereign interests through legal challenges. Even if the State is ultimately successful to some degree, the acquisition results in uncertainty and litigation.

[2] Neither the Eighth Circuit in *South Dakota*, 423 F.3d at 795-800, the First Circuit in *Carcieri*, 423 F.3d at 56-59, nor the Tenth Circuit below addressed the issue of whether the "degree of agency discretion" was "acceptable" in relation to the "scope of the power congressionally conferred" under a nondelegation analysis as required by *Whitman*, 531 U.S. at 475. Instead, as with the Tenth Circuit below, they relied upon the reasoning in *Roberts* that in turn relied upon the dissent in the initial panel decision in *South Dakota v. Department of the Interior*, 69 F.3d 878 (8th Cir. 1995) (Murphy, J., dissenting), *cert. granted and decision vacated at*, 519 U.S. 919 (1996), to uphold the delegation.



The existing situation is untenable. *Whitman*'s recognition that Congress must provide more guidance when conferring a power that has nationwide impact – like the trust power – than it must provide when legislating in more quotidian areas is simply too fundamental to be ignored. *Whitman*, 531 U.S. at 475.

Despite that principle's importance, the lower courts have blithely failed to consider the scope of the trust power at all in assessing the constitutionality of § 465. That failure is of particular import here given the trust power's substantial and negative implications for state sovereignty. The federal courts appear to have been blinded to the continued existence of the nondelegation doctrine by the lapse of time since this Court last invoked it to hold a statute unconstitutional and by the lower courts' pre-*Whitman* decisions upholding § 465. It is up to this Court to provide a definitive statement as to the viability of the nondelegation doctrine.

This case presents a crucial opportunity to provide such a statement. It may be that a statute only runs afoul of the nondelegation doctrine if Congress delegates a power of extraordinary scope and fails to provide "substantial guidance." *Whitman*, 531 U.S. at 475 (opinion of the Court). It may be that "there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Id.* at 487 (Thomas, J., concurring). Either way, § 465 is patently unconstitutional. Ultimately, this Court should provide a clear answer, whatever it may be.

## II. THE TENTH CIRCUIT'S DECISION INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT IMPACTS FUNDAMENTAL STATE SOVEREIGN INTERESTS

Whether § 465 is an unconstitutional delegation of legislative power is more than just a technical question; the exercise of the trust power strikes at the core of state sovereignty and fundamentally impacts the balance of power between the States, the federal government and the Indian tribes. It allows the Secretary to take land anywhere in the Country – no matter how far removed from the tribe's reservation – into trust, thereby carving it out of the State's territorial jurisdiction in many respects and severely limiting the State's ability to protect the health, safety, and welfare of all citizens within the State, Indian and non-Indian alike.[3] Allowing the Secretary to exercise power of that scope without even minimal – let alone substantial – Congressional guidance is a clear violation of the nondelegation doctrine.

The Constitution recognizes the States' core sovereign interests, particularly where their control over their territory is concerned. *See, e.g., Printz v. United States*,

[3] As the Eighth Circuit noted in striking down § 465 as an unconstitutional delegation,

> By its literal terms, the statute permits the Secretary to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls. Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present.

*South Dakota v. Department of the Interior*, 69 F.3d 878, 882 (8th Cir. 1995), *cert. granted and decision vacated at*, 519 U.S. 919 (1996).



521 U.S. 898, 918-19 (1997) (noting that the States' "residuary and inviolable sovereignty" is "reflected throughout the Constitution's text, including . . . the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3"). The exercise of the trust power directly and profoundly infringes on those constitutionally protected interests.[4]

As averred to above, when the Secretary exercises the trust power, the land taken into trust is in many respects removed from the State's territorial jurisdiction and state and local governments' ability to regulate that land is adversely affected. Specifically, trust land is insulated from state and local taxation, land use restrictions and, possibly, environmental regulation. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110-11 (1998) (noting that trust land is insulated from state and local taxation absent clear congressional authorization); 25 C.F.R. § 1.4(a) (providing that trust land is exempt from "the laws . . . 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"); Judith V. Royster and Rory Snow Arrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 Wash. L. Rev. 581 (1989) (concluding that environmental regulation "whether aimed at native or non-native persons or activities, is prohibited in Indian country"). Moreover, there is a

[4] The strength of that interest is further reflected by the Enclave Clause, U.S. Const. art. I, § 8, cl.17, which requires the federal government to obtain the consent of a State before exercising exclusive legislative authority over land within the State.

question as to whether – as the Tenth Circuit held below – trust lands are "Indian country."[5] If they are, that imposes even more barriers to state civil and criminal jurisdiction on trust lands, because in Indian country state regulatory interests are generally made subordinate to the federal interest in favor of tribal sovereignty. *See, e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980).

The ultimate result of the Secretary's exercise of the trust power on behalf of an Indian tribe goes beyond the substantial impacts resulting from limiting the State's regulatory control and ability to tax the land. Taking land into trust also 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. This case demonstrates those negative impacts. The tribe marketed its exemption from state regulation to a private entity to allow that entity to engage in conduct that violated state law.[6] Thus, the trust power was used as a deliberate end-run around state law.

[5] Circuit courts are split on the question. *Compare Shivwits Band of Paiute Indians v. Utah* (Pet. App. 45) (assuming that trust land constitutes "Indian country" as defined in 18 U.S.C. § 1151) with *United States v. Stands*, 105 F.3d 1565, 1572 & n.3 (8th Cir. 1997) ("For jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country. In some circumstances, off-reservation tribal trust land may be considered Indian country.").

[6] *Colville* informs us that tribes cannot market an exemption from state law such as this, where the value marketed by the tribe is not generated on the reservation. *Washington v. Conf. Tribes of the Colville*

(Continued on following page)



This is far from the only such example of the nationwide impact of the Secretary's exercise of the trust power. The Secretary has already taken into trust several million acres nationwide pursuant to § 465 (an area approximately twice the size of Connecticut and Rhode Island combined) and receives a large number of applications annually to take additional land into trust. Each of those potential trust acquisitions has substantial reverberations. One example is the trust acquisition of 90 acres in the City of Oacoma, South Dakota, which due to the location of the land threatens to stifle the natural growth of the community.[7] Each such trust acquisition deprives the impacted State of aspects of its regulatory authority, in favor of a competing sovereign.

In light of the scope of the § 465 trust power and its substantial impact on state sovereignty, there can be no doubt that Congress was required to provide the Secretary "substantial guidance" as to how to exercise that power. *Whitman*, 531 U.S. at 475. Contrary to the implications of the decision below, imposing sharp limits on state jurisdiction over lands within their borders in favor of a competing sovereign is not equivalent to regulating "country elevators." *Id.*

*Indian Res.*, 447 U.S. 134 (1980). The Secretary's unbridled power gives rise to these situations of acquiring trust land solely to market an exemption, contrary to *Colville*'s teaching.

[7] South Dakota challenged that acquisition and has filed a Petition for a Writ of Certiorari with this Court, No. 05-1428, requesting review of *South Dakota v. Department of Interior*, 423 F.3d 790 (8th Cir. 2005) (rehearing and rehearing *en banc* was denied February 6, 2006, with Chief Judge Loken and Judge Gruender dissenting). Like Utah's petition here, South Dakota's petition also presents the question of whether § 465 unconstitutionally delegates legislative power.

## III. THE TENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE CONSTITUTIONAL PRINCIPLES UNDERLYING THE NONDELEGATION DOCTRINE

As discussed above, the Tenth Circuit's failure to consider the scope of the trust power in assessing § 465's constitutionality was inconsistent with this Court's direction in *Whitman*. That is not the only flaw in the decision below. The Tenth Circuit also improperly relied on legislative history to find an "intelligible principle" in § 465. As this Court has recognized, legislative history is "often murky, ambiguous, and contradictory" and § 465's is particularly so. *Exxon Mobil Corp. v. Allapattah Servs.*, ___ U.S. ___, 125 S. Ct. 2611, 2626 (2005). It does not provide meaningful congressional guidance limiting the exercise of the trust power and pretending that it does simply allows the Secretary to cherry pick whatever "guidance" she would like to follow. That is unacceptable under any circumstances and particularly so here given the scope of the trust power. Indeed, the trust power has such an impact on core state sovereign interests that it should be considered inherently legislative and should not be delegated at all.

### A. The Trust Power Has Nationwide Impact and § 465 Fails to Provide Substantial Guidance

Section 465 is patently unconstitutional under this Court's delegation jurisprudence. *Whitman* made clear that in the intelligible principle inquiry "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Id.* at 475. Where a power of national scope – especially one that is



intrusive on state sovereignty – is at issue, Congress must provide the entity exercising that power "substantial guidance" to avoid an unconstitutional delegation. *Id.*

There is no doubt that the trust power is of national scope. That cases raising the same issue were also recently decided by the First and Eighth Circuits and that multiple States from throughout the Nation have signed on to this *amicus curiae* brief is a testament to that. Thus, the pivotal question is whether § 465 provides "substantial guidance" as to how the trust power must be exercised. *Id.*

By any reasonable measure, the guidance § 465 provides – essentially that the trust land be acquired "for Indians" – does not rise to the level of "minimal," let alone "substantial." At the outset, the Court should note that the Tenth Circuit did not even consider whether the guidance met the "substantial" standard *Whitman* contemplated where powers of national scope are at issue. *Id.* That alone is reason enough to grant *certiorari*, reverse the decision and remand it for proper consideration of the scope of the power pursuant to *Whitman*. *Cf. Elder v. Holloway*, 510 U.S. 510, 515 (1994) (granting certiorari, reversing and remanding where circuit court misconstrued Supreme Court precedent).

Had the Tenth Circuit properly considered whether the guidance Congress provided was sufficiently "substantial" in light of the scope of the trust power, the result would have been different. As it was, the decision in *Roberts*, which the circuit court concluded bound it despite this Court's decision in *Whitman*, had to resort to legislative history to find even limited guidance. *See United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999). In so doing, the court implicitly acknowledged that the

statutory text alone is not enough to supply even the guidance necessary where less significant power is at issue. That is certainly true.

Because the statutory text provides functionally no guidance for the exercise of the trust power, the Tenth Circuit – in *Roberts* and, by extension, here – relied on § 465's legislative history to provide the constitutionally required intelligible principle. Pet. App. 12-13. That was improper.

Allowing the Secretary, through her designees, to exercise such far-reaching and constitutionally momentous power guided only, or even in part, by legislative history – as opposed to statutory text – is extremely problematic. This Court recognized as much in *Whitman*, explicitly 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). Legislative history is not a "legislative act." *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs.*, ___ U.S. ___, 125 S. Ct. 2611, 2626 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."). Nor does it provide meaningful guidance upon which to base the exercise of substantial power. As this Court has noted, "legislative 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. For instance, several parts of that history indicate that § 465 was intended to apply only to landless Indians – which would not include the Shivwits Band. *See, e.g.*, *South Dakota v. Department of the Interior*, 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 her "friends" and discarded the inconvenient information.

Although it can be fraught with difficulty, courts have the constitutional authority to assess sometimes ambiguous legislative history and use it to inform the interpretation of a statute. *See, e.g.*, *id.* (concluding that although the legislative history "frequently mentions landless Indians, we do not believe that Congress intended to limit its broadly stated purposes of economic advancement and additional lands for Indians to situations involving landless Indians"). That is a "quintessential judicial function." *Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Authority*, 464 U.S. 89, 98 (1983). Here, the Tenth Circuit – along with the other lower courts that relied on legislative history to sustain § 465 – essentially delegated that function to the Executive Branch by leaving the Secretary to fill the vacuum created by the lack of statutory guidance by making her own determination of what Congress intended by cherry picking legislative history for "guidance" that suits her purposes. Not only is that an abdication of Congress' duty to provide "substantial

guidance" where allowing other branches to exercise powers of broad scope, it is also an abdication of the judicial power.

The Secretary has taken advantage of the vacuum left by those abdications to seize unfettered power. Although she 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 her discretion.[8] She 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 her discretion and without any real congressional guidance.

### B. The Trust Power's Significance is Too Great for it to Be Considered Anything Other than Legislative

Even if Congress had provided a meaningful intelligible principle to guide the Secretary's exercise of the trust power, which it did not, the trust power is of such significance that it is inherently legislative and cannot constitutionally be delegated. In Justice Thomas' concurrence in *Whitman*, he expressed the view that "there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the

[8] Of course, even if they did, it would not avoid the nondelegation problem. *See Whitman*, 531 U.S. at 473 (noting that the promulgation of administrative rules cannot "cure an unconstitutional delegation").



decision to be called anything other than 'legislative.'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring); *see also* Gary Lawson, *Article: Delegation and Original Meaning*, 88 Va. L. Rev. 327, 331 (2002) ("Justice Thomas is clearly right about the Constitution. It does contain a discernible, textually grounded nondelegation principle that is far removed from modern doctrine.").[9] The *Amici* States' position is consistent with this view, as it is difficult to imagine a delegated decision that would be more constitutionally significant than the decision to take land into trust.

As discussed in detail above, the exercise of the trust power has profound impacts on the State within which the trust land is located. This case illustrates those impacts. Here, the tribe used the trust power to help a private party make a deliberate end-run around state law by carving the subject land out of Utah's ability to control. The decision and its consequences for state jurisdiction are of extraordinary significance, both constitutionally and practically, and simply cannot properly "be called anything other than 'legislative.'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).

Ultimately, the decision below can only be allowed to stand if the nondelegation doctrine is truly dead. Section 465 allows the Executive to exercise broad power directly and fundamentally infringing on state sovereignty nationwide based on "guidance" the Executive is allowed to

[9] Justice Thomas went on to note that were the issue presented he "would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." *Id.* at 487. As noted above, the *Amici* States intend to present that question if given the opportunity.

distill from ambiguous legislative history. If the nondelegation doctrine allows § 465 to stand, it is meaningless. If that is indeed the case, the death of the nondelegation doctrine should at least be acknowledged by this Court – the doctrine should not be allowed to simply wither from desuetude.

## CONCLUSION

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

Respectfully submitted,

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