No. 09-579

In The Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

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

WOLFCHILD PETITIONERS' REPLY BRIEF TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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This brief is impelled by the Government's avoidance of Petitioners' arguments.

I. The Solicitor General did not address the conflicts between the Circuits or with the Supreme Court's prior decisions, thus avoiding the *Wolfchild* Petitioners' first question presented.

The Solicitor General's response brief is most notable for what it does not say. It never mentions or cites *Smith v. Babbitt*.[1] The silence is particularly notable because the Petitioner's first question presented is based on the conflicts between *Smith*, the Federal Circuit decision below, *Carcieri,* and the Ninth Circuit decisions.[2] Consistent with this silence, the Solicitor General ignored the *Wolfchild* Petitioners' first question presented without comment.

The Solicitor General's silence on *Smith* only emphasizes the circuit conflicts and its conflicts with *Carcieri*. *Smith* held that the district courts do not have jurisdiction to hear the petitioners' claims against Interior for violations of "IGRA, ICRA, IRA, RICO and the Tribe's Constitution" because Shakopee Mdewakanton Sioux Community is an historical tribe

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[1] 100 F.3d 556 (8th Cir. 1996), *cert. denied sub nom., Feezor v. Babbitt,* 522 U.S. 807 (1997).

[2] *Carcieri v. Salazar,* __ U.S. __, 129 S.Ct. 1058 (Feb. 24, 2009); *United States v. Yakima Tribal Court,* 806 F.2d 853 (9th Cir. 1986); *United States v. White Mountain Apache Tribe,* 784 F.2d 917 (9th Cir. 1986). *See* Pet. 2-5, 21-31.

which can unilaterally determine its members – who receive the benefits from the 1886 lands, the subject of this *Wolfchild* litigation.[3]

The Solicitor General's brief *disagrees* with *Smith* by asserting the communities are administrative creations under the IRA – not historical tribes:

> Under the Indian Reorganization Act (IRA), 25 U.S.C. 461 et seq., three Indian communities – the Lower Sioux Indian Community, the Prairie Island Indian Community, and the Shakopee Mdewakanton Sioux – were formed in the areas where the 1886 lands were located.[4]

The Solicitor General cites no pre-1934 IRA treaty or statute that would make the communities historical tribes. The Opposition affirms the Petitioners' position, citing only the Act of Feb. 16, 1863, 12 Stat. 652, in which "Congress annulled all treaties with the Minnesota Sioux and confiscated Sioux lands in the State."[5]

Thus, the holding of *Smith* cannot be reconciled with the Opposition's brief, the Federal Circuit's "statutory use restriction," nor with the U.S. Court of Federal Claim's "*trust*." *Smith* is also in conflict with

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[3] *Smith*, 100 F.3d at 559.

[4] U.S. Br. 4.

[5] U.S. Br. 2.

Carcieri's holding that Interior is accountable in federal court for violations of the IRA. Yet, *Smith* remains good law.

This Court has primary responsibility among the three branches to resolve conflicts among the Circuits especially in the absence of either a congressional statutory resolution to the conflict or an agency regulatory resolution.[6]

Since the U.S. Court of Federal Claims granted partial summary judgment to the Petitioners in 2004, neither Interior nor Congress has worked toward reconciling the conflicts. This Court should not now defer to the other branches in this case.

II. The Opposition's recitation of the Federal Circuit's decision without analysis to substantiate a denial of the instant Petition begs the question of whether the Appropriation Acts created a trust.

The questions presented here are of undeniable national importance to the interpretation, the interplay and the impact of all laws affecting Indians. With the Federal Circuit's introduction of "statutory use restriction" into the lexicon of Supreme Court

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[6] *Braxton v. U.S.*, 500 U.S. 344, 347-48 (1991). *See Bingler v. Johnson*, 394 U.S. 741, 747-48 (1969) (granting review on circuit conflict over treasury regulation interpretation); *United States v. O'Malley*, 383 U.S. 627, 630 (1966) (because of conflicting circuit decisions, certiorari was granted).

interpretative principles and the legal framework for Native American laws, the court has disrupted and brought into doubt whether federal forums exist for Native Americans to bring claims against the United States. As further evidenced by participating *amici*, the Federal Circuit's decision is troubling with far-reaching implications to future generations of Native Americans, their relationship with the United States, and for possibilities of sustaining United States treaty and statutory obligations to Native Americans. Therefore, the Federal Circuit decision should not be permitted to stand unreviewed.

The Solicitor General's brief glosses over the 1888, 1889, and 1890 Appropriation Acts as "simply ordinary annual appropriations of public funds for the Secretary to expend for the benefit of certain Indians . . . to aid the Mdewakanton in Minnesota following the 1862 uprising."[7] They are hardly "ordinary."

The Opposition's position belies the historic context of the Acts and the contemporaneous government acknowledgement of trust obligations to the Loyal Mdewakanton. The acting Commissioner of the Department of Interior wrote on February 20, 1899:

> As you are doubtless aware, the title to all the land purchased by late Agent Henton for

[7] U.S. Br. 10 (March 2010).

> *said Indians*, is still vested in the United States – being *held in trust for them*. . . .[8]

"*Said Indians*" refers to the Loyal Mdewakanton. And, as the Area Director wrote in 1976, discussing issues regarding Interior-held trust funds derived from the purchased 1886 lands:

> It is our feeling that we should not attempt to distribute such [trust] funds on the strength of the resolutions from the three communities [Lower Sioux, Prairie Island, and Shakopee Mdewakanton Sioux Communities][9] at this time . . . The land was originally purchased for the Mdewakanton Sioux residing in Minnesota on May 20, 1886, and their descendants. . . .[10]

The referenced trust is extended under 25 U.S.C. §462.

The Solicitor General admits the existence of the "Loyal Mdewakanton" – i.e., the "1886 Mdewakanton." By doing so, the Government acknowledges an historical fact that through the Appropriation Acts, certain specific Indians who became "known as the 'Loyal Mdewakanton' because they *were* affiliated with the Mdewakanton band of the Sioux Tribe."[11]

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[8] Pet. Reply App. 3 (emphasis added).

[9] Post-1934 IRA communities – not historic tribes.

[10] Pet. Reply App. 6.

[11] U.S. Br. 2 (emphasis added).

The Solicitor General correctly used the past tense "were" in identifying this specific group – the "Loyal Mdewakanton." To receive benefits under the Acts demanded the "[severance] of their tribal relations."[12] But, the Solicitor General inexplicably argues that this group of Indians is too unidentifiable and too indefinite to fall within trust principles.[13] The Solicitor General's legal argument is inconsistent with the fact she acknowledges.

The 1863 Act eviscerated the *historical* tribal identity of the Mdewakanton, as well as their lands, and their treaties with the United States. The purported wrongdoers were exiled from Minnesota. Those who remained in Minnesota – those who exerted themselves in saving whites – were the "Loyal Mdewakanton."

With the Appropriation Acts, Congress gave Interior specific instructions to benefit a specific group of people who suffered because of the 1863 Act. As the Solicitor General acknowledges, the Loyal Mdewakanton are the "individual[s] * * * who exerted [themselves] in rescuing whites from the late

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[12] Act of June 29, 1888, ch. 503, 25 Stat. 217 at 228; Act of Mar. 2, 1889, ch. 412, 25 Stat. 980 at 992; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336 at 349; App. 154-55.

[13] U.S. Br. 11-12 (citing no case law).

massacre of said Indians"[14] and who "sank into poverty" in Minnesota.[15]

The Solicitor General's recitation of "selected" excerpts from the Federal Circuit's decision is unpersuasive. Her dismissal of the historical context of the Appropriation Acts as "limited restrictions" of the "kinds of directions that are routinely contained in appropriation acts" is misplaced. While the Solicitor General affirmed that the Acts provided "some restrictions on how the Secretary may expend the appropriated funds," she avoided the historical context and subsequent government control and supervision over acquired lands held "in trust"[16] for "said Indians."[17]

The Solicitor General merely restated the Federal Circuit's decision that the Acts are "inconsistent with the existence of a specific statutory right in, or duty to, the loyal Mdewakanton. . . ."[18] Her approach provides no rationale and is an argument that begs the question of whether the Acts created a trust, providing more reason for review of the Federal Circuit's decision.

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[14] *Id.* 2.

[15] *Id.*

[16] Pet. Reply App. 3.

[17] *Id.*

[18] U.S. Br. 11.

Moreover, the Opposition's approach fails to acknowledge that the Appropriation Acts incorporated a "humane and self-imposed policy" toward the 1886 Mdewakanton. This Court previously recognized important principles to keep in mind when interpreting Native American law:

> Under a humane and self-imposed policy which is found expressly in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.[19]

Contrary to the Solicitor General's contention that this case involves an "abstract conflict" with Supreme Court statutory interpretative principles of Congressional Acts affecting Native Americans,[20] the Federal Circuit precipitates a conflict with other Court decisions and sets new preconditions for statutes of antiquity to establish government obligations toward Native Americans – where previously there has been none.

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[19] *Seminole Nation v. United States,* 316 U.S. 286, 296-97 (1942) (relevant, although expressed in the context of an existing treaty with the Seminole Nation).

[20] *United States v. Mitchell,* 463 U.S. 206, 225 (1983). U.S. Br. 9.

For example, while stating that the "word 'trust'" is unnecessary in a statute to create a trust relationship, the Federal Circuit nevertheless held "the failure to use the term [trust] gives rise to doubt that a trust relationship was intended." This certainly suggests a precondition of *explicit* word usage – here "trust" – to show Congressional intent, a notion not adopted in Supreme Court jurisprudence nor part of the Indian trust law lexicon.

Similarly, the Federal Circuit's innovative phrase "statutory use restriction" is currently not part of Supreme Court jurisprudence nor Indian trust law lexicon.[21] A "statutory use restriction" creates an unsuitable analytical framework as applied to 19th Century statutes. This new legal wrinkle ultimately will allow federal government avoidance of statutory liability to Native Americans – as it has in this case.

Moreover, "statutory use restriction" is a phrase with no meaning for Native Americans. There is no case law, no document in over 100 years of Interior administrative history, where Interior's obligations under the Appropriation Acts to the 1886 Mdewakanton are referred to as "statutory use restrictions."

The new phrase is a judicial creation apparently leaving Native Americans with no forum to litigate against the federal government when post-1934 IRA

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[21] Pet. App. 27 ("[T]he Appropriations Acts are best interpreted as merely appropriating funds subject to a statutory use restriction, and not creating a trust relationship. . . .").

non-tribal community governments are involved. The "statutory use restrictions" create no substantive rights and provide no standing to sue the government. Accordingly, this permits Interior, without federal court review, to take lands and benefits from one statutorily-defined group of Native American beneficiaries and transfer the land and benefits to a post-1934 IRA non-tribal community government which excludes the Congressionally-intended beneficiaries.

Amicus curiae Historic Shingle Springs Miwok find themselves in this very position.[22] Lands once appropriated for the Historic Miwok, were inexplicably given by the federal government to another group of people using the "Miwok" name, but who were not of the Historic Shingle Springs Miwok people. The Federal Circuit decision denies them a federal forum.

III. *Carcieri* is inconsistent with the Federal Circuit's decision and relevant to this case.

The Solicitor General uses a *non sequitur* argument regarding the Federal Circuit holding that this Court's recent decision in *Carcieri v. Salazar* is irrelevant to the Petitioners' presented questions. The Solicitor General argued that the Federal Circuit's decision is "not inconsistent" with the *Carcieri*

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[22] Brief of *Amicus Curie* Historic Shingle Springs Miwok.

holding; later, she asserts that it is irrelevant to the questions presented. First, if *Carcieri* is consistent with the Federal Circuit decision as the Solicitor General argues, then she is wrong because it must be relevant.

Second, and as noted above, the Government did not argue the *Wolfchild* Petitioners' first "question presented" regarding conflicts among the circuits *and* between the circuits and Supreme Court precedents. Petitioners argued that *Carcieri* provided subject matter jurisdiction for Native Americans to challenge federal government statutory violations "presumably even those involving a post-1934 Indian Reorganization Act non-tribal community government."[23]

In the instant case, Petitioners' concern involves the lack of statutory authority for Interior to abrogate its obligations to 1886 Mdewakanton and then transfer them to the post-1983 IRA non-historical, non-tribal communities. This includes the holding of lands in trust for those communities. This fits well within the realm of the *Carcieri* holding that the 1934 IRA "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934."[24]

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[23] Pet. 30.

[24] *Carcieri*, 129 S. Ct. at 1060-61; U.S. Br. 12.

IV. The reliance on a "natural conclusion" to terminate a trust conflicts with *Passamaquoddy* when, from 1936 to 1980, Interior acted on its fiduciary duties to individual Loyal Mdewakanton while the Communities were recognized.

Prior to the Federal Circuit decision, the First Circuit's *Passamaquoddy*[25] case required that Congressional statutes be "plain and unambiguous" to terminate Indian trusts. Despite this, the Opposition argues if the statutory text of the 1980 Act yields a "natural conclusion" of trust termination, it is enough.

Because of the "extraordinarily poor drafting reflect[ed] in the 1980 Act,"[26] legislative history also played a role in the decisions below. But, like the Federal Circuit, the Opposition ignores the IRA and the administrative period from 1936 through 1980. Despite no explicit trust termination language, the Solicitor General finds (as did the Federal Circuit) that the 1980 Act reflects a "natural conclusion . . . that Congress intended the 1980 Act to terminate any trust that might have been created by the Appropriations Acts."[27]

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[25] *Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

[26] *Wolfchild v. United States*, 62 Fed.Cl. 521, 532 *rev'd*, 559 F.3d 1228 (Fed.Cir. 2009), *rehearing en banc denied* (June 11, 2009).

[27] U.S. Br. 15.

The "natural conclusion" is founded on the Solicitor General's unsubstantiated declaration that "[t]he United States cannot simultaneously hold those same lands in trust for the loyal Mdewakanton and their lineal descendants."[28] But, this declaration proves too much – contradicting Interior's policies from 1936 through 1980 where it recognized obligations to individual 1886 Mdewakanton while recognizing the post-1934 IRA community governments situated on 1886 lands. The Solicitor General's declaration could not be true because Interior approved community constitutions for Prairie Island and Lower Sioux in 1936 that expressly and exclusively *reserve* the vested rights of individual Loyal Mdewakanton to 1886 lands.[29]

The facts contrast with the Solicitor General's and the Federal Circuit's suggestion that there can be nothing akin to "trust on a trust." The communities' statutory existence under the IRA has been contingent on the 1886 Mdewakanton's rights and United States' obligations to them – because the communities are not historical tribes but recognized under the IRA

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[28] *Id.*

[29] In another apparent governmental breach, the same Loyal Mdewakanton vested rights were excluded from the SMSC constitution approved by Interior in 1969.

based on the 1886 Mdewakanton residing on reservation land.[30]

As the *amici* attest, the significance of the Opposition's erroneous interpretation of the 1980 Act is significant to Indian law. The Federal Circuit's interpretation of the 1980 Act as an implicit "termination act" of a trust *while* implicitly substituting a new statutory identity for post-1934 IRA non-tribal communities is troubling.

Congressional silence in the face of proposed statutory constructions that result in sweeping changes when adopted, without explicit language in the statute, violates this court's analogizing test to the "dog that did not bark:"

> [I]f Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point . . . Congress' silence in this regard can be likened to the dog that did not bark.[31]

The text of the 1980 Act does not contain words that terminate the 1886 Mdewakanton's beneficiary rights in the 1886 lands – nor words that establish a

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[30] 25 U.S.C. §476 (prior to amendments in Pub.L. 100-581, Stat. 2938-39 (1988) which contained a relevant savings clause at §103).

[31] *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991), *citing* A. Doyle, *Silver Blaze*, in *The Complete Sherlock Holmes* 335 (1927).

new statutory identity for the communities under the 1934 IRA. The legislative history is similarly silent as to terminating rights or creating a new identity for the three post-1934 IRA communities. At most, the 1980 Act was viewed as a "technical" statute that would result in "no changes in existing law."[32] nor any *additional cost* to the government with the Act's enactment.[33]

CONCLUSION

For the foregoing reasons, and those of the petition and the briefs of *amici curiae*, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[32] S. Rep. No. 96-1047 at 3, 7. *See also* H.R. Rep. No. 96-1409 at 3.

[33] H.R. Rep. No. 96-1409 at 3; S. Rep. No. 96-1047 at 3. *See also* 96-1409 at 3 ("Enactment of H.R. 7417 will result in no cost to the United States").

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