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## Winner, Best Appellate Brief in the 2012 Native American Law Student Association Moot Court Competition

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## WINNER, BEST APPELLATE BRIEF IN THE 2012 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION

Jocelyn Jenks\* & Jacquelyn Amour Jampolsky\*\*

### *Questions Presented*

I. Did the Secretary have the authority under 25 U.S.C. § 465 to acquire land and hold it in trust for the Native Molokinian Government as a “federally recognized” Indian tribe, despite Congress’s subsequent recognition of the Molokini Nation?

II. Was the Native Molokinian Government entitled to receive federal acknowledgment through the administrative Office of Federal Acknowledgment process, even though the Native Molokinian Government extends membership to adopted children without Native Molokinian blood?

### *The Facts*

The Native Molokinians are the original inhabitants of Molokini. (Problem ¶ 1.) They are the only Native group within the Pacific Islands and they currently make up the state of Molokini. (*Id.*) Since time immemorial, the Native Molokinians have been self-governing and have a highly sophisticated form of government. (*Id.*) In the early seventeenth century, the Native Molokinians formed treaties with the United States, France, the United Kingdom and other international States. (*Id.*) In the late nineteenth century the United States overthrew the Native Molokinian government. (*Id.*) After destroying their government, the United States annexed Molokini as part of their territory in 1898. (*Id.*)

In 1921, the United States Congress passed the Molokinian Homestead Act in order to establish a permanent land base for the benefit and use of the Native Molokinians, and to ensure that the lands set aside under the Act would always be held in trust for continued use by the Native Molokinians in perpetuity. (Problem ¶ 2.) The Molokinian Act granted benefits to

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Native Molokinian descendants with no less than one-half part of the blood of the races inhabiting Molokini previous to 1778. (*Id.*) The Act established a special trust relationship between the federal government and the Native Molokinians. (*Id.*)

In 1959 the territory of Molokini became a state. (Problem ¶ 3.) Upon statehood, the United States transferred its trust relationship with the Molokini people to the new Molokini State Government. (*Id.*) The federal government retained oversight authority as well as the ability to amend the 1921 Homestead Act and sue on the behalf of the Native Molokinians for breach of trust. (*Id.*)

In 2011, the State Legislature of Molokini passed Act 200, which recognized Native Molokinian people as the only indigenous people of Molokini. (Problem ¶ 4.) The Act also established a commission to prepare and maintain a roll of “qualified Native Molokinians.” (*Id.*) The Act defines “qualified Molokinians” as: (1) An individual who is a descendant of the aboriginal peoples who prior to 1778, occupied and exercised sovereignty in the area that now constitutes the state of Molokini, or, (2) An indigenous Native individual of Molokini who was eligible in 1921 for the programs authorized by the Molokinian Homestead Act, or someone who is a direct lineal descendant of that individual, and (3) The individual has maintained a significant cultural, social, or civic connection to the Native Molokinian community and wishes to participate in the organization of the Native Molokinian governing entity, and is 18 years of age or older. (*Id.*) Act 200 states that the persons on the roll of “qualified Native Molokinians” and the descendants of those members are recognized by the State of Molokini as the indigenous, aboriginal, Maoli population of Molokini. (*Id.*)

In 2014, the Commission dissolved after completing the rolls. (Problem ¶ 5.) The qualified Native Molokinians independently organized and held a referendum vote repudiating the one half blood quantum requirement and making all qualified Native Molokinians eligible to participate in the nation-building process. (*Id.*) Additionally, they voted to allow all adopted children of Native Molokinians that maintain significant cultural, social, or civic connections to the Native Molokinian community to be eligible to participate in nation-building process; even if they lack Native Molokinian blood. (*Id.*) The decision to allow adopted children to be eligible to participate in the nation-building process was respectful of, and consistent with the long standing Native Molokinian tradition of considering adopted children to be descendants of their adoptive parents. (Problem ¶ 6.)

The Indian Reorganization Act was amended in 2013 to include “all federally recognized Indian Tribes” instead of the more restrictive “now federally recognized tribes” originally in the Act’s language. (*Id.*) Consistent with those amendments, the people of the Native Molokinian Nation adopted a constitution, and elected leadership. (*Id.*) The Native Molokinian body politic petitioned the federal government’s Office of Federal Acknowledgement (“OFA”), and received federal recognition in January 2016. (*Id.*) The OFA determined that the Native Molokinians criteria for membership met the requirement that membership consist of individuals who descend from historical Indian tribes. (*Id.*)

After receiving federal recognition the Native Molokinian Government purchased 50,000 acres of their traditional land from a sugar plantation. (Problem ¶ 7.) The Native Molokinian Government wanted to build homes for its enrolled members, as well as a school, hospital, and government building with executive, legislative, and judicial offices on the newly purchased land. (*Id.*) In order to do so, the Native Molokinian Government petitioned the Secretary of Interior to take the 50,000 acres of land into trust pursuant to 25 U.S.C. § 465. (*Id.*) The 2013 amendments to the Indian Reorganization Act also affirmed the Secretary’s authority to take land into trust for all “federally recognized Indian tribes.” (*Id.*) In January of 2017, the Secretary of Interior approved the petition and informed the State of Molokini of its acceptance. (Problem ¶ 10.)

Just prior to the Secretary of Interior informing the State of its approval, the State of Molokini Legislature passed Act 100 in January of 2017. (Problem ¶ 8.) The Act states that only those “qualified Native Molokinians” that were enrolled by the Native Molokinian Roll Commission pursuant to Act 200 are the indigenous, aboriginal, Maoli people of Molokini. (*Id.*)

The United States Congress passed the “Molokini Nation Reorganization Act in January of 2017.” (Problem ¶ 9.) The State of Molokini’s U.S. Senator, whose party has recently taken control of both the White House and Congress, pushed the Act through Congress in an attempt to use the controversial issue of blood quantum to divide the Native Molokinians, and frustrate their efforts to achieve self-governance. (*Id.*) The federal legislation grants federal recognition only to those Native Molokinians currently residing on homestead land, who are eligible to receive benefits under the Molokinian Homestead Act of 1921. (*Id.*) The Molokini Nation Reorganization Act states that the Molokini Nation is the “representative sovereign governing body of the Native Molokinian people” and “the single federally recognized Native Molokinian governing entity.” (*Id.*) A group of

Native Molokinians who meet the blood quantum eligibility requirements under the Molokinian Homestead Act of 1921 create a reorganized Molokini Nation Government pursuant to the Molokini Nation Reorganization Act. (Problem ¶ 10.)

### *The Proceedings*

The State of Molokini appealed the Secretary of Interior's decision to take the 50,000 acres into trust for the Native Molokinian Government to the Interior Board of Indian Appeals, which upheld the Secretary's decision. (Problem ¶ 11.) The United States Court of Appeals for the Ninth Circuit upheld the decision of the Secretary. (*Id.*) The court stated that (1) The Native Molokinian Government constitutes a "federally recognized" Indian tribe, and the Secretary had the authority under 25 U.S.C. § 465 to acquire land and hold it in trust for the tribe, and (2) that the Native Molokinian Government possesses the inherent authority to define "descendancy" for membership purposes, and membership may include persons without Native Molokinian blood when there is a strong cultural basis for the inclusion, and the OFA has the authority to recognize such a group. (*Id.*) The Native Molokinian Government was entitled to receive federal acknowledgement through the administrative OFA process. (*Id.*) This Court granted their petition for certiorari. (*Id.*)

### *Summary Of The Argument*

*I. The Supreme Court should affirm the United States Court of Appeals for the Ninth Circuit, and uphold the Secretary of Interior's decision to put the Native Molokinian Government's 50,000 acres into trust in accordance with 25 U.S.C § 465 of the Indian Reorganization Act, because the Secretary has authority to hold land in trust for the federally recognized Tribe.*

First, The United States Government has recognized the special need to preserve Tribal lands since its passage of the Indian Reorganization Act ("IRA") of 1934. In *Carcieri v. Salazar*, this Court held that in order to be eligible to receive land in trust under the IRA, a tribe had to be federally recognized at the time of its implementation. The Native Molokinian Government has been a federally recognized tribe since the Molokinian Homestead Act of 1921. Since the Tribe was federally recognized at the implementation of the IRA, through that Congressional legislation, the

Secretary has authority to take land into trust for the Native Molokinian Government.

Second, even if the Court finds that the Native Molokinian Government was not a federally recognized tribe in 1934, the 2013 Amendment to the IRA gives the Secretary broad discretion to determine which Indian Tribes should come within the scope of the Act. Reversing the Secretary's decision to grant the Native Molokinian Government's petition for their 50,000 acres to be placed into trust would be an affront to the longstanding principle of giving full deference to agency discretion. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Finally, The Native Molokinian Government remains a federally recognized tribe despite Congress' subsequent recognition of the Molokini Nation. Taking away the Native Molokinian Government's trust land due to the federal recognition of the Molokini Nation would constitute a preference of one federally recognized tribe over another. Allowing the Molokini Nation preference over the Molokinian Government would be a violation of 25 U.S.C.A. § 476, which prohibits discrimination amongst Tribes.

*II. The Ninth Circuit Court of Appeals rightly upheld the federal recognition of the Native Molokinian Government even though it extends membership to adopted children without Native Molokinian blood, and this Court should affirm the Secretary's decision to bring the 50,000 acres of land into trust for the Tribe.*

First, this Court should not review the Office of Federal Acknowledgment's ("OFA") decision to federally recognize the Native Molokinian Government because federal recognition is a non-justiciable political question. Even if this Court were to adjudicate the OFA's decision, it should find that the OFA properly exercised its authority to recognize the Native Molokinian Government notwithstanding the fact that it extended membership to adopted children that may lack Native Molokinian blood. The OFA acted in accordance to the Code of Federal Regulations, and from a policy perspective, the trend of federal common law to broadly construe Indian status for adjudicatory purposes implies that the Native Molokinian Government should also be able to broadly construe tribal membership.

Second, as a federally recognized tribe, the Native Molokinian Government retains the inherent sovereign power to self-govern that is both pre and extra-constitutional, and can only be diminished by a clear act of Congress. Determining tribal membership is a fundamental attribute of the Native Molokinian Government's sovereign authority, and thus, should not

be scrutinized by this Court regardless of how it determines who its members are. Furthermore, the Native Molokinian Government's membership provisions are consistent with the requisite political classification to sustain the statutory and regulatory privileges often afforded to Indian tribes. To accept the State's appeal to reinstate a race-based policy for recognition would be to accept an unconstitutionally discriminatory policy.

Accordingly, the Ninth Circuit Court of Appeals properly upheld the federal recognition of the Native Molokinian Government, and this Court should affirm the decision for the Secretary to put the 50,000 acres of former Molokinian land into trust for the Tribe.

### *Argument*

*I. This Court should affirm the Ninth Circuit Court of Appeals' decision, and uphold the Secretary's authority to acquire land and hold it in trust for the Native Molokinian Government under federal statutory and common law, because the Native Molokinian Government remains a federally recognized Indian tribe regardless of Congress's subsequent recognition of the Molokini Nation.*

"Land forms the basis for social, cultural, religious, political, and economic life for American Indian nations," 1-15 *Cohen's Handbook of Federal Indian Law* § 15.01.

Preserving a tribal land base is essential for the survival of Indigenous groups. *Id.* The United States government has recognized the special need to preserve tribal lands since its passage of the Indian Reorganization Act ("IRA") of 1934. *Id.* The IRA was a means for Congress to address many of the past wrongs directed at American Indians and provide an opportunity to restore Native lands to their rightful owners. The Act codified in Title 25 section 465 of the United States Code Annotated gives the Secretary of Interior authority to acquire land for American Indians. 25 U.S.C.A. § 465. The Native Molokinian Government has been a federally recognized tribe since 1934, and thus is entitled to benefit from the provisions of the IRA. Moreover, the Native Molokinian government remains a federally recognized tribe despite the recognition of the Molokini Nation.

*A. This Court should uphold the Secretary of Interior's authority to take land into trust for the Native Molokinian Government under federal common law because the Native Molokinian Government has been a federally recognized Indian Tribe since 1934, and therefore is eligible to have land taken into trust under 25 U.S.C.A. § 465.*

When a statute's language is clear, agency interpretation is irrelevant, and the statute is applied according to its plain meaning. *Carcieri v. Salazar*, 555 U.S. 379 (2009). The Indian Reorganization Act of 1934 allows the Secretary to place land into trust for Indians. 25 U.S.C. § 465. The Act defines Indians as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* In 2009 the Supreme Court in *Carcieri*, stated that the definition was unambiguous and "now under federal jurisdiction" could only be interpreted to refer to tribes already federally recognized in 1934 at the Act's implementation. 555 U.S. at 382. The Native Molokinian Government was a federally recognized tribe in 1934. Therefore, the Secretary's decision to bring their land into trust should be upheld.

In *Carcieri*, the Supreme Court held that because the Narragansett tribe was not a federally recognized tribe in 1934 when the Indian Reorganization Act was implemented, they were not eligible to receive land into trust under the Secretary's discretion. *Id.* at 383. The Narragansett tribe relinquished its tribal authority and was essentially assimilated into the State of Rhode Island during the late 19<sup>th</sup> century. *Id.* at 383. Despite attempts to receive federal assistance in the early 1900's, the federal government rejected all of the Tribe's requests, citing the New England State's jurisdiction over the Tribe. *Id.* at 384. The Narragansett did not gain federal recognition until 1983. *Id.* After they received recognition, they petitioned the Secretary to put a parcel of land into trust, and, interpreting the statute's language to mean that trust land could be granted to any Indian tribe currently recognized by the federal government, the Secretary granted their request. *Id.* at 385. The Supreme Court held that was an impermissible interpretation of the definition of an "Indian" under the IRA, and that the Statute's language clearly refers to members of tribes that were under federal jurisdiction at the time the IRA was enacted. *Id.* at 391. Therefore, the Secretary did not have authority to take land into trust for the tribe.

Unlike the tribe in *Carcieri*, the members of the Native Molokinian Government were federally recognized in 1934 when the Indian Reorganization Act was implemented. The Homestead Act of 1921 federally recognized the Native Molokinian people and created a trust



relationship between the federal government and the Native Molokinians in order to establish a permanent land base for their benefit. (Problem ¶ 2.) The United States did not transfer its trust obligations to the Molokini State government until 1959; therefore, when Indian Reorganization Act was implemented in 1934, the Native Molokinians were a federally recognized tribe, eligible to receive land in trust pursuant to 25 U.S.C. § 465. Moreover, the United States maintained a relationship with the Native Molokinian people even after they transferred their 1921 trust obligations to the State; the federal government retained oversight authority and the authority to sue on the behalf of Native Molokinians, and thereby continued to federally recognize them. (Problem ¶ 3.) The Native Molokinian Government was formed directly by the Native Molokinians originally recognized by the 1921 Homesteading Act. Therefore, the Secretary had authority to take land into trust for the Native Molokinian Government, because they were a federally recognized tribe in 1934, and bringing their land into trust is consistent with this Court's opinion in *Carcieri*.

*1. Even if the court determines the Native Molokinian Government was not a federally recognized tribe in 1934, after the 2013 amendments to the IRA, all federally recognized tribes without regard to the date at which they are recognized are now eligible to have land taken into trust.*

In 2013, Congress amended the Indian Reorganization Act and changed the 1934 language from tribes “now under federal jurisdiction,” to “all federally recognized tribes.” 25 U.S.C. § 465; (Problem ¶ 9.) While the original language of the IRA, unambiguously referred to Indian tribes recognized at the time the Act was implemented, the new language reflects Congress's attempt to give the statute broader reach. “All federally recognized tribes” either unambiguously refers to all tribes given federal recognition at any point, or is ambiguous language that should give the Secretary deference to determine its scope. *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984). Therefore, even if the Court finds that the Native Molokinian Government was not federally recognized in 1934, they are now a federally recognized tribe. Therefore, the Secretary may put their land into trust. The federally recognized members of the Native Molokinian Tribe created the Native Molokinian Government, and therefore the Native Molokinian Government has been a federally recognized tribe since 1921. However, even if the Court determines that the Native Molokinian Government is a separate band from the Native Molokinians recognized under the Native Molokinian Homestead Act of 1921, the Office of Federal Acknowledgement formally

recognized the Native Molokinian Government in 2016. (Problem ¶ 8.) The Native Government met all the criteria for federal recognition. *Id.* In granting the Native Molokinian's request to put their land into trust, the Secretary has determined that the IRA's reach extends to the Native Molokinian Government. In light of the 2013 Amendment, the Secretary's decision to acquire land and hold it in trust for the recognized Native Molokinian Government should be given deference.

*2. This Court should uphold the Secretary of Interior's authority to take land into trust for the Molokinian Government under 25 U.S.C.A. § 465 and its 2013 amendment, because the decision was consistent with principles of Chevron deference.*

When Congress delegates authority to an agency through legislation, the agency's secretary is granted deference to interpret the statute's reach. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If Congressional delegation of authority for an agency to interpret a statute is explicit,

"[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. [If] delegation to an agency on a particular question is implicit rather than explicit . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 843-44.

With respect to the Indian Reorganization Act, the Statute's language explicitly grants the Secretary with the decision to bring land into trust for Indian tribes. 25 C.F.R. § 151.3. The 2013 Amendment to the Act replaces the clear restrictive 1934 language with broad language giving the Secretary authority to take land into trust for "all federally recognized tribes." The language either clearly gives the Secretary authority to place land into trust for any recognized tribe, or is ambiguous and allows the Secretary broad discretion to determine which Tribes are eligible to receive trust land under the act. Therefore, under principals of *Chevron* deference, the Secretary's decision to bring that land into trust for the Native Molokini Tribe should be upheld.

In *Navajo Nation v. HHS*, the court held that the Secretary of HHS's interpretation of the Indian Self-Determination and Education Assistance Act ("ISDEAA") was valid, and therefore, under *Chevron* principals of deference the Secretary was not obligated to approve the Tribe's self-determination contract for Temporary Assistance for Needy Family

("TANF") funds. 285 F.3d 864, 875 (9th Cir. 2002). Congress implemented the TANF program in 1996, which provided grants to states and Indian Tribes that wanted to fund welfare programs for citizens in their jurisdiction. *Id.* at 867. The Navajo Nation used the ISDEAA, which provides programs for the benefit of Indians due to their special status as Indians, to apply for TANF funds. *Id.* at 867, 868. Not all federal programs can be transferred to the tribes through ISDEAA self-determination contracts. *Id.* The Secretary rejected the Tribe's application, stating that it went beyond the scope of the ISDEAA because the TANF program was not intended to be implemented for the particular benefit of Indians, but rather for all low-income peoples, and because the TANF funds did not meet the requirements of a self-determination contract as enumerated in ISDEAA. *Id.* at 868. The Secretary "interpreted 'program[] . . . for the benefit of Indians because of their status as Indians' to mean that Indians must be the *exclusive* beneficiaries of the program in question." *Id.* at 869. The court determined that the legislation was ambiguous and that the Secretary's interpretation was one reasonable possibility, and therefore, the Secretary's decision should be given *Chevron* deference. *Id.* at 870. Congress gave the Secretary of HHS authority to interpret the ISDEAA's meaning and application. Therefore, the court must defer to that interpretation. *Id.* at 872.

Similarly to the statute at issue in *Navajo Nation*, Congress gave authority to interpret the Indian Reorganization Act and the ability to apply its provisions to Indian tribes to the Secretary of Interior. 25 U.S.C.A. § 465. The IRA grants the Secretary broad authority over the use and acquisition of Indian lands, including the authority to place lands purchased by tribes "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." 25 U.S.C.A. § 465. Under the IRA and its 2013 amendment, the Secretary of Interior may bring land into trust for an individual Indian or a tribe when:

"the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; when the tribe already owns an interest in the land; or when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. 151.3.

The Native Molokini Government is a federally recognized Indian tribe that purchased 50,000 acres of traditionally Native land, and therefore owns interest in that land. (Problem ¶ 8.) The Secretary accepted the Native

Molokini Government's land into trust pursuant to 25 U.S.C. § 465. (Problem ¶ 10.) Her decision that the Native Molokini Government was eligible to have their land put into trust under the federal government was not arbitrary and capricious, but rather reflected the Tribe's status, its relationship to the land, and its desire to use the land in order to facilitate self-determination and economic development. (Problem ¶ 8.) Under the 2013 amendment, the Native Molokini Government is clearly intended to benefit from 25 U.S.C. § 465, but even if the Court determines the statute's application to the Native Molokini Government is unclear, it should defer to the Secretary's interpretation of the IRA's reach under principles of *Chevron* deference.

*B. This Court should uphold the Secretary of Interior's decision to take land into trust for the Molokinian Government regardless of the simultaneous recognition of the Molokinian Nation because 25 U.S.C.A. § 476 prohibits discrimination amongst federally recognized Tribes.*

The federal government and its agencies cannot implement the Indian Reorganization Act or any other act of Congress in a manner that "with respect to a federally recognized Indian tribe . . . classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C.A. § 476 (West). The federal government has routinely recognized multiple Indian tribes and Indian bands that are comprised of persons of the same race or persons that originate from the same territories. See, e.g., *The Sioux Nation: Graham v. United States and Sioux Tribe of Indians*, 30 Ct. Cl. 318 (1895); *Cherokee Nation: E. Band of Cherokee Indians v. Torres*, 4 Cher. Rep. 9 (2005); U.S. Dep't of Interior, *Indian Affairs Tribal Directory*, (Jan. 9, 2012) <http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm>.

When there is simultaneous recognition of tribes originating from the same ancestors, the government cannot give preference to one band over the other. 25 U.S.C.A. § 476 (f), (g). Moreover, the 2013 amendments to the Indian Reorganization Act when read in conjunction with section 476, must be interpreted in a manner that will not prefer one federally recognized tribe over another. The Secretary's decision to hold land in trust for the Native Molokinian Government should be upheld in order to ensure that the federally recognized tribe is not treated in a discriminatory manner.

In *Carcieri v. Norton*, the court held that construing the definition of an Indian to limit benefits only to tribes that were recognized at the time of the enactment of the Indian Reorganization Act of 1934 would constitute

discrimination against tribes that were subsequently recognized, and thus violate 25 U.S.C.S. §§ 476(f), (g). 398 F.3d 22, 32 (2005). While the court's decision was overruled by this Court in *Carcieri v. Salazar*, the 2013 Amendment to the Indian Reorganization Act, which clarified Congress's intent to provide trust land and benefits to "all federally recognized tribes," gives new weight to the previously overturned decision. Even though the Native Molokinian Government has membership guidelines differing from those of the subsequently recognized Molokini Nation, both groups are federally recognized Indian tribes. (Problem ¶ 9, 11.) In implementing statutes the government cannot act in a manner that privileges one federal tribe over the other. *United Houma Nation v. Babbitt*, 1996 U.S. Dist. LEXIS 16437 (1996). Providing benefits to the Molokini Nation and then denying them to the Native Molokini Government frustrates the purpose of the Indian Reorganization Act as clarified and reiterated by the 2013 Amendment, and its attempt to restore Native territories to Indian tribes and assure tribal self-determination. Moreover, it favors one federally recognized tribe over another, constituting discrimination in violation of 25 U.S.C. §476. Therefore, this court should uphold the Secretary's authority to acquire land and hold it in trust for the Native Molokinian Government.

The State contends that the Molokinian Nation is the sole recognized tribe of the State of Molokini.

"If the Congress and the Executive have determined that a group of Indians is a tribe or the political representative of the tribe for the purpose of defining its relationship to the United States and its powers and attributes as a tribal government that decision is respected by the Judicial branch of government." *Cogo v. Cent. Council of Tlingit & Haida Indians of Alaska*, 465 F. Supp. 1286, 1289 (D. Alaska 1979).

Congress and the Executive have determined that the Native Molokinian Government is a federally recognized tribe. However, even if the Native Molokinian Government is determined to be a splinter group of the Molokinian Nation, as the state contends, they have functioned from time immemorial as an autonomous tribal entity and therefore should remain a federally recognizable tribe. The Native Molokinian Government does not require a specific blood quantum and allows adopted children, regardless of their Native Molokinian ancestry, to be tribal members. The Native Molokinian Government has implemented these guidelines because it honors long standing traditional Native Molokinian practices. (Problem ¶ 8.) The Code of Federal Regulations, Title 25, section 83.3 states, "groups that can establish clearly that they have functioned throughout history until

the present as an autonomous tribal entity may be acknowledged under this part, even though they have been regarded by some as part of, or have been associated in some manner with an acknowledged North American Indian tribe.” The Native Molokinian government has exercised their sovereign authority and remained a functioning tribal entity since time immemorial. The Native Molokinian Government should retain their federally recognized status despite the subsequent recognition of the Molokini Nation.

*II. This Court should uphold the federal recognition of the Native Molokinian Government even though it extends membership to adopted children without Native Molokinian blood, because Native Molokinians possess the inherent sovereign authority to define descendancy for membership purposes to include persons who are not racially members of the group where there is a strong cultural basis for the inclusion, and because the Office of Federal Acknowledgement has the authority to recognize a group so constituted.*

The Ninth Circuit Court of Appeals rightly upheld the federal recognition of the Native Molokinian Government even though it extends membership to adopted children without Native Molokinian blood, and this Court should affirm the Secretary’s decision to bring the 50,000 acres of land into trust for the Tribe. First, this Court should not review the Office of Federal Acknowledgment’s (“OFA”) decision to federally recognize the Native Molokinian Government because federal recognition is a non-justiciable political question. Even if this Court were to scrutinize the OFA’s recognition of the Native Molokinian Government, the OFA acted within its delegated authority and in accordance to federal regulations when it recognized the Native Molokinian Government. Second, as a federally recognized Tribe, the Native Molokinian Government retains the inherent sovereign power to self-govern. Determining tribal membership is a fundamental attribute of the Native Molokinian Government’s sovereignty, and membership provisions are not subject to review by the courts, regardless of how a tribe determines who its members are.

*A. The OFA properly exercised its authority when it recognized the Native Molokinian Government, and this Court should uphold the Secretary’s decision to bring land into trust for the Tribe.*

This Court should uphold the federal recognition of the Native Molokinian Government and affirm the Secretary’s decision to bring the 50,000 acres of land into trust for the Tribe because (1) federal recognition

of Indian tribes is a non-justiciable political question and should not be adjudicated by this Court, and (2) the OFA properly recognized the Native Molokinian Government even though its enrollment criteria extends membership to adopted children that may lack Native Molokinian blood.

*1. This Court should not review the OFA's decision to recognize the Native Molokinian Government because recognition is a political question.*

The authority for the OFA to recognize tribes derives from the Secretary of Interior's general authority over Indian affairs delineated at 5 U.S.C. § 301, 25 U.S.C. §§ 2 and 9, and 43 U.S.C. § 1457. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 420 (D. Conn. 2008). Making a decision to federally recognize an Indian group is a political determination, and is not justiciable by the courts. *Samish Indian Nation v. United States*, 419 F.3d 1355, 1370 (Fed. Cir. 2005). Courts must defer to the OFA, other executive agency, or Congress when faced with a challenge to federal recognition. *Id.*; see also *United States v. Rickert* 188 U.S. 432, 445 (1903); *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *Miami Nation of Indians of Ind., Inc. v. Dep't of Interior*, 255 F.3d 342, 346-48 (7th Cir. 2001); *W. Shoshone Bus. Council For and on Behalf of W. Shoshone Tribe of Duck Valley Reservation v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993); *James v. United States Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987). This Court has firmly established that "[i]n reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same." *United States v. Holliday*, 70 U.S. 407, 419 (1865).

Supreme Court precedent prohibits this Court from reviewing the OFA's decision to recognize the Native Molokinian Government because federal recognition is a non-justiciable political question. Courts continue to prohibit review of federal recognition based on the political question doctrine, and nothing distinguishes the instant case from any of the other cases barring adjudication. The State's challenge to the OFA's recognition of the Native Molokinian Government should end here.

*2. Even if this Court were to review the OFA's decision, it should find that it properly recognized the Native Molokinian Government according to the Code of Federal Regulations and federal common law.*

The only way the State could challenge the OFA's decision to recognize the Native Molokinian Government would be under the Administrative Procedure Act ("APA") "concerning the executive's recognition determination under 25 C.F.R. Part 83." *Samish Indian Nation*, 419 F.3d at 1369; *Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 420. The State brings no such complaint. Even if this Court were to *sua sponte* review the OFA's recognition of the Native Molokinian Government under the APA, it is clear that the OFA acted within the guidelines provided by section 83 of the Code of Federal Regulations.

The Code of Federal Regulations, 25 C.F.R. §83.7, establishes the mandatory criteria for federal recognition, and permits the OFA to grant great deference to the petitioning tribe with respect to membership provisions. Section 83.7 allows tribes to present a wide range of evidence to establish that the membership "consists of individuals who descend from a historical Indian tribe." *Id.* at §83.7(e). Specifically, 25 C.F.R. § 83.7(e)(1)(iv) accepts "affidavits of recognition by tribal elders, leaders, or the tribal governing body identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity," to prove descendancy for the purpose of membership.

In the instant case, the State conceded that the Native Molokinian Government meets all of the criteria for acknowledgment through the OFA process except for the membership requirement. (Problem ¶ 11.) It challenges the OFA's recognition based on the Native Molokinian Government's membership ordinance that extends membership to adopted children that retain a strong connection to the community even if they do not have Molokinian blood. (*Id.*) The State misinterprets the OFA's authority to determine what descendancy means.

Nothing in the Code of Federal Regulations establishing the mandatory criteria for federal acknowledgment refers to blood quantum of any kind. 25 C.F.R. §83.7(e). Furthermore, 25 C.F.R. § 83.7(e)(1)(iv) accepts recognition by the Tribe as sufficient evidence to prove descendancy. The Native Molokinian Government decided to extend membership to adopted children that do not necessarily have Native Molokinian blood out of respect for long-standing Native Molokinian tradition and customary social organization. (Problem ¶ 6.) The OFA had the authority to accept the



Native Molokinian Government's definition of descendency, and this Court should affirm that decision.

Furthermore, this Court has traditionally deferred to tribal custom when determining whether claimants may legally be considered Indians for the purpose of adjudication. *See, e.g., Waldron v. United States*, 143 F. 413, 419 (C.C.D.S.D. 1905) (Tribal custom can define membership); *Alberty v. United States*, 162 U.S. 499, 502-03 (1896) (Tribal courts have jurisdiction over offenses committed Indians, which included Indians by adoption). In *Nofire v. United States*, 164 U.S. 654, 658 (1897) this Court cited to Cherokee Law when deciding that a man lacking any Cherokee blood was "Indian" because he was adopted as a tribal member. It found that "[t]he Cherokee statutes make it clear that all white men legally married to Cherokee women and residing within the Nation are adopted citizens." *Id.* In affirming the applicability of Cherokee law, this Court reasserted that because the Cherokee Nation recognized him as a citizen, and because he asserted his citizenship, he "was a citizen by adoption, and, consequently, the jurisdiction over the offense charged herein is . . . vested in the courts of that Nation." *Id.* at 662.

*Nofire* was the last Supreme Court case to address adoption of non-racial members as citizens for tribal jurisdiction, and clearly permits tribes to maintain enrollment criteria that extend membership to racially unrelated people. Like this Court deferred to Cherokee law when finding that a white man may be enrolled in a tribe and treated as an Indian for adjudicatory purposes in *Nofire*, this Court should respect the Native Molokinian Government's prerogative to extend membership to adopted children that may lack Native Molokinian blood in the instant case. In *Nofire*, this Court respected a tribal membership ordinance that acknowledged men who married Cherokee women as members without requiring any other cultural tie to the community. Here, the Native Molokinian Government only extends membership to children adopted by Tribal members that have maintained a significant cultural, social, or civic connection to the Native Molokinian community and wish to participate in the organization of the Native Molokinian governing entity. If this Court respected a tribal membership ordinance based on marriage alone, it should also respect the Native Molokinian Government's membership ordinance that seeks to extend membership based on respect for and deference to a long-standing, traditional Native Molokinian cultural practice of social organization.

Finally, a specific blood quantum is not dispositive of Indian status for adjudicatory purposes in criminal and child welfare cases, and from a policy perspective, should not be considered a requisite for enrollment here.

“The term ‘Indian’ has not been statutorily defined but instead has been judicially explicated over the years.” *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), cert. denied, 444 U.S. 859 (1979). For example, in criminal cases, courts generally consider the degree of Indian blood, and tribal or government recognition as an Indian when determining whether or not a claimant may be considered Indian for jurisdictional purposes. *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996) (quoting *Broncheau*, 597 F.2d at 1263). However, the application of these requirements proves inconsistent. See, e.g., *U.S. v. Rogers*, 45 U.S. 567, 573 (1846) (adoption into Cherokee Tribe as an adult alone was not sufficient to be considered Indian); *Vezina v. United States*, 245 F. 411 (8th Cir.1917) (between 1/4 and 3/8 Chippewa person was held to be Indian); *Sully v. United States*, 195 F. 113 (8th Cir.1912) (1/8 sufficient to be Indian); *St. Cloud v. United States*, 702 F.Supp. 1456, 1460 (D.S.D. 1988) (15/32 Yankton Sioux was sufficient to be held Indian). Today neither eligibility nor enrolment are required to prove Indian status if that individual is recognized as an Indian by the community, *United States v. Bruce*, 394 F.3d 1215, 1225-26 (9th Cir. 2005).

Similarly, in the Indian Child Welfare Act (“ICWA”) 25 U.S.C. §§ 1901 cases, courts often look to tribal enrollment criteria to establish whether or not the child can be considered Indian under the statute. See, e.g., *Indian Tribe v. Doe*, 849 P.2d 925, 928 (Idaho 1993); *John v. Baker*, 30 P.3d 68, 73 (Alaska 2001). Tribal enrollment does not necessarily require Indian blood. To be considered an “Indian child” under ICWA, the child must be “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4). Courts have interpreted that this definition may still implicate Indian status even though the child may lack tribal determination, 1-11 Cohen's Handbook of Federal Indian Law § 11.02 (citing *see Doe*, 849 P.2d at 928; *In re A.P.*, 962 P.2d 1186 (Mont. 1998)), and that children may be considered Indian for the purposes of the Act even if their ancestry is uncertain, *see In re J.T.*, 693 A.2d 283 (Vt. 1997); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988). Thus, like in the criminal cases, a claimant may be enrolled or eligible to be enrolled, and may be the biological child of an enrolled member, and still lack Native blood if tribal enrollment doesn't require it. In short, not all people with Indian blood are legally considered to be Indian, and people lacking any Indian blood may still be considered legally Indian.

The inconsistent application of the blood quantum and membership requirements in criminal and child welfare cases demonstrates that the question of "Indianness" is a broad one, and can neither be considered purely racial nor purely political. From a general policy perspective, if courts broadly determine who is Indian for adjudicatory purposes, tribes should also be able to broadly determine who its members are for purposes of civic and cultural participation. Accordingly, affirming the Native Molokinian Government's ability to enroll members that may lack Native Molokinian blood but maintain specific cultural ties to the community is consistent with the trend to broadly construe Indian status in the federal common law.

In summation, this Court is barred from reviewing the OFA's decision to recognize the Native Molokinian Government because federal recognition is a non-justiciable political question. Even if this Court were to review the OFA's finding based on the membership ordinance, it should find that the OFA properly recognizing the Native Molokinian Government according to federal regulations and federal common law. Accordingly, this Court should affirm the Ninth District Court of Appeals's decision to uphold the OFA's federal recognition of the Native Molokinian Government, and affirm the Secretary's placement of the 50,000 acres of land into trust for the Tribe.

*B. The Native Molokinian Government appropriately exercised its inherent sovereign authority when it extended membership to adopted children without Native Molokinian blood, and accords with constitutional limitations on race-based classifications.*

By recognizing the Native Molokinian Government, the federal government recognizes the Native Molokinian Government's sovereign authority to self-govern. 25 C.F.R. § 83.2. The Ninth Circuit Court of Appeals properly held that the Native Molokinian Government had the right to define descendancy for membership purposes as part of its inherent sovereign authority to self-govern, and this Court should uphold the Secretary's decision to place 50,000 acres of land into trust for the Tribe because (1) this Court does not have the authority to review issues involving Native Molokinian Government membership, and (2) to reinstate a race-based policy for recognition would be to accept an unconstitutionally discriminatory policy.

*1. The Native Molokinian Government retains the inherent sovereign right to determine its membership, and this Court does not have the authority to review those provisions.*

Tribes are “distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . .” *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). As such, Indian nations retain the inherent sovereign right to self-governance that is both pre and extra-constitutional, and can only be diminished by a clear act of Congress. *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978). Although tribes have been divested of many of their sovereign attributes since the time of contact, one power remains clear: tribes retain exclusive and plenary power to govern their members. *Montana v. U. S.*, 450 U.S. 544, 564 (1981).

The inherent sovereign right of tribal self-governance includes the right to determine tribal membership. *Id.* This long-standing legal and political precedent exempts “purely intramural matters such as conditions of tribal membership” from federal statutes that otherwise apply to Indian tribes. *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005) (citing *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985)); *see also Apodaca v. Silvas*, 19 F.3d 1015, 1016 (5th Cir. 1994); *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996)). Because determining tribal membership is an essential attribute of sovereignty, challenges to enrollment provisions are not subject to review by this Court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

In *Santa Clara*, *id.* 63, this Court found that it did not have the authority to adjudicate Tribal membership disputes. In *Santa Clara*, a female tribal member sought declaratory and injunctive relief under the Indian Civil Rights Act (“ICRA”) because the Pueblo’s enrollment ordinance granted membership to children of men who married outside of the Tribe, but refused membership to the children of women who married outside the Tribe. *Id.* at 51. This Court ruled in favor of tribal sovereignty and reversed the Tenth Circuit’s decision, holding that it was “unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA.” *Id.* at 61. It found that regardless of the sensitive merits being adjudicated, the right for tribes to define membership had “long been recognized as central to its existence as an independent political community,” and that “the role of courts in adjusting relations between and among tribes and their members” is limited. *Id.* at 72. In the end, this Court found that absent an act from Congress, the Pueblo was solely responsible for establishing the appropriate balance between ICRA

and membership ordinances, and that “. . . to abrogate tribal decisions, particularly in the delicate area of membership, for whatever ‘good’ reasons, is to destroy cultural identity under the guise of saving it.” *Id.* at 55.

The impermissibility for Courts to adjudicate tribal membership issues applies equally to challenges to the tribe itself as it does to complaints against the federal government. *See, e.g., Ordinance 59 Ass’n v. U.S. Dept. of Interior Sec’y*, 163 F.3d 1150, 1189-60 (10th Cir. 1998); *Lewis*, 424 F.3d at 963; *Williams v. Gover*, 490 F.3d 785, 787-88 (9th Cir. 2007). Both the Ninth and Tenth Circuits have specifically held that plaintiffs “cannot get around the *Santa Clara* rule by bringing suit against the government, rather than the tribe itself.” *Lewis*, 424 F.3d at 963. For example, in *Williams*, 490 F.3d at 787-88, two former members of the terminated Mooretown Rancheria were not able to re-enroll following reinstatement because of a tribal ordinance that narrowed membership criteria. In an attempt to skirt the clear *Santa Clara* precedent, instead of challenging the Tribe, the claimants challenged the Bureau of Indian Affairs (“BIA”) under the APA. *Id.* at 789. The Court found that the BIA did not promulgate any rule by tacitly approving the new membership ordinance and did not implicate the APA, and that under *Santa Clara*, the BIA could not determine tribal membership even if it wanted to. *Id.* at 790-91. The Tribe has the “power to squeeze the plaintiffs out, because it has the power to define its own membership . . . For this reason, the BIA could not have defined the membership of Mooretown Rancheria, even if had tried.” *Id.*

Accordingly, by challenging the Secretary’s decision to take land into trust for the Native Molokinian Government vis-à-vis the Office of Federal Acknowledgment’s (“OFA”) recognition process, the State does not avoid *Santa Clara* in the case at bar. Just like the Pueblo in *Santa Clara*, the Native Molokinian Government is a federally recognized Indian nation that retains the inherent sovereign power to determine who its members are. (Problem ¶ 6.) After receiving State recognition under Act 200, the Native Molokinian Government independently organized to seek federal recognition under the OFA. (*Id.*) The OFA officially recognized the Native Molokinian Government in January 2016 (*id.*). As demonstrated above, the OFA properly recognized the Native Molokinian Government, and officially established the Tribes’ sovereign authority to self-govern. If this Court was able to uphold the *Santa Clara* Pueblo’s sovereign right to sustain a blatantly discriminatory membership ordinance, it should also uphold the Native Molokinian Government’s sovereign authority to implement an ordinance that extends membership to culturally affiliated adopted children.

Membership rules are “no more or less than a mechanism of social . . . self-definition,” and are “basic to the tribe's survival as a cultural and economic entity.” *Santa Clara*, 436 U.S. at 54 (citing *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 15 (D.N.M. 1975)), and this Court simply should not intervene in this strictly tribal matter, regardless of the substantive provisions of membership ordinances.

Since *Santa Clara*, state and federal Courts have consistently upheld tribal sovereignty when refusing to review tribal membership issues. *See, e.g., Equal Employment Opportunity Comm’n v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 249 (8th Cir. 1993); *Martinez v. Southern Ute Tribe*, 249 F.2d 915, 920 (10th Cir. 1957); *Smith*, 100 F.3d 556; *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2009). This Court is obliged to follow this precedent, and should uphold the Native Molokinian Government’s sovereign authority to define tribal membership.

*2. To reinstate a race-based policy for Native Molokinian recognition would be to accept an unconstitutionally discriminatory policy.*

Federally recognized tribes are privy to certain statutory and regulatory benefits that stem from their unique government-government relationship with the federal government. 25 C.F.R. § 83.2. Policies that favor Indians over non-Indians are constitutionally permissible when preference “is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities,” based on a long history of diplomatic relations with the federal government. *Morton v. Mancari*, 417 U.S. 535, 555-54 (1974). Because Indian status is political and not racial, special treatment need only be rationally related to “Congress's unique obligation toward the Indians.” *Id.* at 555. On the other hand, if a policy granting special treatment to Native people is primarily race-based, it will likely be struck down on equal protection grounds. *Rice v. Cayetano*, 528 U.S. 495, 497 (2000).

For example, in *Rice* this Court struck down an ordinance that limited voting in the Office of Hawaiian Affairs (“OHA”) to people of native Hawaiian, “or as descendants of not less than one-half part of the races inhabiting the islands before 1778,” and Hawaiian ancestry, or “descendants of the peoples inhabiting the Hawaiian Islands in 1778,” under the 15<sup>th</sup> Amendment. It distinguished *Mancari* by finding that granting voting privileges according to Hawaiian ancestry was merely a proxy for race, because “[t]he inhabitants shared common physical characteristics, and by 1778 they had a common culture,” and because “[t]he history of the State's definition also demonstrates that the State has

used ancestry as a racial definition and for a racial purpose.” *Id.* at 496. Because OHA’s categorization was racial and not political, this Court found the voting provision failed because “it rests on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters.” *Id.* at 497.

Ironically, the State asks that this Court reverse the Secretary’s decision to bring the 50,000 acres of former Molokinian land into trust for the Tribe because the Native Molokinian Government is not distinguished by race alone. (Problem ¶ 7.) The State seeks to reinstate recognition by the criteria established in the 1921 Homestead Act, which defines a Native Molokinian as “any descendant of not less than one-half part of the blood of the races inhabiting Molokini previous to 1778.” (Problem ¶ 2, 9.) The criterion the State asks this Court to establish is strikingly similar to the racial categorization of native Hawaiians that was struck down in *Rice*. In contrast, the current membership provisions promulgated by the Native Molokinian Government complies with the *Rice* precedent because extending membership to adopted children that may not have the requisite blood deems that delineation political, and not racial. Although a challenge to legislation recognizing an Indian tribe is not the same as challenging a voting ordinance, this Court should consider the implications of *Rice* in potential challenges to legislation that may favor Native Molokinian people in the future.

In conclusion, the Ninth District Court of Appeals properly upheld the federal recognition of the Native Molokinian Government because the Native Molokinian Government retains the inherent sovereign right to determine descendancy or membership purposes. This Court should affirm the Native Molokinian Government’s current membership provisions because to accept the State’s appeal to reinstate a race-based policy for recognition would be to accept an unconstitutionally discriminatory policy that would likely be struck down in the future. Accordingly, this Court should respect the sovereign authority of the Native Molokinian Government, adhere to current Supreme Court precedent that prohibits statutes favoring Native people based on race alone, and uphold the Secretary’s decision to place the 50,000 acres of former Molokinian land in trust for the Tribe.

### *Conclusion*

The Supreme Court should affirm the United States Court of Appeals for the Ninth Circuit, and uphold the Secretary of Interior’s decision to put 50,000 acres of land into trust for the Native Molokinian Nation in

accordance with 25 U.S.C § 465 of the Indian Reorganization Act, because the Secretary has authority to hold land in trust for the federally recognized Tribe. The Secretary has authority under the Indian Reorganization Act to hold land in trust for the Native Molokinian Government, because the tribe was federally recognized prior to the IRA's implementation, the 2013 Amendments make all federally recognized tribes eligible to have land placed in trust, and the Native Molokinians' federal status did not change with the subsequent recognition of the Molokinian Nation.

The Ninth Circuit Court of Appeals rightly upheld the federal recognition of the Native Molokinian Government even though it extends membership to adopted children without Native Molokinian blood. The OFA properly exercised its authority in recognizing the Native Molokinian Government, and the Native Molokinian Government has the power to determine membership as part of its inherent sovereign right to self-govern without the scrutiny of this Court. Accordingly, this Court should affirm the Secretary's decision to bring the 50,000 acres of land into trust for the Tribe.







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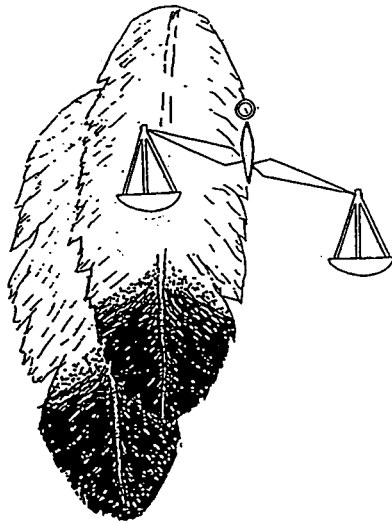
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