No. 16-572

IN THE

Supreme Court of the United States

CITIZENS AGAINST RESERVATION SHOPPING, *et al.*,
Petitioners,

v.

SALLY JEWELL, in her official capacity as secretary of the United States Department of the Interior, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR CALIFORNIA TRIBAL BUSINESS ALLIANCE, MOORETOWN RANCHERIA OF MAIDU INDIANS, AND UNITED AUBURN INDIAN COMMUNITY AS *AMICI CURIAE* SUPPORTING PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2(b), California Tribal Business Alliance, Mooretown Rancheria of Maidu Indians, and United Auburn Indian Community respectfully move for leave to file the accompanying brief as *amici curiae*. As of the date this brief is being finalized for printing (November 28, 2016), no party has refused consent and five of the six parties have affirmatively consented.

Submitted herewith are written consents from the following parties: (1) Petitioners Citizens Against Reservation Shopping, *et al.*; (2) Respondents Sally

Jewell, *et al*.; (3) the Cowlitz Indian Tribe; (4) Clark County, Washington; and (5) the City of Vancouver, Washington.

The remaining party—the Confederated Tribes of the Grand Ronde Community of Oregon—was not able to respond by the date the brief was printed, as a result of the Thanksgiving holiday.

Amici are federally-recognized Indian tribes and an organization representing federally-recognized Indian tribes. As described in the proposed brief, the *amici* have a strong interest in this case and its implications for tribal gaming outside of the historic reservations and aboriginal territories of Indian tribes that were not recognized by the United States in 1934. *Amici* suggest that the perspective of federally-recognized tribes on this important issue would be of assistance to the Court.

For these reasons, California Tribal Business Alliance, Mooretown Rancheria of Maidu Indians, and United Auburn Indian Community respectfully request that leave to file this brief as *amici curiae* be granted.

Respectfully Submitted,

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INTEREST OF *AMICI CURIAE*

Amici curiae are the California Tribal Business Alliance, Mooretown Rancheria of Maidu Indians, and United Auburn Indian Community.[1] *Amici* are (a) Indian tribes or nations recognized by the United States, and (b) one organization representing two Indian tribes recognized by the United States. All *amici* tribes are located in California.

The California Tribal Business Alliance is a public policy organization formed in 2004 to address the diverse business interests of its founding Indian tribes, including business, housing, transportation, agriculture, and environmental issues. The Alliance has two members: the Pala Band of Mission Indians, located in Pala, California, and the Picayune Rancheria of the Chukchansi Indians, located in Coarsegold, California. Both members of the Alliance are Federally-recognized Indian tribes.

The Mooretown Rancheria of Maidu Indians is a Federally-recognized Indian tribe located in Oroville, California.

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[1] Pursuant to Rule 37.6 *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties received notice of *amici*'s intent to file this brief at least ten days before the due date. All but one of the parties have consented to the filing of this brief, and their letters consenting to its filing have been filed with the Clerk's Office. The remaining party was not able to respond by the date the brief was printed, as a result of the Thanksgiving holiday.

The United Auburn Indian Community is a Federally-recognized Indian tribe located in Auburn, California.

All of the *amici* Indian tribes were considered "recognized Indian tribes" by the Interior Department after the 1934 enactment of the Indian Reorganization Act (IRA). As recognized tribes, the *amici* participated in tribal elections organized by the Interior Department to determine if their members wanted to accept or reject the benefits of the IRA. The *amici* tribes also organized under the terms of the IRA after these special elections.

The *amici* tribes are concerned about an expansive interpretation of the IRA's definition of "Indian" that is being used in this case to authorize a large-scale casino outside of the historic reservation and aboriginal territory of the Cowlitz Indian Tribe in the State of Washington. The land in question is located approximately 25 miles from the Tribe's headquarters and outside of the exterior boundaries of the Tribe's aboriginal territory, as defined by the Indian Claims Commission in decisions rendered several decades ago. *See* 21 Ind. Cl. Comm. 143 (June 25, 1969); and 25 Ind. Cl. Comm. 442 (June 23, 1971).

The *amici* tribes have complied with the organizational conditions of the IRA (and the Federal requirements of the Indian Gaming Regulatory Act) to establish casinos within their own reservations and aboriginal territories. The Interior Department's expansive interpretation of the definition of "Indian" ignores the considered judgment of Congress in enacting the IRA and will facilitate the movement of more Indian casinos outside of tribal reservations and

aboriginal territories, in order to be closer to urban gaming markets.

SUMMARY OF ARGUMENT

The fundamental question in this case is whether the Indian Reorganization Act (IRA) authorized the Secretary of the Interior to take land into Federal trust for an Indian tribe that was not recognized by the United States in 1934, when this statute was enacted. The definition of "Indian" in the IRA, 25 U.S.C. § 479, limits the Secretary's authority to "any recognized Indian tribe now under Federal jurisdiction."

In *Carcieri v. Salazar*, 555 U.S. 379 (2009), this Court decided 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." 555 U.S. at 395 (emphasis added).

In 2013, the Secretary of the Interior approved an application to take land into Federal trust for the Cowlitz Indian Tribe in the State of Washington. The Cowlitz were not a "recognized" tribe in 1934 and achieved their Federal recognition in 2002. The Secretary developed an interpretation of § 479 that the term "now under Federal jurisdiction" does not modify the word "recognized." The District Court and the D.C. Circuit deferred to this interpretation.

The D.C. Circuit misinterpreted the text of § 479 by evaluating the term "now," instead of evaluating the term "recognized." This Court already has determined that the phrase "[Indian] tribe now under Federal jurisdiction" is unambiguous. The only remaining question is whether the adjective "recognized" modifies the noun "Indian tribe." Evaluating the plain meaning of

this statutory provision leads to a conclusion that the Secretary's authority to take land into Federal trust is limited to those Indian tribes that were recognized by the United States (and under Federal jurisdiction) when the IRA was enacted in 1934.

The structure, purpose, and legislative history of the IRA support this temporal limitation on the Secretary's authority. The Secretary's interpretation is an attempt to ignore both the parameters established by Congress in the IRA and the historical record of the Cowlitz, which was neither recognized nor organized as an Indian tribe in 1934.

The precedent that is being established by the Cowlitz case is substantial. The Cowlitz Tribe will be permitted to build and operate a casino outside of its historic reservation and aboriginal territory. Other Indian tribes that played by the rules established by Congress are adversely affected by this type of Federal action, especially when land is taken into trust outside the homelands of one tribe and within the aboriginal territory of another. This creates a double standard for tribes.

The Secretary is not adhering to the limitations in the IRA that Congress established and the courts are providing too much deference. *Amici* tribes therefore respectfully urge the Court to grant review and reverse the decision below.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE COWLITZ ARE A "RECOGNIZED INDIAN TRIBE NOW UNDER FEDERAL JURISDICTION," AS DEFINED BY 25 U.S.C. § 479.

The Indian Reorganization Act of 1934 (IRA) authorizes the Secretary of the Interior to acquire land and hold it in Federal trust for "the purpose of providing land for Indians." 25 U.S.C. § 465.[2] In the IRA, Congress limited the Secretary's authority to acquire land into trust for Indian tribes and individuals of Indian descent to the following three circumstances:

> The term 'Indian' as used in this Act shall include all persons of Indian descent who are [1] members of any *recognized Indian tribe now under Federal jurisdiction*, and [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 shall further include [3] all other persons of one-half or more Indian blood.

25 U.S.C. § 479 (emphasis added).

This Court held in *Carcieri v. Salazar*, 555 U.S. 379 (2009) that "the term 'now under Federal jurisdiction' in §479 *unambiguously* refers to those tribes that were under the federal jurisdiction of the United States

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[2] 25 U.S.C. § 465 has been transferred to 25 U.S.C. § 5108. To avoid confusion, this brief will refer to the earlier codification references for provisions of the Indian Reorganization Act that have been recently transferred by the compilers of the United State Code.

when the IRA was enacted in 1934." *Id*. at 395 (emphases added).

Carcieri means that the phrase "Indian tribe now under Federal jurisdiction" refers only to Indian tribes under Federal jurisdiction when the IRA was enacted in 1934. One of the questions presented in the Petitioner's brief is whether an Indian tribe must also have been "recognized" in 1934. In other words, whether the term "recognized" modifies or limits the unambiguous phrase "Indian tribe now under Federal jurisdiction."

The D.C. Circuit relied on an interpretation of the IRA by the Secretary of the Interior that a tribe does not have to be "recognized" in 1934. In a 2013 decision by the Secretary to accept title to 152 acres of land in Federal trust for the Cowlitz Indian Tribe (Cowlitz) in the State of Washington, the Secretary determined that the date of Federal recognition does not limit her authority under § 479 of the IRA:

> In Section 19 of the IRA, the word 'now' modifies only the phrase 'under federal jurisdiction'; it does not modify the phrase 'recognized tribe.' As a result '[t]he IRA imposes no time limit upon recognition'; the tribe need only be 'recognized' as of the time the Department acquires the land into trust, which clearly would be the case here, under any concept of 'recognition.' The Cowlitz Tribe's federal acknowledgment in 2002, therefore, satisfies the IRA's requirement that the tribe be 'recognized.'

Pet. App. 308a (quoting *Carcieri* at 398 (Breyer, J., concurring)).

The Cowlitz Indian Tribe was Federally-recognized by the Secretary in 2002, almost 70 years after the

enactment of the IRA. Reconsidered Final Determination for Federal Acknowledgment of the Cowlitz Indian Tribe, 67 Fed. Reg. 607 (Jan. 4, 2002). The D.C. Circuit deferred to the Secretary's interpretation that § 479 does not impose a temporal limitation on when a tribe must be "recognized." Pet App. 20a ("[W]e are bound to defer to the [Secretary's] reasonable interpretation of the statute it is charged to administer.") (citing *UC Health v. NLRB*, 803 F.3d 669, 681 (D.C. Cir. 2015)).

The D.C. Circuit did not properly apply this Court's two-step analysis under *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). *Chevron* Step One evaluates whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-843. If the court determines that Congress has not directly addressed the question, then it proceeds to *Chevron* Step Two, in order to evaluate whether the agency's interpretation is reasonable. *Id.* at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

The D.C. Circuit's interpretation of § 479 is contrary to *Carcieri*, in which this Court stated that Congress "left no gap in 25 U.S.C. § 479 for the agency to fill." 555 U.S. at 391. The *Chevron* analysis should have ended at Step One, as the text, structure, purpose, and legislative history of the IRA demonstrate that "Congress has directly spoken to the precise question at issue." *See* 467 U.S. at 842.

1. The D.C. Circuit misinterpreted the text of the statute by limiting its analysis to the term "now," instead of evaluating the term "recognized." In its opinion, the court of appeals stated that the word "now' is an adverb and that grammar rules dictate that "adverbs modify verbs, adjectives or other adverbs." Pet. App. 12a (citing Michael Strumpf and Auriel Douglas, *The Grammar Bible* 112 (2004 ed.) (hereinafter *Strumpf & Douglas*). The court then stated that "[a]dverbs typically precede the adjectives and adverbs they seek to modify, which strongly signals that 'now' is limited to the prepositional phrase, 'now under Federal jurisdiction.'" *Id.* (citing *Strumpf & Douglas* at 121).

   The court of appeals conceded that the placement of "now" in the phrase does not provide a complete answer and presented the interpretive issue as follows:

   > The more difficult question is whether that temporally limited prepositional phrase, 'now under Federal jurisdiction,' modifies the noun, 'tribe,' before its modification by the adjective, 'recognized,' or whether it modifies the already modified noun, 'recognized tribe.' If 'now under Federal jurisdiction' only modifies 'tribe,' there is no temporal limitation on when recognition must occur. If the prepositional phrase instead modifies 'recognized tribe,' recognition must have already happened as of 1934. *See Carcieri*, 555 U.S. at 391.

   Pet. App. 12a-13a (citation included).

   The analysis of "now" by the court of appeals is flawed. This Court has already determined

that the phrase "[Indian] tribe now under Federal jurisdiction" is an unambiguous expression of Congressional intent. The only remaining question is not the development of a new interpretation of "now," but whether the word "recognized" modifies "Indian tribe" and, by extension, the rest of the phrase "now under Federal jurisdiction."

The court of appeals acknowledged that the word "recognized" in this phrase is used as an adjective. *Id*. Grammar rules dictate that "adjectives are words that modify nouns or pronouns." *Strumpf & Douglas* at 87. If the phrase "Indian tribe now under Federal jurisdiction" is unambiguous, as this Court held in *Carcieri,* then the adjective "recognized" can only be read to modify the noun "Indian tribe." The word "recognized" must also modify the entire phrase, as *Carcieri* already determined that the word "now" applies to "tribes that were under federal jurisdiction [in 1934]." *See* 555 U.S. at 391 ("[W]e agree with [BIA Commissioner Collier] that the word 'now' in §479 limits the definition of 'Indian,' and therefore limits the exercise of the Secretary's trust authority under §465 to those members of tribes that were under federal jurisdiction at the time the IRA was enacted.").

An evaluation of the plain meaning of § 479 only needs to review whether the adjective "recognized" modifies the term "Indian tribe." The application of basic grammar rules makes it clear that it does modify the noun it precedes and so it must also modify the unambiguous

phrase "[Indian] tribe now under Federal jurisdiction." Under this interpretation, the plain meaning of this statutory provision must be applied according to its terms. *United States v. Gonzales*, 520 U.S. 1, 9 (1997) ("[T]he straightforward language of [the statute] leaves no room to speculate about congressional intent.").

2. The structure of section § 479 of the IRA confirms Congressional intent to place temporal limitations on all three definitions of "Indian" in this section. As this Court held in *Carcieri,* the first definition of "Indian" unambiguously refers to "those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." 555 U.S. at 391. Likewise, the second definition of "Indian" in the section includes "all persons who were, *on June 1, 1934*, residing within the *present boundaries* of any Indian reservation." 25 U.S.C. § 479 (emphases added). Finally, in *United States v. John*, 437 U.S. 634 (1978), this Court concluded that the third definition of "Indian" that refers to "persons of one-half or more Indian blood," is limited only to those who met the definition "at the time the Act was passed." 437 U.S. at 651.

   As this Court stated in *Carcieri*, Congress included in the IRA other provisions that incorporated both contemporaneous and future events by using the phase "now or hereafter." 555 U.S. at 389 (citing 25 U.S.C § 468, referring to "the geographic boundaries of any Indian reservation *now existing or established hereafter*"; and 25 U.S.C. §472, referring to "Indians who may be appointed . . . to the various positions

maintained, *now or hereafter*, by the Indian Office.") (emphases added). This provides further textual support for the conclusion that Congress was purposeful in its uses of the word "now" and the phrase "now or hereafter." 555 U.S. at 389 (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)) ("[W]hen 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." (internal quotation marks omitted)).

3. One of the primary purposes of the IRA was to support the creation of tribal organizations with more formal governance structures, through the adoption of constitutions and bylaws. *See* 25 U.S.C. § 476 (organization of Indian tribes). The IRA also provided an opportunity for tribes to vote to accept or reject the provisions of the IRA by holding special elections within one year after the enactment of the statute. 25 U.S.C. § 478 (acceptance optional).[3]

   The administrative actions by the Interior Department after the passage of the IRA lend additional support to the argument that the Department treated "recognized" as having a temporal limitation. The special elections conducted by the Department occurred over a two-year period, from 1934-1936, and all of the

[3] As stated by this Court in *Morton v. Mancari*, 417 U.S. 535 (1974), the "overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." 417 U.S. at 542.

amici tribes held elections for this purpose. Tribes that accepted the IRA were then encouraged to develop written constitutions and subject them to a vote by the adult members of each tribe.

The historical record shows that the Cowlitz were not permitted to vote on the IRA, or organize under the IRA. U.S. Department of the Interior, Bureau of Indian Affairs—Branch of Acknowledgment and Research, *Historical Technical Report: Cowlitz Indian Tribe*, at 131 (1997).[4] In fact, the Commissioner of the Bureau of Indian Affairs (BIA), John Collier, formally denied the existence of the Cowlitz as a "tribal entity" in a letter written in October 1933:

> No enrolments [sic] are now being made with the remnants of the Cowlitz tribe which, in fact, is no longer in existence as a communal entity. There are, of course, a number of Indians of Cowlitz descent in that part of the country, but they live scattered about from place to place, and have no reservation under Governmental control.

Letter from John Collier, Commissioner of Indian Affairs, to Lewis Layton (Oct. 25, 1933).

The Department could not implement the provisions contained in § 476 (organization of Indian tribes) and § 478 (acceptance optional) without a contemporaneous process to determine which

[4] This Historical Technical Report was prepared by the Bureau of Indian Affairs in connection with the Cowlitz petition for Federal recognition. *See* U.S. Department of the Interior, *Summary under the Criteria and Evidence for Proposed Finding: Cowlitz Tribe of Indians* (Feb. 12, 1997).

Indian groups it would recognize for the purposes of (a) holding elections to approve tribal constitutions and bylaws, and (b) holding special elections to decide whether to accept or reject the IRA's benefits. The need for these implementation steps to be taken by the Department (and the Indian groups it acknowledged as tribes) provides further confirmation that Congress intended only to apply the provisions of the IRA to Indian tribes that were "recognized" at the time of the enactment of the IRA. This process was followed for hundreds of tribes, but the Cowlitz were not eligible because of their non-tribal status.

4. The legislative history of the IRA supports this interpretation that the term "recognized Indian tribe" was intended to be temporally limited to 1934. The original version of the IRA was drafted as a Roosevelt Administration measure, by Interior Department attorneys working at the direction of BIA Commissioner Collier. *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 Before the S. Comm. on Indian Affairs*, 73 Cong. 85-86 (1934) (hereinafter *Senate Committee Hearings*).

   The first draft of the bill by the Interior Department referred to "recognized Indian tribe" as an element of the definition of "Indian." *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73 Cong. 6 (1934) (hereinafter *House Committee Hearings*); *see also Senate Committee Hearings* at 6. The term "recognized Indian tribe" remained the

same throughout the drafting process in both the House and Senate, and it did not change in the final version that became the IRA.

When Commissioner Collier first testified in favor of the bill in the U.S. House of Representatives, he provided Congress with a memorandum to explain the specific legislative provisions that Interior was proposing. This memorandum was entitled "The Purpose and Operation of the Wheeler-Howard Indian Rights Bill (S. 2755; H.R. 7902)." *House Committee Hearings* at 15. Commissioner Collier's explanation of the definition of "Indian" expressed the Interior Department's original intention to place a temporal limitation on Indian tribes and Indians residing on reservations:

> As defined in section 13 of title I, Indians to whom charters may be granted include all persons of Indian descent who are *members of existing tribes*, or descendants of members and who reside within *existing reservations*, and all Indians of one fourth degree of blood or more. The object of this definition is to include all Indian persons who, by reason of residence, are definitely members of Indian groups, as well as persons who are Indians by reason of degree of blood.

Id. at 22 (emphasis added). This memorandum and explanation of the definition of "Indian" were also presented at the first Senate hearing held to consider the Interior Department's bill. *Senate Committee Hearings* at 23.

This intention to impose a temporal limitation is confirmed during the House hearings on the

IRA. Commissioner Collier explained at a later hearing before the House Committee that the third definition of "Indian," called the "Indian blood rule," was meant to be a residual clause, to extend IRA benefits to Indians who were not members of existing tribes, or living on existing reservations, as long as they could meet a blood quantum requirement. *House Committee Hearings* at 133 ("I may say that in the new communities, where new communities are created for Indians who are scattered and are now landless, the bill does introduce the Indian blood rule.").

The concept of a temporal limitation applying to *existing* tribes and *existing* reservations, with an exception for anyone qualifying under the "Indian blood rule," was also evident in the Senate hearings on the IRA legislation. Particularly instructive was a colloquy at the last Senate Committee hearing held on May 17, 1934:

> Chairman Wheeler: Of course this bill is being passed, as a matter of fact, to take care of the Indians that are taken care of *at the present time*.
>
> Senator Frazier: Those other Indians have got to be taken care of, though.
>
> Chairman Wheeler: Yes; but how are you going to take care of them unless they are wards of the Government *at the present time*?
>
> Senator Thomas: Take, for example, the Catawbas in South Carolina where we visited. I think that is the most pathetic and deplorable Indian tribe that I have discovered in the

> United States. I think the Seminoles in Florida should be taken care of. They are in bad circumstances. They are just as much Indians as any others.
>
> Chairman Wheeler: There is a later provision in here I think covering that, and defining what an Indian is.
>
> Commissioner Collier: This is more than one-fourth Indian blood.
>
> Chairman Wheeler: That is just what I was coming to. As a matter of fact, you have got one-fourth in there. I think you should have more than one-fourth. I think it should be one-half. . . . If you pass it to where there are quarter-blood Indians you are going to have all kinds of people coming in and claiming they are quarter-blood Indians and want to be put upon the Government rolls, and in my judgment it should not be done. What we are trying to do is get rid of the Indian problem rather than add to it.
>
> Senator Thomas: If your suggestion should be approved then do you think that Indians of less than half blood should be covered with regard to their property in this act?
>
> Chairman Wheeler: No; not unless they are enrolled *at the present time*.

Senate Committee Hearings at 263-264 (emphases added).

As the discussion progressed at this Senate hearing, a concern was expressed about further limiting the definition of "Indian" to address a concern that "white" members of an Indian tribe

could access the benefits of the IRA. *Id*. at 266. In response to this concern, Commissioner Collier suggested adding an additional requirement that a recognized Indian tribe also be under Federal jurisdiction at the time:

> Would this not meet your thought, Senator: After the words 'recognized Indian tribe' in line 1 insert 'now under Federal jurisdiction'? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

Id. at 266.

The legislative history is quite clear that the IRA was intended to apply to existing tribes and enrolled Indians living on existing reservations. The Collier insertion of "now under Federal jurisdiction" added an additional requirement to the temporal limitation. Any Indian or group of Indians not meeting these temporal and other requirements needed to meet a blood quantum requirement.[5]

This interpretation of the definition of "Indian" was similarly followed in the U.S. House of Representatives. The Chairman of the House Committee on Indian Affairs, Representative Edgar Howard, confirmed this understanding during the House floor debate on the bill on June 15, 1934:

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[5] The blood quantum requirement in the original draft of the IRA was one-fourth Indian blood. It was changed in the Senate to be one-half Indian blood and remained so in the final version that was enacted.

> For the purposes of this act, section 21 defines the persons who shall be classed as Indians. In essence, it recognizes the status quo of the present reservation Indians and further includes all other persons of one-fourth or more Indian blood. The latter provision is intended to prevent persons of less than one-fourth Indian blood who are not already enrolled members of a tribe or descendants of such members living on a reservation from claiming the financial and other benefits of the act. Obviously the line must be drawn somewhere or the Government would take on impossible financial burdens in extending wardship over persons with a minor fraction of Indian blood.

78 Cong. Rec. H11732 (daily ed. June 15, 1934).

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

The Indian Reorganization Act reflects Congress's considered judgment regarding how the definition of "Indian" is to apply to those tribes and individual Indians seeking the benefits of the IRA. The court of appeals decision ignored the text, structure, purpose, and legislative history of the IRA, in concluding that a recognized Indian tribe does not face a temporal limitation when requesting that land be acquired in Federal trust by the Interior Department. This interpretation that the Federal recognition of a tribe "floats in time" turns the framework of the IRA on its head and eviscerates *Carcieri*.

The Secretary's interpretation is an example of executive branch overreach. The Secretary is not adhering to the limitations established by Congress, and the

courts are providing too much deference to the Secretary's aggressive interpretation.

The precedent that is being established by the Cowlitz case is substantial. Expanding the Secretary's authority to acquire land in Federal trust for any tribe, or group of individual Indians, that only needs to show some type of "Federal jurisdiction" in 1934 is not what the authors of the IRA intended. In this case, the Cowlitz would be permitted to build and operate a casino outside of its historic reservation and aboriginal territory.

The acquisition of land into Federal trust by the Secretary for an Indian tribe changes the balance of civil and criminal jurisdiction among states, tribes, and the Federal government.[6] Other tribes may also be affected when land is taken into trust outside the homelands of one tribe and within the aboriginal territory of another. These decisions involve competing jurisdictional interests and other historical factors that should be left to the Congress for tribes that do not meet the IRA's definition of "Indian." The *amici* tribes have been consistently supportive of Congressional legislation to address the issues raised by *Carcieri*, as long as the related issue of off-reservation gaming is addressed at the same time.

The D.C. Circuit's decision is fundamentally unfair to those Indian tribes that were recognized in 1934 and are not seeking to acquire land in Federal trust outside of their reservations and aboriginal territories.

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[6] *See*, *e.g.*, Felix S. Cohen, *Handbook of Federal Indian Law* § 6.01[1], at 500 (2005 ed.) ("States may not assert civil jurisdiction over the conduct or property of non-Indians in Indian country if it would cause interference with tribal self-government or a conflict with federal laws and policies.").

This creates a double standard for those tribes that followed the organizational processes developed by the IRA over the past 82 years.

All of the *amici* tribes conducted special elections organized by the Interior Department in 1934 and 1935, to decide whether to accept or reject the provisions of the IRA.[7] The Interior Department only conducted special elections for Indian tribes it recognized as tribes at the time the IRA was enacted. Unlike the *amici* tribes, the Cowlitz were not recognized by the Interior Department as an Indian tribe in 1934.

The Cowlitz's lack of existence as a tribe or communal entity during this time period was effectively summarized in a letter written by the Secretary of the Interior to the Chairman of the Senate Indian Affairs Committee in 1924, regarding land claims legislation:

> The records show that as early as 1893, these Indians were reported as being scattered through the southern part of the State of Washington, most of them living on small farms of their own; that they hardly formed a distinct class, having been so completely absorbed into the settlements . . . . In view of the foregoing, it will be seen that the Cowlitz Indians are without any tribal organization, are generally self-supporting, and have been absorbed into the body politic.

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[7] These IRA special elections by the *amici* tribes were held on the following dates: Pala (December 18, 1934); Picayune (June 10, 1935); Mooretown (June 12, 1935); and Auburn (June 14, 1935). Theodore H. Haas, *Ten Years of Tribal Government Under IRA*, at 14-16 (1947).

Letter from Hubert Work, Secretary of the Interior, to Honorable J.W. Harreld, Chairman, Committee on Indian Affairs, United States Senate (Mar. 28, 1924).

This non-recognition of the Cowlitz by the United States continued until the Interior Department issued a final determination in 2002 to grant the Cowlitz Federal recognition. National Indian Gaming Commission, Cowlitz Tribe Restored Lands Opinion, at 5 (Nov. 22, 2005) ("[T]he United States did not recognize the Cowlitz Tribe as a governmental entity from at least the early 1900's until 2002."). The Cowlitz also conceded their non-tribal status during this period, stating to the National Indian Gaming Commission several years before *Carcieri* that they were "administratively terminated in the early twentieth century, as evidenced by numerous and unambiguous statements from federal officials." The Cowlitz Indian Tribe, Request for a Restored Lands Opinion, Submitted to the National Indian Gaming Commission, at 13 (Mar. 15, 2005).

The Secretary's attempt to rewrite the IRA is a recurring one in the courts. Her interpretation of § 479 is being raised in cases being litigated in California, the District of Columbia, Massachusetts and New York,[8] Some courts have deferred to the Secretary's interpretation that the IRA does not require an Indian tribe to have been recognized in 1934. *See*, *e.g.*, *Stand Up for California! v. U.S. Dep't of the Interior*, 2016 U.S. LEXIS 119649, at *170 (D.D.C. 2016). At least

[8] *E.g.*, *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1184 (E.D. Cal. 2015); *Stand Up for California! v. U.S. Dep't of the Interior*, 2016 U.S. Dist. LEXIS 119649, at *170 (D.D.C. 2016); *KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1, 11 (1st Cir. 2012); and *State v. Salazar*, 2012 U.S. Dist. LEXIS 136086, at *48 (N.D.N.Y. 2012).

one other court has stated that there is a "serious issue of whether the Secretary has any authority, absent Congressional action, to take lands into trust" for tribes that were not "federally recognized in 1934." *KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1, 11 (1st Cir. 2012). And another court has interpreted *Carcieri* as requiring it to evaluate both the recognition question and the jurisdiction question. *State v. Salazar*, 2012 U.S. Dist. LEXIS 136086, at *48 (N.D.N.Y 2012) ("[T]he operative question for a court or the Agency in determining whether trust authority may properly be exercised is whether the tribe in question was federally recognized and under federal jurisdiction in 1934.").

The lower courts are clearly confused about how to apply *Carcieri*. One irony is that the courts interpreting § 479 *before* the *Carcieri* decision seemed to have less difficulty interpreting the statute than the courts *after Carcieri*. *See*, *e.g.*, *United States v. John*, at 650 ("The 1934 Act defined 'Indians' . . . as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction'. . . ."); *United States v. State Tax Commission of Mississippi*, 505 F.2d 633, 642 (5th Cir. 1974) ("The language of Section 19 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."); and *Maynor v. Morton*, 510 F.2d 1254, 1256 (D.C. Cir. 1975) ("[T]he IRA was primarily designed for tribal Indians and neither [the plaintiff] nor his relatives had any tribal designation, organization, or reservation *at that time*.") (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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