No.

In the Supreme Court of the United States

CITIZENS AGAINST RESERVATION SHOPPING, ET AL.,
PETITIONERS

v.

SALLY JEWELL, 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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, permits the Secretary of the Interior to take land into trust for "Indians," thereby restricting the jurisdiction and sovereignty of the State where the land is located. 25 U.S.C. 465. The statute defines "Indians" 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 term 'now under Federal jurisdiction' in §479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Id.* at 395.

The court of appeals held that the Secretary of the Interior may take land into trust for a tribe even if that tribe was not recognized in 1934 and even if its members did not reside in Indian country. The questions presented are as follows:

1. Whether, to have been a "recognized Indian tribe now under Federal jurisdiction" in 1934, a tribe must have been "recognized" at that time.

2. Whether, to have been "under Federal jurisdiction" in 1934, a tribe must have been located in Indian country—that is, on land over which the United States exercised jurisdiction to the exclusion of State jurisdiction.

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs and appellants below, are Citizens Against Reservation Shopping, Al Alexanderson, Greg and Susan Gilbert, Dragonslayer, Inc., and Michels Development, LLC.

Respondents who were defendants and appellees below are Sally Jewell, in her official capacity as Secretary of the Department of the Interior; Kevin Washburn, in his official capacity as Assistant Secretary–Indian Affairs of the Department of the Interior; Stanley M. Speaks, in his official capacity as Regional Director, Northwest Region, Bureau of Indian Affairs; the Department of the Interior; the Bureau of Indian Affairs; the National Indian Gaming Commission; and Jonodev Osceola Chaudhuri, in his official capacity as Chair of the National Indian Gaming Commission. The Cowlitz Indian Tribe was an intervenor and appellee below and is a respondent here. The Confederated Tribes of the Grand Ronde Community of Oregon; Clark County, Washington; and the City of Vancouver, Washington were plaintiffs and appellants below and are respondents here.

RULE 29.6 STATEMENT

Citizens Against Reservation Shopping, Dragonslayer, Inc., and Michels Development, LLC each represent that they have no parent corporation and that no publicly held corporation owns 10% or more of their stock.

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Citizens Against Reservation Shopping, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-35a) is reported at 830 F.3d 552. The opinion of the district court (App., *infra*, 36a-109a) is reported at 75 F. Supp. 3d 387. The record of decision of the Secretary of the Interior (App., *infra*, 110a-412a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2016. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

25 U.S.C. 479 provides in pertinent part:

> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

INTRODUCTION

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," which it defines to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. 479.[1] In 2007, the First Circuit upheld the Secretary's decision to take land into trust for the Narragansett Tribe of Rhode Island even though that Tribe had not been under federal jurisdiction when the IRA was enacted in 1934. *Carcieri* v. *Kempthorne*, 497 F.3d 15 (1st Cir.

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[1] All statutory references are to the 2012 edition of the United States Code. In the next edition of the United States Code, the Indian Reorganization Act will be reclassified as 25 U.S.C. 5101 *et seq.*, and Section 479 will appear at 25 U.S.C. 5129.

2007) (en banc), rev'd, 555 U.S. 379 (2009). The State of Rhode Island petitioned for a writ of certiorari, arguing that the case presented "jurisdictional issues of enormous import" and that the First Circuit's decision conflicted with decisions of the Fifth and Ninth Circuits, as well as with *United States* v. *John*, 437 U.S. 634 (1978), in which this Court observed that the IRA "defined 'Indians' * * * as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction.'" *Ibid.* (quoting 25 U.S.C. 479) (brackets in original). Pet. at 2, 13-21, *Carcieri* v. *Salazar*, 555 U.S. 379 (2009) (No. 07-526).

This Court granted certiorari and reversed the First Circuit. It held that the word "now" refers to the time of the IRA's enactment, and thus that "the term 'now under Federal jurisdiction' in §479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri* v. *Salazar*, 555 U.S. 379, 395 (2009). The Court explained that "Congress left no gap in 25 U.S.C. §479 for the agency to fill," but that it had limited the Secretary's authority because it had "explicitly and comprehensively defined the term" "Indian." *Id.* at 391.

Constrained by this Court's interpretation of the word "now," the Secretary has nevertheless largely eliminated the practical effect of *Carcieri* by reinterpreting the surrounding words in the statute so as to remove the temporal limitation that this Court identified. Specifically, she has determined (1) that a tribe need not have been "recognized" in 1934 to qualify as a "recognized Indian tribe now under Federal jurisdiction" and (2) that notwithstanding the traditional un-

derstanding that tribes are under the jurisdiction of the federal government when they occupy land set aside for them, a tribe can have been "under Federal jurisdiction" in 1934 even if its members resided independently on land that was fully subject to state jurisdiction.

In the decision below, the court of appeals upheld the Secretary's new interpretation of the IRA. Its decision gives rise—again—to the same conflict that led the Court to grant review in *Carcieri*. And it permits the Secretary to disrupt the jurisdictional balance among the federal government, States, and tribes throughout the country, without regard to the limitations that Congress imposed on that authority. The decision warrants this Court's review and correction.

STATEMENT

1. In 1934, Congress enacted the IRA, significantly changing federal policy toward Indians. Before 1934, the federal government had pursued a policy established by the Indian General Allotment Act, ch. 119, 24 Stat. 388, which sought "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large," *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992). The IRA ended the allotment policy by prohibiting further allotments of reservation land. 25 U.S.C. 461.

In order to provide land for Indians who had been left landless by the allotment policy, the IRA also authorized the Secretary of the Interior "to acquire * * * any interest in lands * * * for the purpose of providing land for Indians." 25 U.S.C. 465. When the Secretary exercises that authority, she takes title to

lands "in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." *Ibid.* The statute provides that land that has been taken into trust "shall be exempt from State and local taxation." *Ibid.* Land held in trust for Indians is "Indian country" for purposes of federal statutes and regulations. *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 529-531 (1998). By regulation, the Secretary has declared trust lands to be exempt from state and local property laws. 25 C.F.R. 1.4; see also *De Coteau* v. *District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 428 (1975).

The IRA's benefits are restricted to those who meet the statutory definition of "Indian." Under 25 U.S.C. 479, the term "Indian" includes (1) "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," (2) "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and (3) "all other persons of one-half or more Indian blood."

This case involves the IRA's first definition of "Indian." In considering that definition in 2009, this Court held that "the term 'now under Federal jurisdiction' in §479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri*, 555 U.S. at 395. In *Carcieri*, this Court concluded that the Secretary did not have authority to acquire land in trust for the Narragansett Tribe because—although that tribe was recognized in 1983—it was "neither federally recognized nor under the jurisdiction of the federal government" in 1934. *Id.* at 395-396.

2. The Cowlitz Indian Tribe has historically resided in western Washington. In 1855, the United States entered into treaty negotiations with several Washington tribes, including the Cowlitz. App., *infra*, 326a-327a. Those negotiations ultimately failed, however, and in 1863, President Lincoln opened Cowlitz lands to non-Indian settlement. C.A. App. 1343. Thereafter, the Tribe ceased to be recognized as a governmental entity by the federal government, and in 1933, Commissioner of Indian Affairs John Collier stated that the Cowlitz were "no longer in existence as a communal entity." *Ibid.* The Cowlitz Tribe was not included on the Secretary's list of tribes eligible to vote on the application of the IRA when the statute was enacted, and it did not do so.

In 2000, however, the Secretary formally recognized the Cowlitz as a tribe under the federal acknowledgement regulations. 65 Fed. Reg. 8436 (Feb. 18, 2000); see 25 C.F.R. Part 83. In January 2002, the Secretary issued a reconsidered final determination reaffirming the 2000 recognition decision. 67 Fed. Reg. 607 (Jan. 4, 2002). The Cowlitz's acknowledgement became effective at that time. App., *infra*, 6a n.4.

On the same day that the Cowlitz's acknowledgment became effective, the Tribe asked the Secretary to take trust title to a parcel of land comprising approximately 152 acres in Clark County, Washington, near the city of La Center. The parcel is about 24 miles from the Tribe's headquarters in Longview, Washington, but it is near Interstate 5 and is only 30 minutes from Portland, Oregon. App., *infra*, 6a.

While the trust-acquisition request was pending, the Tribe asked the National Indian Gaming Commission (NIGC) to determine that the parcel was eligible for gaming. App., *infra*, 7a. The Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, generally prohibits gaming on lands acquired after 1988, but it contains an exception for the "restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. 2719(b)(1)(B)(iii). The NIGC granted the request in November 2005, concluding that the Tribe qualified for the restored-lands exception because "the historical evidence establishes that the United States did not recognize the Cowlitz Tribe as a governmental entity from at least the early 1900s until 2002." C.A. App. 1342.

In April 2013, the Secretary—acting through the Assistant Secretary–Indian Affairs—issued a final decision approving the Cowlitz's application to take the land into trust. App., *infra*, 110a-412a. The Secretary concluded that she was authorized to take land into trust for the Cowlitz because the Tribe was both a "recognized Indian tribe" and "under Federal jurisdiction" within the meaning of the IRA. App., *infra*, 304a-340a.

The Secretary first determined that Section 479 does not require a tribe to have been "recognized" in 1934. App., *infra*, 308a. She reasoned that "the word 'now' modifies only the phrase 'under federal jurisdiction'; it does not modify the phrase 'recognized tribe.'" *Ibid.* For that reason, the Secretary concluded, "'[t]he IRA imposes no time limit upon recognition,'" and "the tribe need only be 'recognized' as of the time the Department acquires the land into trust, which clearly

would be the case here." *Ibid.* (quoting *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring)).

Next, acknowledging that, as interpreted by this Court in *Carcieri*, the statute requires a tribe to have been "under Federal jurisdiction" in 1934, the Secretary stated that determining whether a tribe was "under Federal jurisdiction" in 1934 requires a two-part inquiry. App., *infra*, 286a, 321a-323a. "The first question," in the Secretary's view, is whether

> the United States had, in 1934 or some point in the tribe's history prior to 1934, taken an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members—that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.

Id. at 321a. The second question is "whether the tribe's jurisdictional status remained intact in 1934." *Id.* at 322a.

Here, the Secretary concluded, both parts of that test were satisfied. The Secretary found that treaty negotiations with the Cowlitz in the 1850s, even though they "did not result in a treaty," "clearly reflect the existence of a relationship with the Tribe (or its predecessors)" and thus "constitute[] sufficient evidence of federal jurisdiction as of at least 1855." App., *infra*, 327a. And "the historical record * * * provides no clear evidence that the United States terminated the Tribe's jurisdictional status, or that the Tribe otherwise lost that status at any point between the mid-1850s and 1934." *Ibid.*

3. Several parties, including petitioners—a community organization, nearby homeowners, and competing card rooms—challenged the Secretary's decision in the United States District Court for the District of Columbia, invoking that court's jurisdiction under 28 U.S.C. 1331. The district court granted summary judgment to the Secretary. App., *infra*, 36a-109a. The court held that "the term 'recognized' does not unambiguously refer to recognition as of 1934, but rather is an ambiguous statutory term," and it therefore deferred to the Secretary's interpretation that a tribe need only be recognized at the time of the trust acquisition. *Id.* at 57a. The court likewise held that the phrase "now under Federal jurisdiction" is ambiguous, and it deferred to the Secretary's interpretation. *Id.* at 63a. It concluded that the Secretary had reasonably relied on "the totality of evidence [which] tipped in favor of finding that the Cowlitz Tribe was under federal jurisdiction." *Id.* at 73a.

While an appeal of the district court's decision was pending, the Secretary took title to the land in trust for the Tribe. See 80 Fed. Reg. 70,250 (Nov. 13, 2015). The dispute remained live, however, because a court has authority to order land taken out of trust if it determines that the trust acquisition was unlawful. See *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199 (2012).

4. The court of appeals affirmed. App., *infra*, 1a-35a. The court explained that "[i]f 'now under Federal jurisdiction' only modifies 'tribe,' there is no temporal limitation on when recognition must occur," but "[i]f the prepositional phrase instead modifies 'recognized tribe,' recognition must have already happened as of

1934." *Id.* at 13a. Applying the framework of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the court held that "'recognized' is ambiguous and susceptible to either interpretation." App., *infra*, 13a. It then concluded that the Secretary's interpretation was reasonable. *Id.* at 19a.

Next, the court of appeals held that the phrase "under Federal jurisdiction" is also ambiguous. App., *infra*, 21a. Observing that "'jurisdiction' is a term of extraordinary breadth," the court reasoned that "due to Congress's plenary powers, every Indian tribe could be considered 'under Federal jurisdiction' in some sense." *Id.* at 21a-22a. The court concluded that the Secretary's two-part test was reasonable, adding that "[i]t makes sense to take treaty negotiations into account, as one of several factors reflecting authority over a tribe, even if they did not ultimately produce agreement." *Id.* at 22a.

REASONS FOR GRANTING THE PETITION

A. The court of appeals erred, and created a circuit conflict, in holding that a tribe could have been a "recognized Indian tribe now under Federal jurisdiction" if it was not recognized in 1934

The court of appeals held that the "temporally limited prepositional phrase, 'now under Federal jurisdiction'" can be read to modify only "tribe," so that "there is no temporal limitation on when recognition must occur." App., *infra*, 12a-13a. It therefore accepted the Secretary's position that as long as a tribe was "under Federal jurisdiction" in 1934, "the tribe need only be 'recognized' as of the time the Department acquires the land into trust." *Id.* at 308a. That

interpretation is contrary to the statutory text, congressional purpose, and prior agency interpretations. By deferring to it, the decision below creates a conflict with this Court's decision in *United States* v. *John*, 437 U.S. 634 (1978), and with decisions of the Fifth Circuit and Ninth Circuit—the same conflict that led this Court to grant review in *Carcieri*.

1. In ordinary usage, the phrase "recognized Indian tribe now under Federal jurisdiction" refers to an Indian tribe that is both "recognized" and "under Federal jurisdiction" "now"—that is, in 1934. If a tribe was not a "recognized Indian tribe" in 1934, it cannot have been a "recognized Indian tribe now under Federal jurisdiction" in 1934. The Secretary's contrary reading necessarily rests on the idea that the phrase "now under Federal jurisdiction" modifies "tribe," but not "recognized Indian tribe." Thus, she reads the statute as though it said, "any Indian tribe that is recognized and is now under Federal jurisdiction." Although the court of appeals accepted that interpretation, App., *infra*, 13a, 19a-20a, its reasoning ignores the statutory context.

In an effort to identify ambiguity in the statute, the court of appeals cited this Court's decision in *Regions Hospital* v. *Shalala*, 522 U.S. 448 (1998), which construed a provision of the Medicare statute providing for hospital reimbursement rates to reflect "the average amount recognized as reasonable under this subchapter for direct graduate medical education costs." 42 U.S.C. 1395ww(h)(2)(A); see App., *infra*, 13a. The Court in *Regions Hospital* observed that "the phrase 'recognized as reasonable' might mean costs the Secretary (1) *has* recognized as reasonable * * * or (2) *will*

recognize as reasonable." 522 U.S. at 458. The analogy between this case and *Regions Hospital* is inapt because, unlike the phrase "recognized as reasonable," neither "Indian" nor "recognized" is an ordinary adjective that can be separated from the noun it modifies ("tribe"). Instead, the phrase "recognized Indian tribe" is a well-established term of art in Indian law, so it is properly regarded as a unit, and "now under Federal jurisdiction" necessarily applies to all of it.

Had Congress wished to enact the version of the statute contemplated by the Secretary, it could simply have referred to "any *now or hereafter* recognized Indian tribe now under Federal jurisdiction." It used just that phrasing elsewhere in the IRA in order to allow the Secretary to take future developments into account. See, *e.g.*, 25 U.S.C. 472 (referring to "Indians who may be appointed * * * to the various positions maintained, now or hereafter, by the Indian Office"); 25 U.S.C. 468 (referring to "the geographic boundaries of any Indian reservation now existing or established hereafter"). As a rule, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). In *Carcieri*, this Court relied on that canon—and the same contrasting provisions of the IRA—in construing the term "now under Federal jurisdiction." *Carcieri*, 555 U.S. at 389-390. That reasoning applies equally here.

The structure of the statute further confirms that recognition is to be determined as of 1934 because all three definitions of "Indian" in Section 479 reflect the same temporal limitation. As this Court held in *Carcieri*, the first definition requires that a tribe have been "under Federal jurisdiction" in 1934. 555 U.S. at 395. Similarly, 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." 25 U.S.C. 479 (emphasis added); see *John*, 437 U.S. at 650 (the IRA's second definition includes members' "descendants who then were residing on any Indian reservation"). And the third definition of "Indian"—which applies to "persons of one-half or more Indian blood"—is likewise restricted to those who qualified "at the time the Act was passed." *Ibid.* By allowing the scope of the first definition to vary based on post-1934 events, the decision below ignores the principle that related parts of the statute should be construed similarly. See *Beecham* v. *United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.").

2. The decision below is also flawed because it causes the word "recognized" to serve no purpose. If the statute requires only that a tribe be "recognized" at the time of the trust acquisition, not in 1934, then there is no reason for it to include the word "recognized" at all. Under any definition of "recognize," the Secretary could not possibly acquire trust land for a tribe that she did not recognize as a tribe. To the contrary, taking land into trust would itself be an act of

recognition. The court of appeals' interpretation is therefore at odds with the "'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)).

By contrast, reading "recognized" to refer to recognition in 1934 would advance the purposes behind the limited definition of "Indian" in Section 479. Congress enacted the IRA to "repudiate[] the practice of allotment," which resulted in the loss of millions of acres of reservation land. *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 650 n.1 (2001). Tribes that were not recognized and did not have a reservation—such as the Cowlitz—were not adversely affected by allotment and do not fall within the statute's remedial purpose.

Because Congress intended to limit the IRA's beneficiaries, it enacted only "three discrete definitions" of "Indian." *Carcieri*, 555 U.S. at 391. Representative Howard, the chief House sponsor of the bill, explained that "the line must be drawn somewhere" or else "the Government would take on impossible financial burdens in extending wardship over persons with a minor fraction of Indian blood." 78 Cong. Rec. 11,732 (1934). Looking to recognition as of 1934 would further that purpose by restricting the beneficiaries of the statute to a fixed and ascertainable set.

3. The court of appeals also failed to give adequate weight to the Secretary's earlier inconsistent interpretations of the statute. Although an agency's inter-

pretation of a statute is not automatically undeserving of deference merely because it reflects a changed position, "the agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125-2126 (2016) (quoting *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). The Secretary failed to do so here.

In 1976, the Secretary explained to the Stillaguamish Tribe that—based on the Solicitor's analysis of the statutory language and legislative history—the Department did not appear to have authority to "take land in trust under 25 U.S.C. § 465 for *tribes* that were not administratively recognized on the date of the act, (June 18, 1934)." C.A. App. 4632. The court of appeals pointed out that the Secretary reconsidered that decision in 1980, App., *infra*, 17a, but at a minimum, that change demonstrates that the Secretary has not interpreted Section 479 consistently.

In addition, in its published decision in *Brown* v. *Commissioner of Indian Affairs*, 8 I.B.I.A. 183 (1980), the Interior Board of Indian Appeals rejected a claim by a Cowlitz member that he qualified as an "Indian" under the first definition in Section 479. After quoting Section 479, the Board stated that it did "not consider it necessary to dwell on the import of the phrase [now under Federal jurisdiction]" because, as a Cowlitz member, the claimant could not show that he "was a member of a federally recognized tribe on June 18, 1934." *Id.* at 188. The court of appeals suggested that the Board "did not offer a contrary interpretation of 'recognized,'" App., *infra*, 18a, but the necessary

premise of the Board's decision was that recognition must have existed as of 1934.

Finally, in 1994, the Assistant Secretary—in the course of describing the difference between historic and non-historic tribes in a letter to the House Committee on Natural Resources—explained that Section 479 "defined 'Indians' * * * as 'all persons of Indian descent who are members of any recognized [in 1934] tribe under Federal jurisdiction.'" C.A. App. 4636 (brackets in original). The court of appeals stated that it "fail[ed] to glean from those brackets or the letter any interpretation of the statute." App., *infra*, 19a. In fact, the placement of the brackets unambiguously reflects a view of the statute as requiring recognition as of 1934.

All of those statements show that the Secretary has not maintained a consistent interpretation of Section 479. Tellingly, the Secretary did not cite any prior administrative determinations supporting her interpretation but instead relied solely on Justice Breyer's concurring opinion in *Carcieri*. App., *infra*, 308a. But that opinion simply stated, without elaboration, that "[t]he statute * * * imposes no time limit upon recognition." 555 U.S. at 398. That issue was not before the Court, and the other Justices in the majority did not address it.

4. Instead, the only time this Court addressed this question, it concluded that a tribe had to be recognized in 1934. In *John*, the Court held that the Choctaw Indians' Mississippi reservation satisfied the federal statutory definition of "Indian country" because, although the Choctaws failed to meet the first definition of "Indian," they qualified under the third definition

(one-half or more Indian blood). 437 U.S. at 650. With respect to the first definition, the Court explained that "[t]he 1934 Act defined 'Indians' * * * as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction.'" *Ibid.* (quoting 25 U.S.C. 479) (brackets in original). The bracketed phrase "in 1934" reflects the Court's understanding that the word "now" restricts the operation of the IRA to tribes that were "recognized" in 1934.

While the Court's holding in *John* did not turn on whether the Choctaws were "recognized" and "under federal jurisdiction" in 1934, the Court clearly considered the Choctaws' failure to satisfy those conditions in its analysis. The Fifth Circuit had relied on precisely that fact to hold that the reservation was not "Indian country." *United States* v. *John*, 560 F.2d 1202, 1213 (5th Cir. 1977), rev'd, 437 U.S. 634. Thus, the issue whether Section 479 is limited to tribes that were "recognized" and "under Federal jurisdiction" in 1934 was before the Court in *John*, even though the Court ultimately relied on the alternative "half-blood" definition to conclude that the Choctaws were covered by the IRA.

The court of appeals chose to disregard *John* because this Court did not cite that decision in *Carcieri*. App., *infra*, 19a. In so doing, the court of appeals overlooked the rule that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

The decision below conflicts with *John* in the same way as the First Circuit's decision that this Court reviewed in *Carcieri*. See Pet. at 15-16, *Carcieri*, *supra* (No. 07-526).

The decision below is similarly in conflict with decisions of the Fifth and Ninth Circuits. In *United States* v. *State Tax Commission*, 505 F.2d 633 (5th Cir. 1974), the Fifth Circuit considered whether the State of Mississippi had authority to collect sales tax from an entity created by the Mississippi Band of Choctaw Indians. The court stated that the question "boil[ed] down to whether the Mississippi Choctaws became a tribe and live on a reservation as the result of the [IRA] and the Proclamation of the Department of the Interior issued in 1944." *Id.* at 642. The court held that even though the Secretary "recognize[d] the[ir] tribal organization" in 1944, the Choctaw were not an Indian tribe within the meaning of the IRA. *Id.* at 642-643. It reasoned that "[t]he language of Section [479] positively dictates that *tribal status is to be determined as of June 1934*, as indicated by the words 'any recognized Indian tribe now under Federal jurisdiction' and the additional language to like effect." *Id.* at 642 (emphasis added). The Choctaws, however, "did not, in June, 1934 fall within the status prescribed by the Act." *Ibid.*

Likewise, in *Kahawaiolaa* v. *Norton*, 386 F.3d 1271 (9th Cir. 2004), cert. denied, 545 U.S. 1114 (2005), the Ninth Circuit upheld the exclusion of Native Hawaiians from the Secretary's tribal-recognition regulations. In so holding, the court observed that the IRA, "by its terms, * * * did not include any Native Hawaiian group" because "[t]here were no recognized

Hawaiian Indian tribes under federal jurisdiction in 1934, nor were there any reservations in Hawaii." *Id.* at 1280.

Both *State Tax Commission* and *Kahawaiolaa* reflect an understanding of the temporal scope of the IRA that is incompatible with the decision below. The State of Rhode Island identified precisely the same conflict in *Carcieri*. See Pet. at 16-17, *Carcieri*, *supra* (No. 07-526). This Court resolved the conflict, but the decision below has recreated it, and it again warrants this Court's resolution.

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

In *Carcieri*, this Court construed the IRA according to the statute's "ordinary meaning * * * when [it] was enacted." 555 U.S. at 388. The court below did just the opposite, characterizing administrative findings that "the Cowlitz were not a 'reservation tribe under Federal jurisdiction or under direct Federal supervision'" as reflecting "a narrower and dated understanding that equated land and direct supervision with jurisdiction." App., *infra*, 25a (quoting C.A. App. 1076). But it is precisely the "dated" understanding of the IRA that the Court adopted in *Carcieri*.

Congress and the courts have consistently linked federal jurisdiction over tribes to superintendence of federal lands set aside for their benefit. At the time the IRA was enacted, it was understood that a tribe was "under Federal jurisdiction" if it resided on lands set aside by treaty, statute, executive order, or grant and managed by the federal government. Tribes like

the Cowlitz, whose members lived on fee lands under state jurisdiction, were not "under Federal jurisdiction." The court below disregarded this foundational principle of Indian law.

1. In 1934, a tribe was understood to be "under Federal jurisdiction" when living on land the federal government had set aside for it

The view that individual Indians living under state jurisdiction could constitute a tribe "under Federal jurisdiction" is irreconcilable with this Court's precedent. Traditionally, "[t]he control by Congress of tribal lands has been one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs." Felix S. Cohen, *Handbook of Federal Indian Law* 94 (1942). In 1894, this Court explained that "[t]he Indians of the country are considered as the wards of the nation, and whenever the United States set apart any land of their own as an Indian reservation, * * * they have full authority to pass such laws and authorize such measures as may be necessary." *United States* v. *Thomas*, 151 U.S. 577, 585 (1894). Thus, when land "has been validly set apart for the use of the Indians," "[i]t is under the superintendence of the government." *United States* v. *McGowan*, 302 U.S. 535, 539 (1938). Within that context, "[t]he government has authority to enact regulations and protective laws respecting this territory." *Ibid.*; accord *United States* v. *Pelican*, 232 U.S. 442, 447 (1914) (Lands "held in trust by the United States" are "under the jurisdiction and control of Congress for all governmental purposes relating to the guardianship and protection of the Indians.").

Federal jurisdiction has historically turned on the existence of "Indian country." For most purposes, land must be set aside and supervised by the United States for the United States—and a tribe—to have primary civil and criminal jurisdiction. For example, in *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), this Court held that the Native Village of Venetie could not impose a business tax on a State contractor operating on its land because the land was not "Indian country" under 18 U.S.C. 1151. The Court explained that Section 1151 codifies two requirements that the Court had generally required to identify "Indian country": first, the lands "must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." 522 U.S. at 527. The first requirement "ensures that the land in question is occupied by an 'Indian community,'" while the second "guarantees that the Indian community is sufficiently 'dependent' on the Federal Government" for the federal government and the Indians to exercise primary jurisdiction. 522 U.S. at 531.[2]

These principles were well understood at the time the IRA was enacted, and courts recognized that

[2] Even in the case of the New Mexico Pueblo Indians, the power of the United States to exercise jurisdiction depended on the status of their lands. See *United States* v. *Sandoval*, 231 U.S. 28 (1913). Although the Pueblos held their lands in fee, their title was held communally. *Id.* at 47-48. In addition, Congress enacted legislation with respect to their lands. *Id.* at 39; see New Mexico Enabling Act, § 2, ch. 310, 36 Stat. 560 (defining "Indian country" to "the Pueblo Indians of New Mexico and the lands now owned or occupied by them").

tribes are under the jurisdiction of the federal government when they live on lands set aside and supervised by the federal government—that is, when they reside in "Indian country." See, *e.g.*, *Ex parte Pero*, 99 F.2d 28, 32 (7th Cir. 1938) (considering the status of "a reservation Indian" and observing that "if he was allotted land under a trust patent * * * it is clear that he is still under the exclusive jurisdiction of the United States"), cert. denied, 306 U.S. 643 (1939); see also *United States* v. *Unzueta*, 35 F.2d 750, 752 (D. Neb. 1929) (stating that an "Indian reservation [is] Indian country and under federal jurisdiction for the purpose of carrying out federal obligations towards the Indians resident there"), rev'd on other grounds, 281 U.S. 138 (1930); *United States* v. *Yakima Cnty.*, 274 F. 115, 117 (E.D. Wash. 1921) (noting that "the property of Indians who have not severed their tribal relations remains under the absolute jurisdiction and control of the United States"). Outside of "Indian country," by contrast, Indians are subject to state jurisdiction. *Dick* v. *United States*, 208 U.S. 340, 352 (1908) (In a "body of territory in which, at the time, the Indian title had been extinguished, * * * the jurisdiction of the state, for all purposes of government, was full and complete."); accord, *e.g.*, *State* v. *Big Sheep*, 243 P. 1067, 1071 (Mont. 1926) ("The United States did not attempt, nor has it ever attempted, to punish its wards for crimes committed within the limits of a state but outside a reservation."); *Pablo* v. *People*, 46 P. 636 (Colo. 1896) (upholding State jurisdiction over murder of Indian by Indian outside of reservation).

That understanding was also reflected in contemporaneous statutes. Two years before Congress en-

acted the IRA, for example, it amended the Major Crimes Act to apply "on and within any Indian reservation under the jurisdiction of the United States Government." Act of June 28, 1932, ch. 284, 47 Stat. 336; see also Rev. Stat. 2145 ("[T]he general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States * * * shall extend to the Indian country."). The idea that "jurisdiction" over tribes was tied to land was considered self-evident, and it was in that sense that Congress included the phrase "now under Federal jurisdiction" in the IRA.

2. The court of appeals' efforts to identify ambiguity in the statute are unavailing

In a one paragraph analysis, the court of appeals "easily" concluded that the phrase "under Federal jurisdiction" was ambiguous because (a) the term "jurisdiction" has "extraordinary breadth"; (b) "Congress nowhere in the statute gave further meaning to these words," and "the legislative history provides no further clues"; and (c) the Department of the Interior suggested, in 1934, that the meaning of the phrase was unclear. App., *infra*, 21a-22a. That reasoning is flawed.

a. In explaining its view that "'jurisdiction' is a term of extraordinary breadth," the court of appeals observed that "due to Congress's plenary powers, every Indian tribe could be considered 'under Federal jurisdiction' in some sense." App., *infra*, 21a-22a. That reasoning overlooks that "[a]mbiguity is a creature not of definitional possibilities but of statutory

context." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); see *Carcieri*, 555 U.S. at 391 (observing that "the susceptibility of [a word] to alternative meanings 'does not render the word . . . whenever it is used, ambiguous,' particularly where 'all but one of the meanings is ordinarily eliminated by context.'") (quoting *Deal* v. *United States*, 508 U.S. 129, 131-132 (1993)).

Interpreting "jurisdiction" in Section 479 as a reference to the federal government's "plenary power" would make the reference to tribes that are "under Federal jurisdiction" meaningless because it would do nothing to restrict the set of tribes covered by the statute. In that expansive sense, all tribes—indeed, all persons within the United States—can be said to be "under Federal jurisdiction." Nor would there have been any reason to add a temporal limitation ("*now* under Federal jurisdiction") because the plenary power of Congress does not change over time. Thus, the availability of the "plenary power" interpretation as a purely linguistic matter does not suggest that the provision is ambiguous when read in context.

b. In stating that "Congress nowhere in the statute gave further meaning" to the phrase "under Federal jurisdiction," the court below ignored the structure and purpose of the Act. App., *infra*, 21a. The design of the statute as a whole gives clear meaning to the concept.

As noted, the purpose of the IRA was "to repudiate[] the practice of allotment" that characterized prior federal Indian policy. *Atkinson Trading Co.*, 532 U.S. at 650 n.1. Most of the IRA's provisions are designed to protect and rebuild tribal land and assets by prohibiting allotment, 25 U.S.C. 461, freezing trust pe-

riods and restricting alienation, 25 U.S.C. 462, restoring surplus lands to tribal ownership, 25 U.S.C. 463, acquiring new trust lands, 25 U.S.C. 465, and protecting natural resources on trust lands, 25 U.S.C. 466. Indians were permitted to vote, by reservation, to determine whether the Act should apply to their land. 25 U.S.C. 478. The statute also gave "[a]ny Indian tribe, or tribes, residing on the same reservation," the right to organize. IRA § 16, 48 Stat. 987.

The Act's overall focus on preserving and rebuilding Indian land and the explicit residency requirement in the second definition of "Indians" support the view that "now under Federal jurisdiction" referred to those recognized tribes for which the federal government was still supervising lands and assets from lands—that is, Indians living in Indian country. Representative Howard explained as much when he said that the definition "recognizes the status quo of the present reservation Indians" and precludes persons "who are not already enrolled members of a tribe" from claiming benefits under the Act. 78 Cong. Rec. 11,732 (1934). It was to ensure that the IRA would be limited to reservation Indians that Congress included the phrase "now under federal jurisdiction."

In accepting the Secretary's interpretation of "under Federal jurisdiction," the decision below fails to achieve what even the court of appeals understood to be Congress's purpose—imposing "some kind of limiting principle." App., *infra*, 22a. Here, for example, the Secretary relied on failed treaty negotiations in determining that the Cowlitz had been "under Federal jurisdiction." *Id.* at 327a. As other courts have correctly recognized, however, an unratified treaty is a

"legal nullity." *Robinson* v. *Jewell*, 790 F.3d 910, 917 (9th Cir. 2015), cert. denied, 136 S. Ct. 1500 (2016). It therefore cannot establish a jurisdictional relationship between the United States and a tribe. If such evidence is deemed sufficient, the "under Federal jurisdiction" test will impose little meaningful limit on the Secretary's authority.

c. Finally, contrary to the view of the court of appeals, the Secretary did not consider the phrase "under Federal jurisdiction" to be ambiguous—at least not until recently. In 1936, Commissioner Collier stated that "the first two conditions of Indian status [in Section 479] are quite clearly defined." U.S. Dep't of the Interior, *Annual Report of the Secretary of the Interior* 164 (1936). Two years before the IRA was enacted, Collier had observed that "Indians living off the reservation on privately owned land * * * are not wards, as they have no property held in trust, do not live on an Indian reservation, [and] belong to no tribe with which there is a treaty." C.A. App. 324. That same year, he denied a request from a Cowlitz Indian asking to be enrolled in the Cowlitz Tribe because they "have no reservation under Governmental control," and "no tribal funds on deposit to their credit in the Treasury of the United States." *Id.* at 1364. And that was undoubtedly why the agency determined, in evaluating the Cowlitz Tribe's request for recognition in 2000, that "from 1880-1940, the Cowlitz Indians *were not a reservation tribe under Federal jurisdiction* or under direct federal supervision." *Id.* at 1076 (emphasis added).

C. The questions presented are important and warrant this Court's review

In its petition for a writ of certiorari in *Carcieri*, the State of Rhode Island explained that the case presented "jurisdictional issues of enormous import * * * because the future allocation of civil and criminal jurisdiction between states and tribes over a potentially unlimited amount of land hangs in the balance." Pet. at 2, *Carcieri*, *supra* (No. 07-526). This Court granted certiorari and held that the Secretary's authority to acquire land in trust on behalf of Indian tribes is limited by the unambiguous language of Section 479.

The Secretary has now reinterpreted the IRA to read those limits out of existence. As explained above, the court of appeals' decision upholding that reinterpretation creates a conflict with respect to the first question presented—the very same conflict that this Court resolved in *Carcieri*. While the second question presented does not yet implicate a circuit conflict, it warrants review in conjunction with the first because both questions are closely related and raise issues of great importance to federal Indian policy.

Land-into-trust decisions profoundly alter the balance of civil and criminal jurisdiction among states, tribes, and the federal government. Land taken into trust is exempt from state and local taxation, 25 U.S.C. 465, as well as state civil and criminal jurisdiction and local zoning requirements, see 25 C.F.R. 1.4; *De Coteau*, 420 U.S. at 428.

In the last seven years, the Secretary has taken into trust more than 542,000 acres of land—an area more

than half the size of Rhode Island.[3] The Secretary has many pending trust applications, and even more can be expected now that the Secretary has determined that she can acquire trust land in Alaska. See 79 Fed. Reg. 76,888 (Dec. 23, 2014). And the Secretary has reduced the procedural safeguards associated with trust acquisitions by eliminating the requirement that tribes comply with the Department of Justice's standards for the preparation of title evidence applicable to other land acquisitions by the United States. 81 Fed. Reg. 10,477 (Mar. 1, 2016).

The Secretary's aggressive expansion of her authority has led to a large number of challenges to trust acquisitions or decisions that turn on the Secretary's trust authority under the IRA.[4] The issues raised by those cases require resolution now because trust acquisitions have immediate—and potentially irreparable—consequences for affected States, local govern-

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[3] U.S. Dep't of the Interior, *Obama Administration Exceeds Ambitious Goal to Restore 500,000 Acres of Tribal Homelands* (Oct. 12, 2016).

[4] See, *e.g.*, *KG Urban Enters., LLC* v. *Patrick*, 693 F.3d 1, 11 (1st Cir. 2012); *Stand up for California!* v. *U.S. Dep't of the Interior*, No. 12-2039, 2016 WL 4621065, at *44-45 (D.D.C. Sept. 6, 2016); *Central N.Y. Fair Bus. Ass'n* v. *Jewell*, No. 08-0660, 2015 WL 1400384, at *10 (N.D.N.Y. Mar. 26, 2015); *No Casino in Plymouth* v. *Jewell*, 136 F. Supp. 3d 1166, 1183 (E.D. Cal. 2015); *Citizens for a Better Way* v. *U.S. Dep't of the Interior*, No. 12-3021, 2015 WL 5648925, at *20 (E.D. Cal. Sept. 24, 2015); *Patchak* v. *Jewell*, 109 F. Supp. 3d 152, 158 (D.D.C. 2015); *Town of Verona* v. *Jewell*, No. 08-0647, 2015 WL 1400291, at *2 (N.D.N.Y. Mar. 26, 2015); *Alabama* v. *PCI Gaming Auth.*, 15 F. Supp. 3d 1161, 1180 (M.D. Ala. 2014); *New York* v. *Salazar*, No. 08-644, 2012 WL 4364452 (N.D.N.Y. Sept. 24, 2012).

ments, and surrounding communities. Although the Secretary formerly had a policy of waiting for the completion of litigation before taking land into trust, she abandoned that policy following this Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199 (2012), which established that federal sovereign immunity does not prevent a court from ordering land taken out of trust. 78 Fed. Reg. 67,928 (Nov. 13, 2013). Once lands are in trust, however, a tribe is free to undertake construction that would otherwise be prohibited by state or local law, and the tribe's sovereign immunity may prevent a court from enjoining construction. Thus, even if a court ultimately determines that the land should not have been taken into trust, undoing the effects of the Secretary's decision may be impossible as a practical matter. That reality underscores the need for immediate resolution of the questions presented.

This Court should grant review to confine the Secretary to the exercise of the limited authority granted by Congress in the IRA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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