No. 17-8

In the Supreme Court of the United States

TOWN OF VERNON, NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The Indian Reorganization Act authorizes the Secretary of the Interior to take land into trust "for the purpose of providing land for Indians." 25 U.S.C. 5108. The Indian Land Consolidation Act (ILCA) provides that the Secretary's land-into-trust authority under Section 5108 "shall apply to all tribes." 25 U.S.C. 2202. The questions presented are:

1. Whether the Oneida Indian Nation, a federally recognized Indian tribe, is a "tribe" within the meaning of the ILCA. 25 U.S.C. 2201(1).

2. Whether Section 5108 is unconstitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A44) is reported at 841 F.3d 556. Opinions of the district court are not published in the *Federal Supplement* but are available at 2009 WL 3165556 (Pet. App. C1-C29) and 2015 WL 1400291 (Pet. App. B1-B24).

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2016. A petition for rehearing was denied on January 27, 2017. On April 17, 2017, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including May 26, 2017. On May 15, 2017, Justice Ginsburg further extended the time to June 26, 2017, and the petition was filed on June 23, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

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 domains." *Cohen's Handbook of Federal Indian Law* § 1.05 (Nell Jessup Newton ed., 2012) (*Cohen*). 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.

a. The Department of the Interior has promulgated regulations to implement the authority granted by Section 5108. See 25 C.F.R. Pt. 151. The regulations establish a process through which a tribe may request that the Secretary of the Interior take land into trust for its benefit. See 25 C.F.R. 151.9. In evaluating such a request, the Secretary must provide notice to state and local governments and must consider a number of specified regulatory criteria. See 25 C.F.R. 151.10 (criteria governing on-reservation acquisitions); 25 C.F.R. 151.11 (criteria governing off-reservation acquisitions). When the land to be acquired is in unrestricted fee status, the Secretary must consider, among other factors, "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." 25 C.F.R. 151.10(e); see 25 C.F.R. 151.11(a).

b. As originally enacted, the IRA permitted tribes to opt out of its provisions by vote at a special election. See

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

25 U.S.C. 5125. Over time, however, Congress repeatedly found it necessary to adopt special legislation to restore, on a case-by-case basis, the Secretary's authority to take land into trust on behalf of a tribe that had opted out of the IRA. See H.R. Rep. No. 908, 97th Cong., 2d Sess. 7 (1982) (House Report). In 1983, Congress enacted the Indian Land Consolidation Act (ILCA), 25 U.S.C. 2201 *et seq.*, which sought to categorically restore the Secretary's land-into-trust authority over "any tribe, reservation or area excluded from [the IRA], including tribes that have previously voted to reject the 1934 Act." House Report 7. The ILCA provides that Section 5108 "shall apply to all tribes notwithstanding the provisions of section 5125." 25 U.S.C. 2202. The ILCA further defines "tribe," for the purposes of that provision, to include "any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust." 25 U.S.C. 2201(1).

2. The Oneida Indian Nation of New York "is a federally recognized Indian Tribe and a direct descendant of the Oneida Indian Nation * * * , one of the six nations of the Iroquois, the most powerful Indian Tribe in the Northeast at the time of the American Revolution." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 203 (2005) (citation and internal quotation marks omitted). "At the birth of the United States, the Oneida Nation's aboriginal homeland comprised some six million acres in what is now central New York." *Ibid.*

a. In 1788, New York State and the Tribe entered into the Treaty of Fort Schuyler, in which the Tribe agreed to sell a "vast area" of its land to the State, retaining for itself a reservation of about 300,000 acres. *City of Sherrill*, 544 U.S. at 203; see *County of Oneida*

v. *Oneida Indian Nation*, 470 U.S. 226, 230-232 (1985). The federal government later "acknowledge[d]" the Oneida Reservation in the 1794 Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44, promising "never [to] claim" or "disturb" the Tribe's lands. *Id.* Art. II, 7 Stat. 45. The government further pledged that "the said reservation[ ] shall remain theirs, until they choose to sell [it] to the people of the United States." *Ibid.*; see *City of Sherrill*, 544 U.S. at 204-205.

To ensure that the disposition of Indian lands would be under federal control, the first Congress passed the Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137, commonly known as the Nonintercourse Act. That Act, which remains substantially in force today, see 25 U.S.C. 177, prohibited the sale of tribal lands without the consent of the United States. Nonintercourse Act § 4, 1 Stat. 138. Despite that prohibition, however, New York continued to purchase Oneida land. See *City of Sherrill*, 544 U.S. at 205. By 1838, the land owned by the Oneidas had dwindled to 5000 acres; the Tribe had less than 1000 acres by 1843; and by 1920, only 32 acres were left. *Id.* at 206-207.

b. "In the 1990s, the Tribe began to repurchase New York reservation land in open-market transactions." Pet. App. A10. The Tribe then asserted that its purchases had "unified fee and aboriginal title," such that the Tribe could "now assert sovereign dominion over the parcels" in a tax dispute. *City of Sherrill*, 544 U.S. at 213. This Court rejected the Tribe's argument. Because the Tribe had not exerted control over the land for more than 200 years, and because its reassertion of control after such a "long lapse of time" would upset "longstanding observances and settled expectations," the Court held that the Tribe's attempt was foreclosed

by principles of equity. *Id.* at 216-221. The Court pointed, however, to an alternate route for the Tribe to achieve some control over those lands: Section 5108 "provides the proper avenue for [the Tribe] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." *Id.* at 221. The Secretary's process under that provision for taking land into trust, the Court explained, is "sensitive to the complex inter-jurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." *Id.* at 220-221 (describing criteria under 25 C.F.R. 151.10(f) for taking land into trust).

c. Following *City of Sherrill*, the Oneidas petitioned the Secretary to accept a transfer of title to more than 17,000 acres, to be held in trust on the Tribe's behalf. Pet. App. A12. All of the land subject to the request was already owned by the Tribe in fee. The acreage encompassed the Tribe's governmental, health, educational, and cultural facilities; housing for tribal members; its hunting lands and undeveloped lands; and its businesses, including the Turning Stone Casino. *Ibid.* The Department of the Interior held public hearings on the Tribe's request, afforded an extended comment period, and prepared an Environmental Impact Statement that considered nine alternative actions. C.A. App. A555-A556.

In May 2008, the Secretary of the Interior decided to accept title to approximately 13,000 acres of the Tribe's fee land. Pet. App. A11. Taking the land into trust, the Secretary explained, would "help to address the [Oneida] Nation's current and near term needs to permanently reestablish a sovereign homeland for its members and their families, preventing alienation of the

lands." C.A. App. A585. The Secretary noted that, under State law, the property was already exempt from many sales, excise, and property taxes, such that "the placement of lands into trust would have the practical effect of continuing the *status quo* with regard to real property tax collections." *Id.* at A574. The Secretary acknowledged that taking the land into trust "may negatively impact the ability of state and local governments to provide cohesive and consistent governance" and could increase somewhat the demand for local government services, but the Secretary concluded that those effects would not be significant. *Id.* at A570, A573. The Secretary also found that taking land into trust for the Tribe would cause "no change in the New York State criminal and civil court jurisdiction" and that State police officers would "continue to be able to make arrests" for violation of federal, state, and local law. *Id.* at A606; see 25 U.S.C. 232, 233 (providing New York with criminal and civil jurisdiction over reservations).[2]

3. Petitioner and other parties filed suit in federal district court challenging the Secretary's land-into-trust decision.

a. One such challenge was brought by the State of New York and by Madison and Oneida Counties. See

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[2] While petitioner's suit was pending in the district court, this Court held in *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), that the Secretary of the Interior may take land into trust under Section 5108 only for Indian tribes that were "under Federal jurisdiction" in 1934. *Id.* at 395 (citation omitted). Following a remand by the district court, the Secretary determined that the Tribe satisfied that requirement and issued an amended decision in December 2013 reaffirming the decision to accept approximately 13,000 acres into trust. C.A. App. A1572. The district court upheld the Secretary's determination. Pet. App. B13. Petitioner did not press that issue on appeal.

Pet. App. A13 n.8. In 2014, that suit was settled, *New York* v. *Jewell*, No. 08-cv-644, 2014 WL 841764, at *1-*2 (N.D.N.Y. Mar. 4, 2014), resolving issues that had been litigated for a half-century, see *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 665 (1974). The settlement resolved, *inter alia*, issues of state and local taxation and regulation on tribal land. See *Jewell*, 2014 WL 841764, at *1-*2. Consequently, New York no longer contends that the entrustment violates its sovereignty.

b. Petitioner is a local government that opposes the Tribe's land-into-trust request. Pet. App. C3. In the district court, petitioner contended that the IRA's land-into-trust procedures are unconstitutional. *Ibid.* In the alternative, petitioner argued that the Tribe is not eligible to benefit from those procedures because it voted in 1936 to opt out of the IRA and because, in petitioner's view, the ILCA did not confer authority on the Secretary to take land into trust for the Tribe. *Ibid.* The court rejected both arguments.

As to petitioner's constitutional arguments, the district court explained that this Court has consistently given a "broad interpretation" to Congress's authority to legislate in matters involving Indian affairs, Pet. App. C8, and that the Secretary's acceptance of tribal land into trust does not violate the Tenth Amendment, *id.* at C8-C9. The district court also rejected petitioner's argument that the Secretary's authority to take land into trust for the Tribe was not restored by the ILCA because the Oneidas are not a "tribe" within the meaning of 25 U.S.C. 2201(1). That argument, the court held, was contrary to normal tools of statutory interpretation and also "would vitiate the very purpose and intent of ILCA." Pet. App. C24; see *id.* at C22-C28.

c. The court of appeals affirmed. Pet. App. A1-A44. The court began by addressing petitioner's three constitutional objections. *Id.* at A15-A43. First, the court rejected petitioner's argument that the land-into-trust authority created by Section 5108 exceeds Congress's powers under the Indian Commerce Clause, noting that "the federal government's power under the Constitution to legislate with respect to Indian tribes is exceptionally broad." *Id.* at A19 (citing *United States* v. *Lara*, 541 U.S. 193, 200 (2004)). Although this Court has placed greater limits on Congress's powers under the *Interstate* Commerce Clause, the court of appeals noted, "the Supreme Court has already rejected the proposed correspondence between the Interstate and Indian Commerce Clauses." *Id.* at A21 (citing *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989)). The court of appeals also rejected petitioner's argument that "the acquisition of land for Indian use is not a 'regulation of commerce' within the meaning of the Indian Commerce Clause." *Id.* at A23 (brackets omitted). "Again," the court explained, "precedent deprives this argument of any traction." *Ibid.* (citing *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 335-337 (1893); *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U.S. 641, 656-659 (1890)).

Second, the court of appeals rejected petitioner's argument that, "even if permitted under Congress's broad Indian Commerce Clause powers, the land-into-trust procedures violate underlying principles of state sovereignty." Pet. App. A23-A24. The court of appeals quoted this Court's explanation to the contrary that "the States' inherent jurisdiction on reservations can of course be stripped by Congress." *Id.* at A25 (brackets omitted) (quoting *Nevada* v. *Hicks*, 533 U.S. 353, 365

(2001)). As an example, the court of appeals pointed to *United States* v. *John*, 437 U.S. 634 (1978), in which this Court upheld the federal government's authority to displace state criminal law on lands purchased for the Choctaw Indians in Mississippi. Pet. App. A26-A27; see *id.* at A23 ("[T]he federal government may, by acquiring land for a tribe, divest a state of important aspects of its jurisdiction, even if a state previously exercised wholesale jurisdiction over the land and even if 'federal supervision over a tribe has not been continuous.'") (brackets omitted) (quoting *John*, 437 U.S. at 653).

Third, the court of appeals rejected petitioner's argument, based on the Enclave Clause, U.S. Const. Art. I, § 8, Cl. 17, that "Congress [must] obtain [a] state legislature's express consent * * * before it can take state land into trust for Indians." Pet. App. A28-A29. The Enclave Clause requires such consent "when the federal government takes 'exclusive' jurisdiction over land within a state," such as when it establishes a military base in the state. *Id.* at A29 (quoting *Paul* v. *United States*, 371 U.S. 245, 263 (1963)). But as "[c]ase law construing the clause" makes clear, the court explained, "state consent is *not* needed" when the assumption of federal control is less absolute, such as when the state remains "'free to enforce its criminal and civil laws on those lands.'" *Ibid.* (quoting *Kleppe* v. *New Mexico*, 426 U.S. 529, 543 (1976)). The court concluded that, because "States retain some civil and criminal authority on reservations," particularly with regard to non-Indians, federal jurisdiction over such land is not "categorically exclusive," and the Enclave Clause does not apply. *Id.* at A30 (citing *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 650-651 (1930)).

Next, the court of appeals rejected petitioner's statutory argument that the Oneidas "are not a 'tribe' eligible to be the beneficiary of land taken into trust by the United States" because they voted in 1936 to opt out of the IRA and "because the language of the [ILCA] does not reach them." Pet. App. A31-A32. Petitioner argued that the ILCA's definition of "tribe" in 25 U.S.C. 2201(1) ("any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust"), applied to an "Indian tribe" only "if, at the time the group is seeking to have the United States take land into trust on its behalf, the United States *already* holds land in trust for that group." Pet. App. A40. But that proposed "reading of § 2201(1)," the court determined, "is inconsistent with the ILCA scheme and would produce anomalous results." *Id.* at A40-A41. Rather, the court concluded, under the "rule of the last antecedent," the phrase "'for which, or for the members of which, the United States holds land in trust'" applies only to the last item in the series ("community"). Consequently, the court explained, an "Indian tribe" falls within the definition even if the United States does not already hold land in trust for the tribe. *Id.* at A41 (citing *Lockhart* v. *United States*, 136 S. Ct. 958, 962 (2016)). A contrary rule, the court also noted, would "[l]imit[] the ILCA's remedial effect to groups for which the United States already held land in trust," which "would be a very strange outcome in light of the ILCA's restorative aim." *Ibid.*

The court of appeals thus held that the Oneidas were a "tribe" within the meaning of the ILCA and that "the United States did not exceed its statutory authority by taking land into trust for the Tribe." Pet. App. A43.

The court accordingly declined to address the government's alternative argument that, even if the ILCA's definition of "tribe" applies only to groups on whose behalf land is already held in trust, that requirement was satisfied here because the United States had separately acquired land for the Oneidas prior to the Secretary's final decision regarding the Tribe's land-into-trust request. *Id.* at A36 n.22.

ARGUMENT

Petitioner argues (Pet. 10-15) that the Oneidas do not meet the ILCA's definition of "tribe," such that the Secretary had no authority under the IRA to take land into trust on their behalf. The court of appeals correctly rejected that argument, which no court has adopted.

Petitioner further argues (Pet. 15-30) that Congress exceeded its constitutional authority in enacting the IRA's land-into-trust provision, 25 U.S.C. 5108. The court of appeals correctly rejected that argument as well, and its decision does not conflict with any decision of this Court or another court of appeals.

This Court has denied review in other cases in which litigants have raised similar constitutional challenges, see *Citizens Against Casino Gambling in Erie Cnty.* v. *Chaudhuri*, 136 S. Ct. 2387 (2016) (No. 15-780); *Stop the Casino 101 Coal.* v. *Brown*, 135 S. Ct. 2364 (2015) (No. 14-1236), including in a petition seeking review of a different Second Circuit decision that arose from the same district court decisions from which this case arose, *Central N.Y. Fair Bus. Ass'n* v. *Jewell*, 673 Fed. Appx. 63

(2016), cert. denied, 137 S. Ct. 2134 (2017) (No. 16-1135). The same result is warranted here.[3]

1. In enacting the IRA, Congress generally authorized the Secretary of the Interior to take land into trust on a tribe's behalf, 25 U.S.C. 5108, but it also permitted tribes to opt out of its provisions by vote at a special election, 25 U.S.C. 5125. The ILCA restored the Secretary's land-into-trust authority as to "*all tribes* notwithstanding the provisions of section 5125." 25 U.S.C. 2202 (emphasis added). Thus, "by its terms, [the ILCA] simply ensures that tribes may benefit from [Section 5108] even if they opted out of the IRA." Pet. App. A41 (brackets and citation omitted).

At issue here is the ILCA's definition of "tribe," which includes "any Indian tribe, band, group, pueblo, or community *for which, or for the members of which, the United States holds lands in trust*." 25 U.S.C. 2201(1) (emphasis added). As the court of appeals explained, the italicized phrase is most naturally read as applying only to the last word in the series ("community"). That reading complies with the "rule of the last antecedent," under which "a limiting clause or phrase * * * should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003); see *Lockhart* v. *United States*, 136 S. Ct. 958, 962 (2016) ("When this Court has interpreted statutes that include a list of terms or phrases followed by a limiting clause, we have typically applied an interpretive strategy called the 'rule of the last antecedent.'") (quoting *Barnhart*, 540 U.S. at 26). That rule, which this Court has applied "from

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[3] The court of appeals' decision in this case is the subject of a separate petition for a writ of certiorari. *Upstate Citizens for Equal., Inc.* v. *United States*, No. 16-1320 (filed Apr. 26, 2017).

[its] earliest decisions to [its] more recent" cases, "reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it." *Lockhart*, 136 S. Ct. at 963. Thus, based on "the apparent grammar of the sentence," the ILCA's definition of "tribe" includes "any Indian tribe"—regardless whether, at the time the Secretary invokes his land-into-trust authority, the United States *already* holds land in trust for that tribe. Pet. App. A41-A42 (citation omitted).

Petitioner advocates (Pet. 11-14) a different interpretation of the ILCA's definition of "tribe," one that no court has adopted. Rather than apply the rule of the last antecedent—the rule that "typically," *Lockhart*, 136 S. Ct. at 963, or "ordinarily," *Barnhart*, 540 U.S. at 26, applies—petitioner urges (Pet. 12) application of "the series-qualifier principle," under which a modifying phrase is applied to all preceding items in the series. Although petitioner is correct that "the rule of the last antecedent 'is not an absolute and can assuredly be overcome by other indicia of meaning,'" *Lockhart*, 136 S. Ct. at 963 (quoting *Barnhart*, 540 U.S. at 26), petitioner identifies no such indicia that would overcome the rule here.

Indeed, the ILCA's "context fortifies the meaning that principle commands." *Lockhart*, 136 S. Ct. at 963. The ILCA is subject to the IRA's already-restrictive definition of "Indian tribe," 25 U.S.C. 5129. See *Carcieri* v. *Salazar*, 555 U.S. 379 (2009) (interpreting limitations imposed by Section 5129). Thus, as the court of appeals explained, "Congress took care" in the ILCA to preserve the IRA's preexisting "'restrict[ions] [on] the acquisition of land for Indians.'" Pet. App. A42 (quoting 25 U.S.C. 2202). But nothing suggests that Congress

intended for the ILCA to impose an *additional* restriction on the Secretary's authority to acquire land for Indian tribes that otherwise meet the IRA's requirements. See *ibid.* To the contrary, the ILCA uses expansive language both in the relevant operational section ("all tribes," 25 U.S.C. 2202) and definitional section ("any Indian tribe," 25 U.S.C. 2201(1)). See *Freeman* v. *Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) (explaining that the word "any" "has an 'expansive meaning'" and "can broaden to the maximum") (quoting *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 131 (2002)).

This interpretation is reinforced by Congress's purpose for enacting the ILCA, which was unusually clear. Prior to the ILCA, Congress had repeatedly considered and approved trust acquisitions on a case-by-case basis for tribes that had opted out of the IRA. Section 2202 was intended to obviate this burdensome process by making the authority in Section 5108 "applicable to *any tribe*, reservation or area excluded from [the IRA], including tribes that have previously voted to reject the 1934 Act." House Report 7 (emphasis added). The bill's sponsors thus explained that it would apply to "all the tribes served by the Secretary," including "tribes who rejected the Act in elections held in the mid-1930s." *Id.* at 13-14.

Petitioner nevertheless argues (Pet. 14) that the ILCA was instead intended "to limit the applicability of [Section 5108]." Petitioner offers no supporting citation or authority for that assertion, which as just noted is contradicted by the House Report explaining the legislation that became the ILCA. Congress intended for the ILCA to apply broadly to benefit Indians that have a relationship with the federal government—as the

Oneidas have since the eighteenth century. Congress therefore included within the ILCA's scope those tribes, bands, and pueblos that the Secretary already had recognized, as well as other Indian "communit[ies]" whose relationship with the federal government was based on their status as trust beneficiaries.

Finally, as the court of appeals observed, petitioner's proposed rule "would produce anomalous results." Pet. App. A41. Petitioner's "interpretation would mean that the ILCA restores land-into-trust eligibility only to those tribes that, despite having voted * * * to *reject* land-into-trust eligibility, somehow did have land held in trust by the government on their behalf." *Ibid.* Not only "would [that] be a very strange outcome in light of the ILCA's restorative aim," it would affirmatively "undercut the ILCA's intended effect." *Ibid.*

2. Petitioner further argues (Pet. 15-30) that Congress exceeded its constitutional authority in enacting the IRA's land-into-trust provision, 25 U.S.C. 5108. The court of appeals correctly rejected that argument, and its decision is consistent with this Court's case law and with the decisions of other courts of appeals.

a. The Constitution grants the United States both "the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State." *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913). Congress's "broad general powers to legislate in respect to Indian tribes," *United States* v. *Lara*, 541 U.S. 193, 200 (2004), derive from the Indian Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, and the Treaty Clause, Art. II, § 2, Cl. 2, among other sources. See *Lara*, 541 U.S. at 200-204; see also *United*

States v. *Kagama*, 118 U.S. 375, 384 (1886) (Because tribes "are communities *dependent* on the United States * * * so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."). On numerous occasions, this Court has described such authority "as 'plenary and exclusive.'" *Lara*, 541 U.S. at 200 (citing *Negonsott* v. *Samuels*, 507 U.S. 99, 103 (1993); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979)).

Congress's constitutional authority over Indian tribes has, from the time of the Founding, consistently been understood to include power over the acquisition, sale, and regulation of Indian land. See *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 204 (2005) (describing the Nonintercourse Act); see generally *Cohen* §§ 5.02[4], 15.03. In *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the Court expressly recognized Congress's constitutional power to create Indian country: "The federal set-aside requirement * * * reflects the fact that because Congress has plenary power over Indian affairs, see U.S. Const., Art. I, § 8, Cl. 3, some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country." 522 U.S. at 531 n.6; see *United States* v. *John*, 437 U.S. 634, 652-654 (1978) (upholding federal criminal jurisdiction over lands that Congress had acquired and that the United States held in trust for the Mississippi Choctaws). In 1934, Congress exercised that power in the IRA by granting the Secretary of the Interior authority to take land into trust for Indian tribes, 25 U.S.C. 5108, and this Court has specifically identified Section 5108 as

"provid[ing] the proper avenue" for the federal government to assume control over tribal land, including the very land at issue here. *City of Sherrill*, 544 U.S. at 221; see *id.* at 220 ("Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being.").

Given the long, unbroken history of federal supervision of tribal lands, it would be surprising for the courts to entertain any doubt about the constitutionality of Section 5108. And, in fact, the courts of appeals have uniformly upheld Section 5108 against various constitutional challenges. See, *e.g.*, *Carcieri* v. *Kempthorne*, 497 F.3d 15, 39-40 (1st Cir. 2007) (en banc) (rejecting challenges under the Indian Commerce Clause, the Tenth Amendment, and the Enclave Clause), rev'd on other grounds, 555 U.S. 379 (2009); see also *County of Charles Mix* v. *United States Dep't of Interior*, 674 F.3d 898, 902 (8th Cir. 2012) (rejecting challenge under the Guarantee Clause); *Michigan Gambling Opposition* v. *Kempthorne*, 525 F.3d 23, 32-33 (D.C. Cir. 2008) (per curiam) (rejecting challenge under the non-delegation doctrine), cert. denied, 555 U.S. 1137 (2009) (No. 08-554); *South Dakota* v. *United States Dep't of the Interior*, 423 F.3d 790, 797-798 (8th Cir. 2005) (same), cert. denied, 549 U.S. 813 (2006) (No. 05-1428); *United States* v. *Roberts*, 185 F.3d 1125, 1136-1137 (10th Cir. 1999) (same), cert. denied, 529 U.S. 1108 (2000) (No. 99-1174).

b. Petitioner offers a series of arguments as to why Section 5108 is unconstitutional. None is persuasive.

First, petitioner argues (Pet. 15-20) that the Indian Commerce Clause does not support "plenary" federal power over Indian tribes and that the court of appeals

adopted an unduly broad interpretation of the Clause that infringes upon State sovereignty.

As an initial matter, although petitioner is correct (Pet. 16) that the term "plenary" does not appear in the Indian Commerce Clause, this Court has long used that term to describe Congress's powers of legislation with respect to Indian tribes. See, *e.g.*, *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 478 (1899); see also p. 16, *supra*. This Court has located Congress's "broad general powers to legislate in respect to Indian tribes," *Lara*, 541 U.S. at 200, not only in the Indian Commerce Clause, but also in the Treaty Clause, among other sources. *Ibid.*

As the court of appeals explained, moreover, petitioner's arguments conflate Congress's powers under the *Interstate* Commerce Clause with its powers under the *Indian* Commerce Clause. Yet this Court "has already rejected the proposed correspondence between the Interstate and Indian Commerce Clauses." Pet. App. A21. The two Clauses "have very different applications" and serve different purposes: "while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989) (citations omitted). In addition, cases interpreting the Interstate Commerce Clause are "premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." *Ibid.* For those reasons, petitioner's reliance on cases arising under the Interstate Commerce Clause, see Pet. 17 (quoting and citing *United States* v. *Morrison*,

529 U.S. 598 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995)), is misplaced.

This Court has also made clear that Congress's power to regulate Indian affairs includes the authority to divest States of jurisdiction on Indian reservations. *Nevada* v. *Hicks*, 533 U.S. 353, 365 (2001) ("The States' inherent jurisdiction on reservations can of course be stripped by Congress.") (citing *Draper* v. *United States*, 164 U.S. 240, 242-243 (1896)); see *Seminole Tribe* v. *Florida*, 517 U.S. 44, 62 (1996) ("States * * * have been divested of virtually all authority over Indian commerce and Indian tribes."). For instance, criminal jurisdiction over offenses committed on an Indian reservation is governed by an often-"complex patchwork" of laws, and "Congress has plenary authority to alter these jurisdictional guideposts." *Negonsett*, 507 U.S. at 102-103 (citation omitted); see *John*, 437 U.S. at 652-653 (Congress may displace state criminal jurisdiction on reservation lands even if such jurisdiction previously "went unchallenged" and even if "federal supervision over [a tribe] has not been continuous."); see also 25 U.S.C. 232 (providing for New York to have "jurisdiction over offenses committed by or against Indians on Indian reservations within the State"). Petitioner offers no authority for the novel proposition that "even if permitted under Congress's broad Indian Commerce Clause powers, the [IRA's] land-into-trust procedures violate underlying principles of state sovereignty." Pet. App. A23-A24.[4]

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[4] Petitioner argues (Pet. 18-19) that the authority granted by Section 5108 has been "destructive to federalism" because an "explosion of tribal gaming" has led to an increased number of trust applications, and in two cases "[c]asino profits" were used to bribe govern-

Second, petitioner asks (Pet. 20-26) this Court to hold that Section 5108 is an unconstitutional delegation of legislative power to the Secretary of the Interior. Yet as petitioner concedes (Pet. 26), petitioner failed to raise that argument below, and consequently it was waived. In addition, the court of appeals did not address the issue; there is no sound reason for this Court to do so in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

Petitioner seeks to excuse its failure to raise the issue below by noting that *a different litigant* made a non-delegation argument to the district court in a companion case, *Upstate Citizens for Equality, Inc.* v. *Jewell*, No. 08-cv-633 (N.D.N.Y. June 16, 2008). See Pet. 26 (citing Pet. App. D6). One party's raising of a constitutional challenge does not preserve the issue for other parties, however. Moreover, petitioner's case was consolidated with *Upstate Citizens for Equality* for briefing and argument in the court of appeals, yet no party raised the issue at that stage. And although Upstate

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ment officials to grant further land-into-trust requests. Yet petitioner disavows (Pet. 20) any such "impropriety" in the Secretary's approval of the Oneidas' land-into-trust request. Petitioner also objects (*ibid.*) to what it characterizes as the Secretary's "extreme rubberstamping of fee-to-trust applications." Yet as this Court explained, the Secretary's application of the IRA is "sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." *City of Sherrill*, 544 U.S. at 220-221. The factual record before the court of appeals in this case bears out that conclusion, see C.A. App. A570-A573, and New York does not itself assert any sovereignty interest here. Moreover, the Secretary accepted into trust only about 13,000 of the approximately 17,000 acres the Tribe requested. See p. 5, *supra*.

Citizens for Equality et al. have filed a separate certiorari petition contending that Section 5108 is unconstitutional, they did not raise a non-delegation challenge in their petition. See *Upstate Citizens for Equal., Inc.* v. *United States*, No. 16-1320 (filed Apr. 26, 2017). There is accordingly no reason to ignore this Court's normal certiorari procedures in order to decide it here.

Finally, and in any event, the courts of appeals have uniformly and correctly rejected non-delegation challenges to Section 5108. See *Michigan Gambling Opposition*, 525 F.3d at 28-29 (D.C. Cir.); *Carcieri*, 497 F.3d at 42-43 (1st Cir.); *South Dakota*, 423 F.3d at 797 (8th Cir.); *Roberts*, 185 F.3d at 1136-1137 (10th Cir.). Further review is unwarranted.

Third, petitioner argues that the Court should grant certiorari to "resolve a circuit conflict regarding the scope of the Enclave Clause." Pet. 28 (capitalization altered; emphasis omitted). No such conflict exists, and the court of appeals correctly rejected petitioner's Enclave Clause argument.

Under the Enclave Clause, U.S. Const. Art. I, § 8, Cl. 17, "state consent is needed only when the federal government takes 'exclusive' jurisdiction over land within a state." Pet. App. A29 (quoting *Paul* v. *United States*, 371 U.S. 245, 263 (1963)); see *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525, 538 (1885) (State consent is necessary for the federal government to obtain "the right of exclusive legislation within the territorial limits of any state."). But "[w]hen land is taken into trust by the federal government for Indian tribes, the federal government does not obtain such categorically exclusive jurisdiction over the entrusted lands." Pet. App. A30. As this Court has explained, reservation lands, even though "set apart and used for public purposes,"

do not fall within the Enclave Clause because "the lands remain part of [the State's] territory and within the operation of her laws":

> Such reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards. Private property within such a reservation, if not belonging to such Indians, is subject to taxation under the laws of the State.

Surplus Trading Co. v. *Cook*, 281 U.S. 647, 650-651 (1930); see *Hicks*, 533 U.S. at 361 ("State sovereignty does not end at a reservation's border."); see also 533 U.S. at 363-365 (upholding State's right to enter a reservation to execute a search warrant related to off-reservation conduct). Thus, land taken into trust under Section 5108 is not "exclusive" in the sense contemplated by the Enclave Clause. *Paul*, 371 U.S. at 263. Indeed, in New York, the State has criminal and civil jurisdiction over all reservations in the State. See 25 U.S.C. 232, 233.

Petitioner argues (Pet. 28-30) that a conflict exists between the First and Second Circuits regarding applicability of the Enclave Clause to the Secretary's land-into-trust authority. That is incorrect. In *Carcieri*, the First Circuit rejected a challenge under the Enclave Clause to the Secretary's authority under Section 5108, concluding that land held in trust for a tribe "is not a federal enclave because state civil and criminal laws may still have partial application thereon." 497 F.3d at 40 (citing *Surplus Trading*, 281 U.S. at 651). That is identical to the holding and reasoning of the decision below. See Pet. App. A31 ("Because federal and Indian authority do not wholly displace state authority over land taken into trust pursuant to [Section 5108], the

Enclave Clause poses no barrier to the entrustment that occurred here.").[5]

Petitioner also asserts that the Second Circuit's decision in this case conflicts with its own holding in a prior case "that tribal jurisdiction 'is a combination of tribal and federal jurisdiction over land, to the *exclusion* of the jurisdiction of the state.'" Pet. 29 (quoting *Citizens Against Casino Gambling in Erie Cnty.* v. *Chaudhuri*, 802 F.3d 267, 279-280 (2d Cir. 2015), cert. denied, 136 S. Ct. 2387 (2016)); see *ibid.* (characterizing *Chaudhuri* as holding that "the Constitution 'vests *exclusive* legislative authority over Indian affairs in the federal government' and that when it comes to dealing with Native Americans, 'there is no room for state regulation.'" (quoting 802 F.3d at 279-280)). Yet as the court of appeals explained, there is no conflict:

> In *Chaudhuri*, quoting language from the Cohen *Handbook*, we observed that "because of plenary federal authority in Indian affairs, there is no room for state regulation." Although read literally this declaration appears to be unqualified, the *Handbook* makes clear that it is in fact subject to exceptions, including that states may continue to regulate the activities of nonmembers on tribal land, and that states may demand assistance from tribal members in the exercise of that regulatory authority. We do not read

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[5] *Carcieri* also stated that "trust land does not fall within the plain language of the Enclave Clause" because "[i]t is not purchased 'for the erection of forts, magazines, arsenals, dockyards, or other needful buildings.'" 497 F.3d at 40 (brackets omitted) (quoting U.S. Const. Art. I, § 8, Cl. 17). Because the court of appeals in this case found the Enclave Clause inapplicable for a different reason—the lack of exclusive federal control—it had no need to consider, and did not consider, that alternative argument.

> *Chaudhuri* to suggest otherwise. The relevant portion of our decision in *Chaudhuri* concerned whether a particular piece of land was subject to tribal jurisdiction *at all*, not the extent or existence of the state's authority on tribal land. For that reason, we decline to treat the quoted portion of *Chaudhuri* as dispositive of the Enclave Clause question at issue here.

Pet. App. A30-A31 n.19 (brackets and citations omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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