No. 16-572

In the Supreme Court of the United States

CITIZENS AGAINST RESERVATION SHOPPING, ET AL.,
PETITIONERS

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement set forth in the petition for a writ of certiorari remains accurate.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes—Continued: Page

Miscellaneous:

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The Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*), permits the Secretary of the Interior to take land into trust for "Indians," defined to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," 25 U.S.C. 479. In *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), this Court held that the word "now" refers to the date of the IRA's enactment in 1934, and thus that the statute "unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enact-

ed in 1934." *Id.* at 395. The Court explained that "Congress left no gap in 25 U.S.C. § 479 for the agency to fill" but instead limited the Secretary's authority by "explicitly and comprehensively defin[ing] the term" "Indian." *Id.* at 391.

Respondents, however, believe that the decision in *Carcieri* clarified nothing except the meaning of the word "now." In their view, all of the surrounding words in the statute are ambiguous and subject to interpretation by the Secretary. And the Secretary has exercised his supposed interpretive discretion to give himself broad authority to acquire land in trust, without any meaningful application of the word "now." In upholding the Secretary's interpretation, the court of appeals erred in two ways, and respondents' efforts to defend its decision are unavailing.

First, the court of appeals held that a tribe could be a "recognized Indian tribe now under Federal jurisdiction" even if it was not a recognized tribe in 1934. Second, it held that despite the traditional understanding that tribes are under the jurisdiction of the federal government when they occupy land set aside for them by the federal government, a tribe can have been "under Federal jurisdiction" in 1934 even if its members resided independently and on land that was fully subject to state jurisdiction. Considered separately, each of those decisions is incorrect; together, they largely eliminate the practical effect of this Court's decision in *Carcieri*.

The considerations that led the Court to grant review in *Carcieri*—among them, concerns about intrusion on state sovereignty, and a conflict with decisions construing the Secretary's authority more narrowly—

are equally present here. Rather than address those considerations, respondents focus on the merits, insisting that Section 479 is ambiguous. But it would have been strange for Congress to be clear about the word "now" and nothing else, and it would be stranger still for this Court to clarify the meaning of just that word, leaving the Secretary free to circumvent the Court's decision through creative reinterpretation of the other language. That is what the court of appeals allowed the Secretary to do, and its decision warrants this Court's review and correction.

A. A tribe cannot have been a "recognized Indian tribe now under Federal jurisdiction" in 1934 if it was not a "recognized Indian tribe" in 1934

In ordinary language, a "recognized Indian tribe now under Federal jurisdiction" means an "Indian tribe" that is both "recognized" and "under Federal jurisdiction" "now." In *Carcieri*, this Court held that "now" refers to the time of the statute's enactment. 555 U.S. at 395. But if a tribe was not a "recognized Indian tribe" in 1934, it cannot have been a "recognized Indian tribe now under Federal jurisdiction" at that time.

Respondents make little effort to reconcile their contrary reading with the statutory language; the most the Secretary is willing to say is that the text is "'susceptible' to the interpretation" he has adopted. Gov't Opp. 16 (quoting Pet. App. 13a). The Secretary argues (Opp. 15) that his interpretation entails reading "now" to modify only the phrase "under Federal jurisdiction," but that begs the question. All agree that "now" modifies "under Federal jurisdiction." The dis-

puted issue is *what* had to be "now under Federal jurisdiction"—any kind of "tribe," or only a "recognized Indian tribe"? While the language of Section 479 naturally implies the latter, the Secretary's theory requires reading the statute as though it said "any tribe that is a recognized Indian tribe and is now under Federal jurisdiction." To that theory, "[t]he short answer is that Congress did not write the statute that way." *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979).

1. Respondents rely heavily on the concurring opinions in *Carcieri*, noting (Gov't Opp. 15; Cowlitz Opp. 15) that the concurring Justices stated that "the statute imposes no time limit upon recognition." 555 U.S. at 400 (Souter, J., concurring in part and dissenting in part); accord *id.* at 398 (Breyer, J., concurring). That question was not before the Court in *Carcieri*, and the majority did not address it. Moreover, Justice Breyer emphasized that, in his view, "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time," observing that "[t]he Department later recognized some of those Tribes on grounds"—such as treaties and appropriations statutes—"that showed that it should have recognized them in 1934 even though it did not." *Id.* at 397-398; see *id.* at 399. That understanding of the statute does not support the Secretary's position.

Neither respondents nor the court of appeals identified any evidence equivalent to that discussed by Justice Breyer, nor a single fact about the Cowlitz that was unknown, overlooked, or unavailable in 1934. Instead, the facts on which the Secretary relied to ac-

quire land are the same facts that caused Secretary Work in 1924 to conclude that the Cowlitz had been "absorbed into the body politic" (C.A. App. 1364); that caused Commissioner Collier in 1933 to conclude that the "Cowlitz tribe * * * *is no longer in existence*" (*ibid.*); and that caused Commissioner Thompson in 1975 to conclude that "[f]rom [the 1850's] to the present, there has been no *continuous official* contact between the Federal Government and any tribal entity which it recognizes as the Cowlitz Tribe" (C.A. App. 1365). Such contemporaneous findings—that an Indian group has been absorbed into the body politic, that it does not exist as a tribe, and that it has had no contact with the federal government for over 100 years spanning 1934—negate any reasonable claim that the group was a recognized Indian tribe under federal jurisdiction in 1934. Cf. *Montoya* v. *United States*, 180 U.S. 261, 266 (1901) (defining a "tribe" as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory"); *Carcieri*, 555 U.S. at 399-400 (Breyer, J., concurring). The Secretary disregarded prior considered judgments without explanation other than to say that they were "rejected." Pet. App. 306a n.61. The reasoning of the *Carcieri* concurrences does not suggest that such an action is permissible.

2. As noted in the petition (at 13-14), the decision below causes the word "recognized" to serve no purpose: if the statute requires recognition only at the time of the land acquisition, there is no reason to require it at all, for the Secretary could hardly take land into trust for a group that he did not recognize as a

tribe. The Secretary says (Opp. 17) that "[t]he term 'recognized' * * * *can* be interpreted as speaking to the Secretary's duty, before granting services to Indians based solely on their status *as tribal members*, to ensure that the subject group exists as an 'Indian tribe.'" But the duty "to ensure that the subject group exists as an 'Indian tribe'" would be apparent if the statute merely said "Indian tribe," so the Secretary's argument fails to account for the presence of the word "recognized."

The Secretary is also unable to explain why the three definitions of "Indian" in Section 479 should vary in their temporal scope. The first definition, the one at issue here, requires that a recognized Indian tribe have been "under Federal jurisdiction" in 1934; the second definition includes "all persons who are descendants of such members who were, *on June 1, 1934*, residing within the *present* boundaries of any Indian reservation"; and the third applies to "persons of one-half or more Indian blood." 25 U.S.C. 479 (emphasis added). The second definition refers to those who qualified "at the time the Act was passed," and the third definition similarly describes a limited and ascertainable class. *United States* v. *John*, 437 U.S. 634, 650 (1978). But under the Secretary's reading, the first definition can be expanded by post-enactment administrative action. The Secretary's response (Opp. 18) is to say that his recognition authority "is hardly unlimited," which does nothing to explain the lack of parallelism among the different components of the definition. The Secretary also argues (Opp. 19) that he has authority to "correct mistakes about tribal status that existed on the date the IRA was enacted." As ex-

plained above, however, the Secretary's interpretation gives him a broad authority to acquire land for tribes recognized after 1934 whether or not their earlier non-recognition was the product of a "mistake."

3. Finally, the Secretary struggles (Opp. 19-21) to account for the agency's earlier inconsistent interpretations of Section 479. The Secretary points out (Opp. 19) that the earlier interpretations did not set out a formal "analysis of the statutory text or legislative history," but he concedes (Opp. 21) that as recently as 1994, the Assistant Secretary had "an understanding or assumption that recognition must have occurred by 1934." While an agency is permitted to change its mind, it must display an awareness that it is doing so, which the Secretary failed to do here. More importantly, the history of earlier administrative interpretations adopting petitioners' plain-language reading of Section 479 significantly weakens the Secretary's argument that his current interpretation is a permissible resolution of a statutory ambiguity.

B. A tribe was not "under Federal jurisdiction" in 1934 if it was not within Indian country

In 1934, it was understood that a tribe was "under Federal jurisdiction" if it had federally managed lands set aside for its benefit, or if it received funds generated from tribal lands that were under federal management. Because the Cowlitz were not the beneficiaries of such lands, and because they primarily lived on fee lands under state jurisdiction, they were not a recognized Indian tribe "under Federal jurisdiction." In accepting the Secretary's interpretation, the court of appeals departed from the understanding of the

statutory language that prevailed in 1934 and permitted the Secretary to weaken a restriction that was intended to limit his authority.

1. The Secretary asserts (Opp. 25) that the court of appeals did not address petitioners' argument about the meaning of "under Federal jurisdiction." That is incorrect. In the court of appeals, petitioners argued that "[t]he phrase 'under Federal jurisdiction' is unambiguous," Pet. C.A. Br. 19, explaining that, in 1934, "the government viewed tribes living in 'Indian country' as subject to Federal jurisdiction," *id.* at 20. The court of appeals rejected petitioners' argument by stating that "[a]ppellants urge that the phrase, 'under Federal jurisdiction' is unambiguous, but we disagree." Pet. App. 21a. The court proceeded to discuss the statutory text and history, nowhere suggesting that petitioners had forfeited the argument. *Id.* at 21a-22a. The issue is therefore properly before this Court.

2. Noting that other statutes refer to "Indian country" and that other provisions of the IRA refer to "reservations," a particular type of Indian country, the Secretary suggests (Opp. 26-27) that "under Federal jurisdiction" must describe something different. But "Indian country" had no statutory definition in 1934, making it an unlikely congressional choice. See *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527-528 (1998). Nor did the United States supervise tribes on reservations only, making the use of "reservation" unduly restrictive. Congress was well aware of the complexity of the federal relationship with Indian tribes, having repeatedly directed the compilation of the treaties, statutes, Executive orders, and other

matters relating to Indian affairs. See, *e.g.*, 4 Charles J. Kappler, *Indian Affairs: Laws & Treaties*, S. Doc. No. 53, 70th Cong., 1st Sess. v (1929). It understood that tribes residing on reserves, pueblos, rancherias, dependent Indian communities, or allotments, or having other trust property, were under federal jurisdiction. And it contemplated that formal legal authorities—not ambiguous accounts of occasional oversight by agency officials, as the Secretary now suggests—would define the federal government's jurisdictional relationship with tribes.

3. Respondents contend (Gov't Opp. 27; Cowlitz Opp. 23-24) that applying the traditional understanding of "under Federal jurisdiction" would frustrate the statutory purpose of acquiring lands for Indians who had been left landless by allotment. That is incorrect. The statute permits the Secretary to acquire lands for individual Indians who are descendants of persons who were "residing within the present boundaries of any Indian reservation" (even a reservation of a different tribe), as well as for any "persons of one-half or more Indian blood" (wherever they resided). 25 U.S.C. 479. And it permits the Secretary to acquire land for members of recognized Indian tribes with reservations in 1934, even if those reservations were almost completely allotted.

The statute does not, however, authorize the Secretary to acquire land for tribes that were newly acknowledged through an administrative process that did not exist in 1934. When it enacted the IRA, Congress could hardly have anticipated the administrative acknowledgment regulations that were promulgated four decades later. 43 Fed. Reg. 39,361 (Sept. 5, 1978).

Before 1871, tribes were recognized under federal treaties; after 1871, the President could no longer "acknowledge[] or recognize[]" tribes by treaty, but only under legislation. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (25 U.S.C. 71). Indians who were not living on federal lands were deemed to have assimilated into society to the point that they no longer constituted a tribe. In the IRA's land-restoration provisions, Congress did not seek to undo that process where it had already occurred.

4. The Cowlitz Tribe argues (Opp. 25-26) that if "under Federal jurisdiction" were understood to refer to tribes living in Indian country, then the "initial reservation" and "restored lands" provisions of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2719(b)(1)(B)(ii) and (iii), would be ineffective because those provisions contemplate that tribes lacking trust lands at the time of IGRA's enactment in 1988 can conduct gaming on certain later-acquired lands. That argument overlooks that neither the restoration of lands nor the creation of an initial reservation for a newly acknowledged tribe necessarily requires action under the IRA. Congress routinely enacts recognition statutes and restoration statutes that provide for land acquisition, and in some cases, it has expressly extended the IRA to restored tribes.* Such statutes

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* See, *e.g.*, Puyallup Tribe of Indians Settlement Act of 1989, Pub. L. No. 101-41, 103 Stat. 83 (providing for acquisition of land in trust); Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, 101 Stat. 1556 (same); Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 (same); see also Ponca Restoration Act, Pub. L. No. 101-484, § 3, 104

permit IGRA to be given effect without recourse to Section 479.

C. The questions presented warrant review

Respondents make little effort to deny the importance of the questions presented. The decision below allows the Secretary to circumvent the limitations on his authority recognized in *Carcieri*. Like *Carcieri* itself, it presents "jurisdictional issues of enormous import" that warrant this Court's review. Pet. at 2, *Carcieri*, *supra* (No. 07-526).

1. As explained in the petition (at 16-19), the court of appeals' holding that a tribe need not have been recognized in 1934 to qualify as a "recognized Indian tribe now under Federal jurisdiction" conflicts with this Court's decision in *John*, with the decision of the Fifth Circuit in *United States* v. *State Tax Commission*, 505 F.2d 633 (1974), and with the decision of the Ninth Circuit in *Kahawaiolaa* v. *Norton*, 386 F.3d 1271 (2004), cert. denied, 545 U.S. 1114 (2005). Respondents say (Gov't Opp. 22-24; Cowlitz Opp. 8-10) that none of those cases considered the Secretary's interpretation of his authority to take land into trust. That may be true, but all of the cases construed Section 479, and they did so in a manner that is irreconcilable with the Secretary's current interpretation. And respondents do not address the point that the conflict with those decisions is precisely the same as that created by the First Circuit's decision in *Carcieri*. Pet. at 16-17, *Carcieri*, *supra* (No. 07-526). This Court grant-

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Stat. 1167 (extending IRA to tribe); Coquille Restoration Act, Pub. L. No. 101-42, § 3(e), 103 Stat. 92 (same).

ed certiorari to resolve that conflict, and review is equally appropriate here.

2. The scope of the Secretary's authority under Section 479 is of great importance to tribes and to state and local governments. See Br. of *Amici Curiae* California Tribal Business Alliance, et al. 18-22; Br. of *Amici Curiae* California State Association of Counties, et al. 22-25. The issue has taken on added urgency as a result of the Secretary's abandonment of his former policy of waiting for the completion of litigation before taking land into trust. 78 Fed. Reg. 67,928 (Nov. 13, 2013). Even if a court ultimately determines that land should not have been taken into trust, tribal sovereign immunity means that undoing the effects of the Secretary's decision may be impossible—for example, a tribe could have engaged in construction that would otherwise have been prohibited by state environmental laws. Respondents quibble about the area of land likely to be affected, arguing that "the majority of trust acquisitions are not contested." Gov't Opp. 30 n.4; see Cowlitz Opp. 12. But many plainly *are* contested, which is why it was necessary for this Court to consider the scope of the Secretary's authority in *Carcieri*. The Court should grant review here to restore the limits recognized in that decision.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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