No. 16-572

In the Supreme Court of the United States

CITIZENS AGAINST RESERVATION SHOPPING, ET AL., PETITIONERS

v.

K. JACK HAUGRUD, ACTING 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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

NOEL J. FRANCISCO
Acting Solicitor General
Counsel of Record
JEFFREY H. WOOD
Acting Assistant Attorney General
JOHN L. SMELTZER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Under the Indian Reorganization Act of 1934, the Secretary of the Interior may take land into trust for "Indians," 25 U.S.C. 5108, a term that is defined to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. 5129. The questions presented are:

1. Whether the Secretary permissibly construed Section 5129 to authorize trust acquisitions for tribes that were "under Federal jurisdiction" in 1934 but not formally recognized by the Secretary until after that date.

2. Whether the Secretary permissibly construed Section 5129 as including tribes over which federal officials exercised jurisdiction before 1934, and had assumed ongoing federal duties or obligations that remained extant in 1934, rather than being limited to tribes already located on federal reservations or other Indian country as of 1934.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Treaty, statutes, and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 16-572

CITIZENS AGAINST RESERVATION SHOPPING, ET AL., PETITIONERS

v.

K. JACK HAUGRUD, ACTING 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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 830 F.3d 552. The opinion of the district court (Pet. App. 36a-109a) is reported at 75 F. Supp. 3d 387. The record of decision of the Bureau of Indian Affairs (Pet. App. 110a-412a) is available at http://www.cowlitzeis.com/documents/record_of_decision_2013.pdf.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2016. The petition for a writ of certiorari was filed on October 27, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Cowlitz Indian Tribe was officially acknowledged as a federally recognized Indian tribe in 2002. Pet. App. 2a. In April 2013, the Bureau of Indian Affairs (BIA) issued a record of decision to acquire approximately 157.87 acres in Clark County, Washington, into trust for the Cowlitz Tribe. *Id.* at 110a-113a. The district court upheld the BIA's decision (*id.* at 36a-109a), and the court of appeals affirmed (*id.* at 1a-35a).

1. Enacted in 1934, the Indian Reorganization Act (IRA), 25 U.S.C. 5101 *et seq.*,[1] "was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal lands." Pet. App. 37a (quoting 1-1 *Cohen's Handbook of Federal Indian Law* § 1.05 (2012)). The IRA authorizes the Secretary of the Interior, "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands * * * within or without existing reservations * * * for the purpose of providing land for Indians." 25 U.S.C. 5108. The IRA defines "Indian" to include:

> [1] all persons of Indian descent who are 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 * * * [3] all other persons of one-half or more Indian blood.

25 U.S.C. 5129.

---

[1] In 2016, Title 25 of the United States Code was reclassified, and the provisions of the IRA were renumbered.

The IRA's first definition of "Indian" was addressed by this Court in *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), a case that involved a decision of the Secretary of the Interior to acquire land and hold it in trust for the Narragansett Tribe of Rhode Island. At issue was whether the Narragansett Tribe was a "recognized Indian tribe now under Federal jurisdiction" within the meaning of what is now Section 5129. The Secretary had determined that the phrase "*now* under federal jurisdiction" meant that the tribe must be under federal jurisdiction "at the time that the land is accepted into trust." *Id.* at 382 (emphasis added, citation omitted). But based primarily on "the ordinary meaning of the word 'now'" and "the natural reading of the word within the context of the IRA," *id.* at 388, 389, the Court held that "the term 'now under Federal jurisdiction' in [Section 5129] 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.

Applying that understanding, the Court determined that the Secretary had improperly taken land into trust for the Narragansett Tribe. "None of the parties or *amici*, including the Narragansett Tribe itself, ha[d] argued that the Tribe was under federal jurisdiction in 1934." *Carcieri*, 555 U.S. at 395. Therefore, the Court "accept[ed] this as fact for purposes of [its] decision," and it set aside the Secretary's determination. *Id.* at 396.

In a concurring opinion, Justice Breyer discussed an issue that the Court did not address. He noted that "an interpretation that reads 'now' as meaning 'in 1934' may prove somewhat less restrictive than it at first appears." *Carcieri*, 555 U.S. at 397. That is because,

under a fair reading of Section 5129, "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time." *Ibid.* For instance, he noted, historical evidence indicated that around the time of the IRA, federal officials "wrongly" treated some tribes as not being under federal jurisdiction. *Id.* at 398. If one of those tribes was later recognized, Justice Breyer explained, then the tribe might qualify under the theory that "later recognition reflects earlier 'Federal jurisdiction.'" *Id.* at 399. But because "[n]either the Narragansett Tribe nor the Secretary ha[d] argued that the Tribe was under federal jurisdiction in 1934," Justice Breyer agreed with the Court that the tribe did not qualify under Section 5129. *Ibid.*

Justice Souter, joined by Justice Ginsburg, concurred in part and dissented in part. He agreed with Justice Breyer that "[n]othing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content." *Carcieri*, 555 U.S. at 400. He echoed as well Justice Breyer's view that "the statute imposes no time limit upon recognition," and further noted that "in the past, the Department of the Interior has stated that the fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at that time." *Ibid.* Justice Souter also explained that "giving each phrase its own meaning would be consistent with established principles of statutory interpretation." *Ibid.* Justice Souter differed from Justice Breyer, however, on the proper disposition of the case. Because the jurisdictional status of the Narragansett Tribe in 1934 was "an issue that no party understood to be

present" during the litigation, Justice Souter would have remanded to provide the parties the opportunity to argue, in the first instance, whether the tribe was in fact "under federal jurisdiction in 1934." *Id.* at 401 (citation omitted).

2. The modern Cowlitz Tribe is the successor of two tribal groups that resided along the Cowlitz River in the early 1800s. C.A. App. 636-658. Although the Tribe refused to cede its aboriginal homeland or accept relocation, the land was nevertheless opened to sale and settlement, leaving the Tribe "scattered" for many years. Pet. App. 2a; see *id.* at 1a-2a. But in 2002, availing itself of the formal federal acknowledgment process, "the Cowlitz at last gained legal status as a tribe in the eyes of the government." *Id.* at 2a. As such, the Cowlitz were "identified as an American Indian entity on a substantially continuous basis since 1900." 25 C.F.R. 83.7(a) (1994); see Pet. App. 330a n.115 ("[T]he Cowlitz tribe continuously existed since at least 1855.").

a. In 1850, Congress authorized the appointment of commissioners "to negotiate treaties with the several Indian tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade Mountains." Act of June 5, 1850, ch. 16, 9 Stat. 437. Under that authority, Washington Territorial Governor Isaac Stevens convened the Chehalis River Treaty Council to negotiate land-cession treaties with several southwestern Washington tribes, including the Lower and Upper Cowlitz. C.A. App. 474-476, 658-668. After failing to reach agreement with the Cowlitz Tribes, however, Governor Stevens advised them that "[t]here will then be no treaty, no prom-

ises but you will be in the hands of the Great Father [President] to do as we please." *Id.* at 667.

The United States did, however, enter into a treaty with the Quinaults and Quillehutes, which permitted establishment of a reservation and provided that the President might "consolidate" them with "other friendly tribes." Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians, Art. VI, 12 Stat. 971; see *Halbert* v. *United States*, 283 U.S. 753, 766-767 (1931). In 1873, the President issued an Executive Order that, "[i]n accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians," and "to provide for other Indians in that locality," withdrew approximately 200,000 acres of land as a reservation for those two tribes and for "other tribes of fish-eating Indians on the Pacific Coast." *Halbert*, 283 U.S. at 757; see *id.* at 757-758.

b. Cowlitz aboriginal lands were made available for public sale in 1863, "without the payment of any consideration therefor." C.A. App. 489-490. In 1868, federal officials attempted to place the Cowlitz on a reservation with the Chehalis Tribe, but the Cowlitz again refused to leave their traditional homes along the Cowlitz River. *Id.* at 493-494, 696-699. Between 1878 and 1883, federal officials prepared censuses of the Lower and Upper Cowlitz Indians who remained on their aboriginal lands and designated chiefs for purposes of dealing with each group. *Id.* at 702-712, 1055-1056. During this period, federal officials also assisted Cowlitz Indians who wished to obtain allotments on public lands, including so-called "fourth section" allotments under Section 4 of the 1887 Indian General Allotment Act, ch. 119, 24 Stat. 388 (25 U.S.C. 334). Under federal policy, "fourth section" allot-

ments were limited to Indians who maintained relations with an existing tribe over which the United States had acknowledged responsibility. C.A. App. 715-716; see 43 C.F.R. 2531.1.

c. In 1911, Congress authorized the allotment of land on the Quinault Reservation "to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the [Quinault]." Act of Mar. 4, 1911, ch. 246, 36 Stat. 1346 (1911 Act). Although the Cowlitz were not formally affiliated with the Quinault, officials in the Department of the Interior deemed Cowlitz Indians eligible for Quinault Reservation allotments. C.A. App. 735. That practice was later sustained by this Court, shortly before the IRA was enacted. See *Halbert*, 283 U.S. at 756-760. Specifically, the Court concluded that "the Chehalis, Chinook and Cowlitz Tribes are among those whose members are entitled to take allotments within the [Quinault] Reservation, if without allotments elsewhere." *Id.* at 760; see Pet. App. 337a-339a. In connection with applications for such allotments, a federal Indian agent prepared a 1919 report on the "Unenrolled" Indians of western Washington. C.A. App. 740; see *id.* at 740-742. The report noted that the Cowlitz had "refused to subordinate themselves to the white man by entering into a treaty with them," leaving the Tribe's members with "no reservation of their own." *Id.* at 741. In 1932, federal officials attended a meeting of Cowlitz Indians called for the purpose of electing delegates to work with attorneys on the Tribe's land claims against the government; the Commissioner of Indian Affairs subsequently approved an attorney contract with the Tribe pursuant to an Act of Congress that required contracts between Indian tribes and attorneys to

receive such approval. *Id.* at 269, 753; see Pet. App. 339a.

The Tribe's fortunes continued to decline. In 1933, in a letter responding to an individual's request for enrollment in the Cowlitz Tribe, Commissioner of Indian Affairs John Collier stated that "[n]o enrollments are now being made with remnants of the Cowlitz tribe" because the Tribe "is no longer in existence as a communal entity." C.A. App. 746. The letter went on to note that the Tribe had "no reservation under Government control" and "no tribal funds * * * to their credit in the [United States] Treasury." *Ibid.*

Nonetheless, the area Indian agency continued to assert "jurisdiction" over Cowlitz Indians, C.A. App. 745; see *id.* at 744-746, and federal officials continued to enroll Cowlitz children in federal Indian schools, to assist Cowlitz Indians with public-domain trust lands, and to provide other Indian services, *id.* at 742-749, 754-758. The Tribe held annual or other regular meetings to address offers of allotments on the Quinault Reservation, to pursue the Cowlitz Tribe's land claims against the United States, and for other governmental purposes. *Id.* at 732-740, 743-744, 758-785. In 1950, the Tribe adopted a constitution, with a stated goal of obtaining "just recognition" from the United States. *Id.* at 768; see *id.* at 765, 835, 965. The following year, a tribal member filed a petition with the Indian Claims Commission, "on relation of the Cowlitz Tribe," seeking compensation for the taking of Cowlitz lands. *Id.* at 450; see *id.* at 453-454, 471-472, 841. The Commission entered a judgment in favor of the Cowlitz Tribe in the amount of $1,550,000, see *Cowlitz Tribe of Indians* v. *United States*, 30 Ind. Cl. Comm. 129, 142

(1973), but recommended a per capita distribution to tribal descendants on the view that there then was no "Federally-recognized successor to the aboriginal entity aggrieved in 1863." C.A. App. 779 (citation omitted).

d. In 1978, the BIA adopted regulations to establish, for the first time, a formal federal administrative acknowledgment process for tribal-acknowledgement decisions. 43 Fed. Reg. 39,361 (Sept. 5, 1978); see 25 C.F.R. Pt. 83. Following an extensive investigation under those regulations, including the preparation of detailed historical, anthropological, and genealogical reports, see C.A. App. 620-1063, the BIA determined that the Cowlitz Tribe met the regulatory acknowledgment criteria. 65 Fed. Reg. 8436 (Feb. 18, 2000); see 25 C.F.R. 83.7 (1994) (criteria).

Among other things, the BIA found that the Cowlitz Tribe had been "Federally acknowledged" in 1855 in conjunction with the Chehalis River Treaty Council and that the period of "unambiguous Federal acknowledgement" continued through 1878-1880, when the BIA appointed tribal chiefs and undertook tribal censuses. 65 Fed. Reg. at 8436. The BIA also determined that "external sources" confirmed that the Cowlitz Tribe persisted as "an Indian entity * * * from the date of last Federal acknowledgment until the present." *Ibid.*; see *ibid.* ("Federal records, ethnographers, local historians and newspapers have identified the [Tribe] as an Indian entity on a substantially continuous basis since 1855."). The BIA thus concluded that the Cowlitz are "a tribe within the meaning of 25 CFR part 83." *Id.* at 8438.

Following an administrative appeal and remand, the BIA reconfirmed that the Cowlitz Tribe "meets the * * * criteria for acknowledgment * * * and is

therefore acknowledged as an Indian tribe." C.A. App. 1143; see 67 Fed. Reg. 607 (Jan. 4, 2002) ("Reconsidered Final Determination for Federal Acknowledgment of the Cowlitz Indian Tribe"). Congress thereafter directed the Secretary to hold the funds awarded in the 1973 judgment of the Indian Claims Commission in trust for the Cowlitz Tribe, to be used for specified tribal educational, cultural, and developmental purposes. Cowlitz Indian Tribe Distribution of Judgment Funds Act, Pub. L. No. 108-222, 118 Stat. 621.

3. Following the acknowledgment process, the Cowlitz Tribe petitioned the BIA to take into trust a parcel of land in Clark County, Washington, so that it could serve as a reservation. See 25 U.S.C. 5108 (Secretary's authority to acquire land in trust); 25 U.S.C. 5110 (Secretary's authority "to proclaim new Indian reservations on land" taken into trust). The BIA approved the Tribe's application in April 2013, concluding that the Cowlitz Tribe is a "recognized Indian Tribe now under Federal jurisdiction" within the meaning of Section 5129. See Pet. App. 110a-412a.

First, the BIA determined that the Tribe is a "recognized Indian Tribe" because it had been approved for and was listed on the Secretary's official list of recognized tribes. Pet. App. 307a-308a; see 25 U.S.C. 5131 ("Publication of list of recognized tribes"). Although official recognition of the Tribe occurred in 2002, the BIA concluded that "the date of federal recognition does not affect the Secretary's authority under the IRA." Pet. App. 308a. The BIA read the text of Section 5129 to provide that "the word 'now' modifies only the phrase 'under federal jurisdiction'; it does not modify the phrase 'recognized tribe.'" *Ibid.* Hence, the BIA expressed the view that "'the IRA im-

poses 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) (brackets omitted)).

Next, the BIA addressed whether the Cowlitz Tribe was "now under Federal jurisdiction," meaning whether it was under federal jurisdiction when the IRA was enacted in 1934. Pet. App. 320a-326a. Based on "the text of the IRA, its remedial purposes, legislative history, and the [Interior] Department's early practices, as well as the Indian canons of construction," the BIA "construe[d] the phrase 'under federal jurisdiction' as entailing a two-part inquiry." *Id.* at 321a. Under that test, a tribe may qualify as "under federal jurisdiction" if: (1) at some point before the IRA's 1934 enactment, the United States had taken action establishing or reflecting "federal obligations, duties, responsibility for, or authority over the tribe"; and (2) such "jurisdictional status remained intact" at the time of the IRA's enactment. *Id.* at 321a, 322a; see *id.* at 323a-326a.

Applying that two-part test, the BIA concluded that the Cowlitz Tribe was "under federal jurisdiction" in 1934. Pet. App. 326a-340a. The BIA found that the historical record contained "clear" indications of a jurisdictional relationship between the United States and the Tribe. *Id.* at 326a; see *id.* at 326a-327a (1855 Chehalis River Treaty Council negotiations); *id.* at 328a (federal government's "course of dealings with both the Tribe and its members" throughout the 1850s and 1860s); *id.* at 329a (formal federal acknowledgment in 1878 of the Cowlitz chiefs); *ibid.* ("statistical tabulation" of tribal members); *id.* at 330a ("The pro-

vision of services to, and actions on behalf of, Cowlitz Indians by the Federal Government continued into the 20th century."); *id.* at 331a (exercise of "supervisory responsibilities" over Tribe by local Indian agency); *id.* at 332a-333a (tribal efforts to obtain compensation for taken land); *id.* at 333a-335a (demographic records); *id.* at 336a-339a (practice of granting allotments pursuant to, *inter alia*, the 1911 Act, and this Court's decision in *Halbert* concluding that the Cowlitz Tribe was among the tribes whose members were so entitled); *id.* at 339a-340a (1932 federal approval of a tribal-attorney contract). The BIA concluded that "[a]ll of this evidence, taken together, supports [the] conclusion that prior to and including 1934 the Cowlitz Tribe retained and did not lose its jurisdictional status as a tribe 'under federal jurisdiction.'" *Id.* at 340a; see *id.* at 345a ("evidence of a continuous political existence since at least 1855").

4. Petitioners filed suit under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, alleging that the BIA's decision to take the Cowlitz parcel into trust was contrary to the IRA. Pet. App. 36a-38a. Petitioners argued that the IRA limits trust acquisitions to tribes recognized in 1934, and that federal officials had ceased to recognize the Cowlitz Tribe before that date. See *id.* at 36a-45a.

a. On cross motions for summary judgment, the district court granted judgment in favor of the Tribe and the United States. Pet. App. 36a-109a. Applying the framework of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the court determined that the phrase "recognized Indian tribe now under Federal jurisdiction" in Section 5129 does not unambiguously require a tribe to have been formally recognized on

the date the IRA was enacted. Rather, the court found that the provision could reasonably be construed, consistent with the agency's interpretation, as applying to tribes that were "under Federal jurisdiction" in 1934 but were formally recognized at a later date. Pet. App. 48a-57a. The court also held that the agency had permissibly adopted its two-part test for determining whether a tribe was under federal jurisdiction in 1934. *Id.* at 58a-67a. Finally, the court held that the BIA had reasonably applied its two-part test to the unique historical circumstances of the Cowlitz Tribe. *Id.* at 67a-73a.

b. The court of appeals affirmed. Pet. App. 1a-35a. It agreed with the district court that the definition of Indian in Section 5129 does not "unambiguously" require official recognition of the Indian tribe in 1934. *Id.* at 15a; see *id.* at 10a-15a. The court of appeals further held that the BIA had reasonably interpreted the IRA as not placing a temporal limit on recognition, and that its interpretation was consistent with past agency decisions. *Id.* at 15a-20a.

As for the "under Federal jurisdiction" requirement, the court of appeals did not specifically address petitioners' new argument, raised for the first time in that court, that the phrase is limited to tribes that were located within Indian country in 1934. See Pet. i, 19-26. Instead, after reviewing the IRA's text, historical context, and legislative history, the court "easily conclude[d] that the phrase is ambiguous." Pet. App. 22a; see *ibid.* (Interior officials "correctly predicted at the time that the phrase was 'likely to provoke interminable questions of interpretation.'") (citation omitted). The court also held that the Interior Department had reasonably adopted its two-part test for determining

whether a tribe was "under Federal jurisdiction" in 1934. *Id.* at 22a-26a. Finally, "after reviewing the record in its entirety," the court concluded that "contacts between the United States and the Cowlitz" sufficiently demonstrated a jurisdictional relationship to the Tribe that began in the 1850s and "remained intact" in 1934. *Id.* at 26a.

ARGUMENT

Petitioners renew their contention (Pet. 10-19) that the phrase "recognized Indian tribe now under Federal jurisdiction" in 25 U.S.C. 5129 unambiguously requires that the Tribe *both* was officially "recognized" *and* was "under federal jurisdiction" in 1934. As the court of appeals recognized, the BIA permissibly interpreted and applied the IRA in this case, and the decision below does not conflict with the decision of any other court of appeals.

Petitioners also argue (Pet. 19) that the BIA's two-part test for determining whether a tribe was "under federal jurisdiction" in 1934 is contrary to the statute, which in their view unambiguously requires that the tribe was residing "within Indian country" on that date. See Pet. 19-26. That argument was not addressed below; and, as petitioners acknowledge (Pet. 27), the court of appeals' ruling on that issue "does not * * * implicate a circuit conflict." Accordingly, the petition for a writ of certiorari should be denied.

1. The IRA defines the term "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. 5129. In *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), this Court determined that the phrase "*now* under Federal jurisdiction * * * 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 (emphasis added). But the Court did not address whether that temporal limitation ("now") also imposes a limitation on when a tribe must be "recognized." In his concurring opinion, however, Justice Breyer took the position that the statute can reasonably be read to include "a tribe [that was] 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so [*i.e.*, did not 'recognize' the tribe] at the time." *Id.* at 397. Following the IRA's passage, Justice Breyer continued, the Interior Department "wrongly" treated certain tribes as not being under federal jurisdiction. *Id.* at 398. If one of those tribes later gained recognition, he concluded, it could satisfy the definition in Section 5129 under the theory that "later recognition reflects earlier 'Federal jurisdiction.'" *Id.* at 399. Justice Souter, writing separately and joined by Justice Ginsburg, agreed with that reading, observing that "the statute imposes no time limit upon recognition." *Id.* at 400.

a. In this case, the Interior Department adopted Justice Breyer's reading, and the court of appeals found the Interior Department interpretation to be a permissible construction of the statute, deserving of deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Pet. App. 10a-20a. Congress used only a single temporal modifier ("now") and placed it in the middle of the phrase, which supports Interior's permissible view that "now" modifies only the second half ("under Federal jurisdiction"). See *id.* at 12a ("Adverbs 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.'"). As a result, the lan-

guage of Section 5129 is "ambiguous and susceptible" to the interpretation offered by the Secretary here. *Id.* at 13a; cf. *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 458 (1998) ("[T]he phrase 'recognized as reasonable' might mean costs the Secretary (1) *has* recognized as reasonable * * * or (2) *will* recognize as reasonable.").

Additionally, at the time the IRA was enacted, many federal reservations were home to groups of Indians that descended from different tribes and lacked a common tribal organization. Some tribes, like the Cowlitz, had no reservation of their own; its members were scattered in multiple locations, including on reservations principally reserved for others. See *Halbert* v. *United States*, 283 U.S. 753, 759-760 (1931) (noting statutory authorization and federal efforts to provide allotments for members of the Cowlitz Tribe on the Quinault Reservation). Further, while Interior Department officials maintained records of Indians residing on reservations, the agency maintained no official record of all recognized tribes, which was not required by Congress until 1994. See Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, Tit. 1, § 104(a), 108 Stat. 4791; 25 U.S.C. 5131. Thus, the Secretary reasonably determined that Congress could have expected Interior officials to confirm the tribal status of Indian groups—and the eligibility of tribal members to receive IRA benefits based on tribal membership—after the IRA's enactment, in the course of the agency's efforts to implement it.[2]

---

[2] Amici California Tribal Business Alliance et al. argue (Br. 12) that "the Cowlitz were not permitted to vote on the IRA, or organize under the IRA." That is a mischaracterization of the IRA's

b. The Secretary also was not required to adopt petitioners' view (Pet. 13-14) that "now" must modify "recognized" in order to give "recognized" meaning in the statute. Section 5129 includes three definitions of "Indian." The definition at issue here (clause one) includes all individuals "of Indian descent"—whether or not they resided within the boundaries of a reservation in 1934 (clause two) or can demonstrate a minimum quantum of Indian blood (clause three)—as long as they are "members of a recognized Indian tribe now [*i.e.*, in 1934] under Federal jurisdiction." 25 U.S.C. 5129. The term "recognized" thus *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." See Felix S. Cohen, *Handbook of Federal Indian Law* 302-306 (1942) (C.A. App. 4606-4610) (explaining need to show "tribal existence" for Indians to be accorded tribal rights under the law). Under that interpretation, tribal status must

---

operation. The IRA required the Secretary of the Interior to conduct referendum elections to enable the residents of any *existing* reservation to "vote against [the IRA's] application." 25 U.S.C. 5125. Because there was no Cowlitz reservation in 1934, the Secretary could not and did not conduct a referendum election among Cowlitz Indians. See C.A. App. 754 (stating merely that "the Cowlitz did not vote on the IRA"). But that says nothing about whether members of the Cowlitz Tribe were "Indians" within the meaning of Section 5129. Nor are amici correct (Br. 12) in describing Indian Commissioner Collier's 1933 letter to a single Cowlitz Indian (C.A. App. 746-747) as "formally" denying Cowlitz tribal existence. At that time, there was no formal administrative process for investigating tribal status akin to the current Federal Acknowledgment Process. When Collier's statement was finally subjected to the Federal Acknowledgement Process, it was "rejected." Pet. App. 306a n.61.

be confirmed—*i.e.*, the tribe must presently be "recognized"—before land is taken into trust under 25 U.S.C. 5108.

Petitioners also err in arguing (Pet. 14) that the BIA's interpretation conflicts with Congress's intent to prevent creation of an open-ended class of eligible Indians, while petitioners' interpretation (requiring official recognition as of 1934) would restrict beneficiaries of the IRA to a "fixed and ascertainable set." The BIA's recognition authority, although not limited to tribes that were officially recognized in 1934, is hardly unlimited. The BIA officially acknowledged the Cowlitz Tribe in 2002 only after a rigorous historical, anthropological, and genealogical investigation, which demonstrated that the tribe was officially recognized in the late 1800s and maintained tribal relations through the present. C.A. App. 620-1063; see 25 C.F.R. 83.7 (1994) (mandatory acknowledgment criteria). The BIA further found that the Cowlitz Tribe had been "cognitive[ly]" recognized in 1934—that is, it constituted a tribe in the eyes of persons, such as anthropologists, with full knowledge of tribal status. Pet. App. 306a n.61; cf. *Halbert*, 283 U.S. at 755, 759, 760 (referring to the Cowlitz as a "tribe" and among the "tribes" whose members were authorized by the 1911 Act to receive allotments from the Quinault reservation). Justice Breyer's concurrence in *Carcieri* observed that a number of tribes had "wrongly" been treated as not being under federal jurisdiction at the time of the IRA. 555 U.S. at 398; see *ibid.* ("The Department later recognized some of those Tribes on grounds that showed that it should have recognized them in 1934 even though it did not."). There is nothing in the IRA's text or legislative history to suggest

that Congress intended to deny services to tribes, like the Cowlitz, based on errors or incomplete information. The BIA's interpretation permits the agency, when implementing the IRA, to resolve uncertainty and correct mistakes about tribal status that existed on the date the IRA was enacted.

c. Petitioners fare no better with their argument (Pet. 14) that "[t]he court of appeals also failed to give adequate weight to the Secretary's earlier inconsistent interpretations of the statute." See Pet. 14-16. The BIA has long recognized its authority under the IRA to correct mistakes in tribal recognition when implementing the statute. For example, in 1980, the Associate Solicitor for Indian Affairs determined that the Department had authority to take land into trust for the Stillaguamish Tribe, even though federal officials in 1934 were "ignorant" of treaty rights that had placed the Stillaguamish under federal jurisdiction, and even though the Interior Department did not extend formal recognition to the Stillaguamish until 1976. C.A. App. 526-527. Justice Breyer cited the Stillaguamish case, among others, as evidence of the Department's longstanding interpretation of the IRA. *Carcieri*, 555 U.S. at 398. Petitioners rely (Pet. 15) on an earlier decision regarding the Stillaguamish, in which the Secretary merely expressed "some doubts" regarding the Department's authority to take land into trust for tribes that were not formally recognized in 1934. C.A. App. 4632. That decision contains no analysis of the statutory text or legislative history and does not reflect the Department's considered view on the IRA's interpretation. Cf. Pet. App. 288a-346a (extensively analyzing and interpreting the IRA).

Petitioners also rely (Pet. 15-16) on two other asserted pieces of evidence: (1) a 1980 decision by the Interior Board of Indian Appeals, *Brown* v. *Commissioner of Indian Affairs*, 8 I.B.I.A. 183, and (2) a 1994 letter from the Acting Assistant Secretary for Indian Affairs to the House Committee on Natural Resources (C.A. App. 4636). But as the court of appeals explained (Pet. App. 17a-19a), in neither instance was the Department of the Interior called upon to address the question of interpretation at issue here: whether "now" modifies "recognized" in Section 5129.

Brown involved an effort to gift-deed a Quinault Reservation trust allotment, a conveyance that required the recipient to meet the IRA's definition of "Indian." 8 I.B.I.A. at 184-185. Because the recipient was a member of the Cowlitz Tribe (not then officially recognized) and "only one-eighth Indian blood," *id.* at 185-186, the grantor did not contend that the recipient was an Indian at the time of the proposed grant. Instead, the grantor made a two-part argument: (1) the recipient had been a member of the Quinault Tribe in 1934, because he was the beneficial owner of a different Quinault Reservation allotment at that time; and (2) the recipient's ownership of the Quinault allotment reflected membership in the Quinault Tribe as of 1934 and thus was sufficient to show his Indian status, given the IRA's references to membership in any "recognized Indian tribe *now under Federal jurisdiction*." *Id.* at 188. The Board rejected the first part of the grantor's argument, holding that beneficial ownership of a Quinault Reservation allotment in 1934 did not make the recipient a member of the Quinault Tribe or any other "federally recognized tribe on June 18, 1934." *Ibid.* The Board accordingly "d[id] not consider it

necessary to dwell on" the grantor's second argument, regarding the "import" of the phrase "now under Federal jurisdiction." *Ibid.* (emphasis omitted). Thus, the Board did not interpret the IRA to mean, as petitioners contend (Pet. 16), "that recognition must have existed as of 1934." See Pet. App. 18a ("The Board * * * did not offer a contrary interpretation of 'recognized' in its discussion.").

The 1994 letter from the Acting Assistant Secretary likewise did not address that issue. To be sure, in quoting the language of Section 5129, the Acting Assistant Secretary inserted the bracketed phrase "[in 1934]" after "recognized" and before "tribe," which indicates an understanding or assumption that recognition must have occurred by 1934. C.A. App. 4636. But the letter addressed a different issue, and it provided no explanation for why the bracketed phrase was inserted there, rather than where Congress placed the provision's only temporal language ("now"). See Pet. App. 19a ("We fail to glean from those brackets or the letter any interpretation of the statute, let alone a departure from past agency interpretation.").

Finally, even if the miscellaneous agency statements cited by petitioners (Pet. 13-16) were suggestive of a different reading of Section 5129, none of those statements represented a considered analysis of the provision or a formal statement of the Department's views. They therefore are insufficient to refute the BIA's thorough, well-considered decision in this case. See Pet. App. 288a-326a (reviewing IRA's text and legislative history); *id.* at 308a-313a (reviewing Department's history of interpreting and applying the IRA).

d. No conflict exists between the decision below and any decision of this Court or any other court of appeals.

Petitioners first contend (Pet. 16) that this Court impliedly construed Section 5129 in *United States* v. *John*, 437 U.S. 634 (1978), and "concluded that a tribe had to be recognized in 1934." See Pet. 16-18. But *John* addressed an unrelated issue: whether lands "designated as a reservation for the Choctaw Indians residing in central Mississippi * * * are 'Indian country,' as that phrase is defined in 18 U.S.C. § 1151." 437 U.S. at 635. In answering that question, the decision paraphrased the IRA by stating that it "defined 'Indians' *not only* as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction,' and their descendants who then were residing on any Indian reservation, *but also* as 'all other persons of one-half or more Indian blood.'" *Id.* at 650 (brackets in original; emphasis added) (quoting predecessor to Section 5129). In the Court's view, "[t]here [was] no doubt that persons of this description [*i.e.*, persons of one-half or more Indian blood] lived in Mississippi, and were recognized as such by Congress and by the Department of the Interior, at the time the Act was passed," and the Court on that basis concluded that "the Mississippi Choctaws were not to be excepted from the general operation of the 1934 Act." *Ibid.* In other words, the Court's decision turned on a *different* clause of Section 5129—the clause covering individual Indians who satisfied the blood quantum requirement—and mentioned the language at issue here only in passing. The Court's insertion of the bracketed phrase ("[in 1934]") did not constitute a considered "conclu[sion]" (Pet. 16); tell-

ingly, when this Court construed the same language in *Carcieri*, it did not even cite *John*, much less rely upon it. See Pet. App. 19a (*Carcieri* "nowhere cite[d]" *John*).

While conceding that "the Court's holding in *John* did not turn on whether the Mississippi Choctaws were 'recognized' * * * in 1934," petitioners nevertheless insist that this Court "clearly considered" the question, because the court of appeals in *John* had relied on a failure of recognition in 1934 to hold that the Choctaws' reservation was not Indian country. Pet. 17 (citing *United States* v. *John*, 560 F.2d 1202, 1213 (5th Cir. 1977)). That is incorrect. The decision below had held that the IRA did not apply to the Mississippi Choctaws because the IRA "obviously" was intended to apply only to "Indians in the government-guardian-ward relationship," and not to individual Indians who, by 1934, had been "long emancipated" and were "outside that relationship." *John*, 560 F.2d at 1212. The Fifth Circuit therefore had no need to decide—and did not decide—whether a tribe must have been "recognized" as of 1934.

Petitioners similarly misread the Fifth Circuit's decision in *United States* v. *State Tax Commission*, 505 F.2d 633 (1974). The Fifth Circuit there observed that, prior to enactment of the IRA, the Mississippi Choctaws had not been under "government * * * supervision or control" and that the Department of the Interior had not "assumed or exercised jurisdiction over them," and it rejected the contention that they had become a tribe as a result of the IRA. *Id.* at 642 (citation omitted). Observing that the IRA "positively dictates that tribal status is to be determined as of June, 1934," the Fifth Circuit held that the Missis-

sippi Choctaws "did not * * * fall within" it. *Ibid.* The Fifth Circuit thus equated "tribal status" with federal "jurisdiction"—what the BIA now calls "jurisdictional status." Pet. App. 322a. As explained in *Carcieri*, a tribe's jurisdictional status (that is, whether the tribe was "now under Federal jurisdiction" when the IRA was enacted) depends on facts and circumstances as they existed in 1934. See 555 U.S. at 395-396. But the Fifth Circuit in *State Tax Commission* did not address whether Interior officials may "later recogni[ze]," during the IRA's implementation, "earlier 'Federal jurisdiction'" that existed on the date of the IRA's enactment. *Id.* at 399 (Breyer, J., concurring).

Nor did the Ninth Circuit address that question in *Kahawaiolaa* v. *Norton*, 386 F.3d 1271 (2004), cert. denied, 545 U.S. 1114 (2005). There, the Ninth Circuit simply observed that Native Hawaiians are not "Indians" under the IRA because "[t]here were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934," and because the IRA specifically excludes persons of Indian descent within federal territories other than Alaska. *Id.* at 1280 (citing 25 U.S.C. 5118 and 5129). Again, the court did not specifically address the date of recognition.

In sum, none of the decisions identified by petitioners conflicts with the BIA's determination here that the IRA permits trust acquisitions for a currently recognized Indian tribe that was "under Federal jurisdiction" in 1934, even if official recognition occurred after that date. As far as we are aware, the court of appeals' decision here is the first appellate decision to address that issue, which was highlighted by Justice Breyer's concurring opinion in *Carcieri*.

2. Petitioners also contend that the BIA's two-part test for determining whether a tribe was "under Federal jurisdiction" in 1934 is erroneous because the phrase unambiguously means "resid[ing] in Indian country." Pet. 22 (internal quotation marks omitted); see Pet. 19-23. Petitioners did not proffer that interpretation in administrative proceedings before the BIA or in the district court. See C.A. App. 4270-4278; D. Ct. Doc. 24, at 9-24 (Sept. 23, 2013). Instead, they raised it for the first time on appeal, Pet. C.A. Br. 20-21, but the court of appeals did not address it. And, as petitioners acknowledge (Pet. 27), the issue "does not * * * implicate a circuit conflict." This Court should deny review for those reasons alone.

In any event, the BIA's two-part test is based upon a permissible interpretation of the statute. Federal jurisdiction over "Indians" is not coterminous with special territorial jurisdiction over "Indian country," which is a distinct concept. As this Court recognized many years before the IRA's enactment, "[a]s long as * * * Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms they shall deal," even as to dealings "outside" Indian country. *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 195 (1876).

In contrast to that understanding of federal jurisdiction over Indians, the term "Indian country" has historically been limited to areas of special federal territorial jurisdiction. In 1834, Congress declared as "Indian country" most lands west of the Mississippi as "to which the Indian title has not been extinguished." Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729. Among

other provisions, the Act of June 30, 1834 declared that federal criminal laws applicable to "any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country," *id.* § 25, 4 Stat. 733, and it prohibited the introduction of "spirituous liquor or wine into the Indian country," *id.* § 20, 4 Stat. 732. As settlement proceeded westward, and as Indian titles were extinguished by treaty and statute, the lands constituting "Indian country" were vastly diminished, principally confined to Indian reservations and allotments subject to restrictions on alienation. See, *e.g.*, *United States* v. *Ramsey*, 271 U.S. 467, 470-472 (1926); *Clairmont* v. *United States*, 225 U.S. 551, 557-558 (1912). But up to and through the time the IRA was enacted, Congress continued to use the term "Indian country" in legislation, enacting "many statutes concerning intercourse with * * * Indians" that specifically relied on the concept. *Bates* v. *Clark*, 95 U.S. 204, 206 (1877); see *United States* v. *McGowan*, 302 U.S. 535, 537 (1938) ("The words 'Indian country' have appeared in the statutes relating to Indians for more than a century.").[3]

With respect to whether tribal members are required to have lived on reservations or within Indian country, the language in the first clause of Section 5129 speaks of tribes "now under Federal jurisdiction" and stands in contrast to the second clause, which explicitly does refer to one type of Indian country: reservation status. 25 U.S.C. 5129 ("all persons who

---

[3] In a 1948 revision of the federal criminal code, Congress defined "Indian country" to mean (a) lands "within the limits of any [federal] Indian reservation," (b) "dependent Indian communities," and (c) Indian allotments. 18 U.S.C. 1151; see *John*, 437 U.S. at 649 n.18.

are descendants of such members who were, on June 1, 1934, *residing within the present boundaries of any Indian reservation*") (emphasis added). And the third clause ("all other persons of one-half or more Indian blood"), by contrast, includes in its definition of "Indian" some Indians who did not reside in "Indian country."

As petitioners note (Pet. 24), a principal purpose of the IRA was to end the policy of allotting reservation lands. See *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 253-254 (1992). But the IRA is hardly limited to ending reservation allotments, nor does it seek to protect only reservation-based tribes. Rather, the "overriding purpose" of the IRA was to enable "Indian tribes * * * to assume a greater degree of self-government, both politically and economically," *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974), an objective not limited to Indians already located on existing reservations. Petitioners' interpretation depends on the premise that Congress intended to limit trust acquisitions (25 U.S.C. 5108) and declarations of *new* reservations (25 U.S.C. 5110) to recognized tribes that were *already* on reservations—despite the potentially greater needs of tribes made landless by federal action.

Petitioners rely (Pet. 25) on a floor statement by Representative Howard explaining that the IRA "recognizes the status quo of the present reservation Indians and further includes all other persons of one-fourth or more Indian blood," thus excluding "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*." 78 Cong. Rec. 11,732 (1934) (emphasis added). But that statement,

which does not even mention "under federal jurisdiction," refers to a different draft definition of "Indian" that was not enacted. See *id.* at 11,725-11,726. Petitioners also ignore the Senate committee hearings, which led to the insertion of the phrase "under Federal jurisdiction" in the Senate bill. See Pet. App. 14a-15a (describing Senate hearings). As the court of appeals observed (*id.* at 22a), the most that can be said about the legislative history is that it "provides no further clues, except that the jurisdictional nexus was meant as some kind of limiting principle."

The permissibility of the BIA's interpretation is also supported by contemporaneous statements from Department officials. Most notably, when comparing the House and Senate bills, Assistant Solicitor of the Interior Felix S. Cohen—who would go on to write "the leading treatise on federal Indian law," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199, 2211 (2012)—explained that the Senate had added "now under Federal jurisdiction" to the first definition of Indian. Pet. App. 22a. Yet Cohen was unable to discern the reason, accompanying his reference to the phrase with the observation "*whatever that may mean*." *Ibid.*; see C.A. Supp. App. 3. The Interior Department's analysis of differences between the House and Senate bills similarly observed that the phrase was "likely to provoke interminable questions of interpretation," Pet. App. 22a (citation omitted); see C.A. App. 398, underscoring the ambiguity of the phrase.

Finally, under the BIA's two-part test, a tribe must still demonstrate that (1) federal officials actually exercised jurisdiction over a tribe *prior to 1934*, and (2) the tribe's jurisdictional status remained intact *in*

1934. See pp. 10-12, *supra*. Petitioners argue that those requirements have no teeth, because in the Cowlitz case, the BIA relied in part on unsuccessful treaty negotiations, which petitioners claim should be treated as a "legal nullity." Pet. 26 (citation omitted). That argument misconstrues the import of treaties in evaluating whether a tribe was under federal jurisdiction. A ratified treaty with a tribe demonstrates formal federal recognition of the tribe at the time of the treaty; depending on the treaty's terms, it may also show the existence of enduring treaty obligations or may acknowledge the status of aboriginal lands. But federal jurisdiction over an Indian tribe does not depend upon the tribe's acquiescence or agreement or its being a party to a treaty. As Chief Justice Marshall explained nearly two centuries ago, the United States enjoys a relationship with Indian tribes that "resembles that of a ward to his guardian," because Indians "occupy a territory to which we assert a title independent of their will." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Even unsuccessful treaty negotiations can therefore provide evidence that the United States has recognized a tribe as a political entity, capable of entering into a treaty, and can support a finding that federal jurisdiction has been exercised over the tribe. Moreover, in finding that the Cowlitz Tribe was "under Federal jurisdiction" in 1934, the BIA did not rely exclusively on treaty negotiations. The BIA also looked exhaustively at the decades-long federal efforts to provide land and aid to the Cowlitz Tribe and to tribal members, which continued through the date of the IRA's enactment. Pet. App. 326a-344a; see pp. 11-12, *supra*. Petitioners have not shown that

the BIA's fact-bound application of its own two-part "under Federal jurisdiction" test was unreasonable.[4]

Amici California Tribal Business Alliance, et al. contend (Br. 2-3) that the court of appeals' decision "will facilitate the movement of more Indian casinos outside of tribal reservations and aboriginal territories, in order to be closer to urban gaming markets." The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, prohibits casino-style gaming on tribal trust lands acquired after 1988, unless a statutory exception applies. 25 U.S.C. 2719(b)(1)(B). To meet IGRA's "initial reservation" exception, 25 U.S.C. 2719(b)(1)(B)(ii), the Cowlitz Tribe had to show, *inter alia*, that the land was "within an area where the tribe has significant historical connections." 25 C.F.R. 292.6(d). Petitioners do not challenge the BIA's determination on this specific factual point (Pet. App. 367a-412a), which was affirmed by the court of appeals (*id.* at 26a-31a), that the land at issue here satisfies that test, as well as other IGRA requirements. Under IGRA, questions may arise regarding the historical relationship of a tribe to newly acquired trust parcels and whether gaming is appropriately permitted on such parcels. But those issues simply are not presented by the petition in this case.

---

[4] Petitioners also erroneously imply (Pet. 27) that this case implicates trust acquisitions amounting to "542,000 acres of land." But that figure represents *all* land taken into trust; petitioners do not identify how much of that acreage would be implicated by the issues involved here. Although the Department of the Interior has recently prioritized restoring Indian lands, the majority of trust acquisitions are not contested.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Acting Solicitor General
JEFFREY H. WOOD
Acting Assistant Attorney General
JOHN L. SMELTZER
Attorney

MARCH 2017