In The
Supreme Court of the United States

MICHIGAN GAMBLING OPPOSITION ("MICHGO"),

Petitioner,

v.

DIRK KEMPTHORNE, in his official capacity as Secretary of the United States Department of the Interior, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, authorizes the Secretary of the Interior – "in his discretion" – to acquire lands "for Indians." Two panel members below held that Section 5 establishes a sufficiently intelligible principle upon which to delegate the power to take land into trust, aligning the D.C. Circuit with the First, Eighth, and Tenth Circuits. Judge Janice Rogers Brown dissented, agreeing with an earlier Eighth Circuit decision which held that Section 5 violates the nondelegation doctrine, agreeing with the Eleventh Circuit, which has held that Section 5 "does not delineate the circumstances under which exercise of [the Secretary's] discretion is appropriate," and agreeing with the 24 states that have asked this Court to hold Section 5 unconstitutional. The first question presented is:

1. Whether the standardless delegation by Congress of totally "discretion[ary]" authority to an Executive official to acquire land "for Indians" is an unconstitutional delegation of legislative power.

Section 19 of the Indian Reorganization Act of 1934, 25 U.S.C. § 479, defines the term "Indian" to include members of any recognized Indian tribe "now" under Federal jurisdiction. On February 25, 2008, this Court granted the petition for certiorari filed in *Carcieri v. Kempthorne*, No. 07-526, to determine whether the Secretary may exercise his unfettered power to acquire land "for Indians" on behalf of

QUESTIONS PRESENTED – Continued

Indian tribes that were not recognized "now," i.e., in 1934, when IRA was enacted. The second question presented here mirrors the question this Court will answer in *Carcieri*:

2. Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to this proceeding are Petitioner, Michigan Gambling Opposition; Respondents, Dirk Kempthorne, in his official capacity as Secretary of the United States Department of the Interior, and Lynn Scarlett, in her official capacity as Assistant Secretary of the United States Department of the Interior; and Intervenor/Respondent, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians. Petitioner states that it has no parent corporation or subsidiaries.

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PETITION FOR CERTIORARI

Petitioner, Michigan Gambling Opposition ("MichGO"), respectfully petitions this Court to review the judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The divided opinion of the court of appeals is reported at 525 F.3d 23 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the district court is reported at 477 F. Supp. 2d 1 and reproduced at App. 36a.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2008. App. 1a. On July 25, 2008, the D.C. Circuit denied, 7-3, a timely petition for rehearing *en banc*. App. 85a. The D.C. Circuit's jurisdiction was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, provides in pertinent part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

Section 19 of the Indian Reorganization Act of 1934, 25 U.S.C. § 479, provides in pertinent part:

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

INTRODUCTION

This Court has long recognized the nondelegation doctrine as "vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892). Yet, after more than seven decades of disuse, the nondelegation doctrine's continuing vitality is in serious doubt. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 674-75 (1980) (Rehnquist, J., concurring in the judgment). The Court's reaffirmance of the nondelegation doctrine as a guiding principle is sorely needed, particularly in the current economic climate, where panic has driven Congress to consider broad delegations of power to the Executive Branch without even thinking about separation of power principles, delegations that the nation has not seen since the depression-era statutes invalidated in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *See, e.g.,* Marcia Coyle, *Bailout proposal grants sweeping powers to Paulson, but are they legal?*, NAT. L.J., Sept. 29, 2008 (questioning whether Secretary Paulson's preliminary bailout proposal could survive a nondelegation challenge, and postulating the present IRA litigation as a possible means "to reinvigorate the doctrine").

This case is the ideal vehicle for breathing fresh life into the nondelegation doctrine. MichGO presents a challenge to a statute, Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, enacted by the same Congress that enacted the defective laws

at issue in *Panama Refining* and *A.L.A. Schechter*. Section 5 baldly authorizes the Secretary of the Interior – "in his discretion" – to acquire property in trust "for Indians." The Secretary has acquired thousands of properties across the country under Section 5, removing vast areas from state and local jurisdiction. Yet, the statute identifies only a beneficiary, not an intelligible guiding principle that allows courts to discern whether the Secretary's actions are in accord with Congressional will.

The Eighth Circuit held Section 5 unconstitutional in *South Dakota v. United States Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated and remanded*, 519 U.S. 919 (1996) ("*South Dakota I*"). And the Eleventh Circuit in *Florida Department of Business Regulation v. United States Department of Interior*, 768 F.2d 1248, 1256 (11th Cir. 1985), concluded that Section 5 "does not delineate the circumstances under which exercise of this discretion is appropriate." But the D.C. Circuit has now joined the First, Eighth, and Tenth Circuits in rejecting nondelegation challenges to Section 5, in derogation of this Court's nondelegation precedent. As Judge Janice Rogers Brown explained in a lengthy dissent below:

> Like other courts that have rejected nondelegation challenges to § 5, *Carcieri v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (*en banc*); *South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 799 (8th Cir. 2005) [*South Dakota II*]; *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), the majority

> nominally performs a nondelegation analysis but actually strips the doctrine of any meaning. . . . Although I agree the nondelegation principle is extremely accommodating, the majority's willingness to *imagine* bounds on delegated authority goes so far as to render the principle nugatory. . . . [The panel majority's] approach *differs radically from the Supreme Court's analytical process in nondelegation challenges.*

App. 20a-21a (emphasis added, citations omitted).

In *South Dakota I*, Justices Scalia, Thomas, and O'Connor urged the Court to resolve Section 5's constitutionality. 519 U.S. 919, 920-23 (1996) (Scalia, J., dissenting). Over the last 12 years, that request has been joined by a chorus of 24 states.[1] The passage of time has been more than sufficient for the question of Section 5's constitutionality to "percolate." It is clear that simply incanting that 75 years have passed since the last successful nondelegation challenge – as most courts have done – is an insufficient basis for

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[1] *See Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005), *cert. denied*, 127 S. Ct. 38 (2006) (Utah; supporting *amici curiae* brief of Rhode Island, Alabama, Arkansas, Colorado, Idaho, Iowa, Kansas, Louisiana, Michigan, Missouri, Nevada, New York, North Dakota, Ohio, South Dakota, and Wyoming); *South Dakota II*, *cert. denied*, 127 S. Ct. 67 (2006) (South Dakota); *Carcieri*, No. 07-526 (2008) (Rhode Island; supporting *amici curiae* brief of Alabama, Alaska, Arkansas, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Massachusetts, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Utah).

concluding that Section 5's unbridled delegation of legislative power is permissible. The fact that parties and numerous states have been forced to bring successive, adverse circuit decisions to this Court is a compelling reason to grant MichGO's petition, particularly where those decisions conflict with this Court's jurisprudence. The immense practical and legal impacts of the nondelegation question, both on our constitutional system and state sovereignty, counsel in favor of this Court's immediate review.

The importance of the second question presented cannot be reasonably disputed, as the Court has already agreed to review the same issue in *Carcieri*: if Section 5 permissibly delegates to the Executive branch carte blanche authority to acquire property in trust for Indians, then does the plain language of 25 U.S.C. § 479 restrict the beneficiaries of such trust actions to those tribes that were federally recognized in 1934, when IRA was enacted? MichGO respectfully requests that the Court grant the petition on this question as well. Since it is undisputed in this case that the Tribe was *not* federally recognized in 1934, MichGO asks that, in the event the Court adopts the Petitioner's position in *Carcieri*, the Court summarily reverse and remand the D.C. Circuit's decision in this case.

STATEMENT OF THE CASE

I. At the Time of IRA's Enactment in 1934, the Tribe Was Not Federally Recognized.

The Tribe descends primarily from a band of Pottawatomi Indians led by Chief Match-E-Be-Nash-She-Wish during the late 1700s and early 1800s. From early in its history, the federal government recognized the Tribe, which had "unambiguous previous Federal acknowledgement" as a tribe through 1870. D.C. Cir. J.A. at 1767, 1774, 1777, 1785.

In a report on the Tribe's history, BIA determined conclusively that the Tribe's federal acknowledgement ceased in 1870, when the Tribe chose to discontinue its compliance with the Treaty of 1855 and received its last annuity-commutation payment. 62 Fed. Reg. 38,113 (1997). As the Tribe explained below, "the federal government withheld formal acknowledgement beginning in 1870. . . . Thus, for well over a century, the Tribe was denied both federal recognition and reservation lands. . . ." Appeal Br. of Def.-Appellee Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians at 3.

II. Sixty-five Years After IRA's Passage, the Tribe Is Re-acknowledged by the Federal Government.

In the mid-1990s, the Tribe applied for federal acknowledgment through the Department of Interior's formal recognition procedure. In a letter to the Assistant Secretary of Indian Affairs, the Tribe stated

that its tribal council had agreed to pursue federal acknowledgement provided "there would never be casinos in our Tribe." D.C. Cir. J.A. at 1863. Almost immediately after receiving federal acknowledgment, however, the Tribe submitted an application requesting that the government set aside land in trust for the benefit of the Tribe to construct and operate a casino. D.C. Cir. J.A. at 1733-58. On May 13, 2005, Respondents issued a notice of their intent to take the proposed casino site in trust for the Tribe. D.C. Cir. J.A. at 60-61.

III. The Lawsuit

MichGO is a Michigan non-profit corporation that seeks to protect the citizenry and quality of life in its community by opposing the proliferation of gambling venues. Its members reside in West Michigan and own the businesses and homes that will be most affected if the Tribe is successful in its attempt to bring 3.1 million casino visitors a year to a rural community of only 3,000 residents. D.C. Cir. J.A. at 21, 465, 1202, 1207-08.

DOI's asserted authority to take land in trust for the Tribe is Section 5 of the Indian Reorganization Act of 1934. 25 U.S.C. § 465. Section 5 is a broad, generic statute that tautologically authorizes the Secretary to acquire land "for the purpose of providing land for Indians." *Id.* Count IV of MichGO's Complaint alleges that Section 5 contains no intelligible standard to limit the Secretary's discretion to

take land in trust, and therefore violates the non-delegation doctrine.

IV. The District Court Is Unable to Find an Intelligible Principle that Would Render Section 5 Constitutional.

The District Court issued an opinion dismissing MichGO's nondelegation claim on February 23, 2007. The court did not identify an intelligible limiting principle in Section 5's bald statutory text, but rather relied on the purported limiting regulations the Department of the Interior had promulgated. App. 81a-83a. The District Court's holding was directly contrary to *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 473 (2001), in which this Court held that an agency cannot cure an unconstitutional, standardless delegation of power through the promulgation of limiting regulations. MichGO filed a timely appeal with the U.S. Court of Appeals for the D.C. Circuit on March 22, 2007.

V. While MichGO's Case Is On Appeal, This Court Grants Certiorari in *Carcieri v. Kempthorne*.

After briefing and oral argument, and while the parties were awaiting a decision from the D.C. Circuit, this Court granted certiorari on February 25, 2008, to review the First Circuit's *en banc* decision in *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007). In *Carcieri*, the First Circuit upheld the Secretary of

Interior's decision to take land in trust under IRA for the benefit of the Narragansett Tribe, even though the tribe had not been federally recognized in 1934, when IRA was enacted. *See id.* at 22. The First Circuit held that IRA's definition of eligible "Indian" tribes – namely, those "recognized [as] Indian tribe[s] *now* under Federal jurisdiction," 25 U.S.C. § 479 (emphasis added) – was ambiguous, and that the Secretary's interpretation was entitled to *Chevron* deference. *See id.* Applying that deference, the court held that the Secretary had reasonably interpreted IRA to require only that a tribe be federally recognized at the time of the relevant land-in-trust application. *See id.*

As the United States explained in opposing the certiorari petition in *Carcieri*, federal courts have consistently held that a tribe need not have been recognized in 1934 to qualify as "Indians" under IRA. Br. in Opp'n, *Carcieri v. Kempthorne*, No. 07-526, at 5 (Nov. 21, 2007) (stating that the First Circuit's decision "does not conflict with the decision of any other circuit"). The first hint of any contrary judicial opinion on this issue came when this Court granted certiorari in *Carcieri* and agreed to review the question of "[w]hether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934." Immediately following that announcement, MichGO filed with the D.C. Circuit a Motion to Supplement the Issues Presented for Review to include the new

statutory interpretation issue presented in *Carcieri*, but the court denied the motion on March 19, 2008.

VI. A Divided D.C. Circuit Panel Holds Section 5 Constitutional.

The D.C. Circuit issued a 2-1 opinion on the merits of MichGO's appeal on April 29, 2008. In its ruling on the nondelegation issue, the majority chastised the District Court for relying on administrative regulations to provide the intelligible limiting principle. App. 12a. Nonetheless, the majority upheld the statute, *inferring* a limiting principle from IRA's purported "purpose" of promoting economic self-sufficiency, a purpose that the majority found implied in the Act's other provisions, general context, and legislative history. App. 13a-17a. In so holding, the majority aligned itself with decisions of the First, Eighth, and Tenth Circuits.

In a lengthy dissent, Judge Janice Rogers Brown concluded that Section 5 violates the nondelegation doctrine, agreeing with the Eighth Circuit's earlier decision in *South Dakota I*, and with the Eleventh Circuit's decision in *Florida* that Section 5 contains no intelligible principle to guide the Secretary's statutory discretion. Judge Brown criticized the majority's willingness to go beyond statutory text to find a limiting standard, noting that when a standard is entirely absent, as is the case here, this Court has refused to create one out of whole cloth. App. 24a (Brown, J., dissenting) (citing *Conn. Nat'l Bank v.*

Germain, 503 U.S. 249, 254 (1992)). As Judge Brown observed, "rather than an ambiguous standard that requires interpretation, § 5 provides an obvious, unambiguous direction that the Secretary is to have complete discretion," and the majority's asserted intelligible principle "arises from the majority's imagination, not from the [statutory] sources." App. 25a. "To rely on the purpose of 'providing land for Indians' does nothing to cabin the Secretary's discretion over providing land for Indians because it is tautological. To say the purpose is to provide land for Indians in a broad effort to promote economic development (with a special emphasis on preventing land loss) is tautology on steroids." App. 28a.

Judge Brown further noted that even if a "mood of economic self-sufficiency can be said to permeate § 5, [that mood] has never constituted a standard to guide the Secretary's decisions." App. 28a. The BIA and the courts have interpreted the statute to grant the Secretary unfettered discretion over which land to take in trust. App. 28a (listing cases). In holding that Section 5 is nonetheless constitutional, the panel majority, following the First, Eighth, and Tenth Circuits, took an approach that "differs radically from the Supreme Court's analytical process in nondelegation challenges." App. 30a (citing *Intermountain Rate Cases* [*United States v. Atchison, Topeka, & Santa Fe Ry.*], 234 U.S. 476, 486-86, 488 (1914), and *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

Judge Brown concluded by emphasizing Section 5's exceptional importance. "[Section] 5 allows the Secretary,

by taking land in trust for Indians, to oust state jurisdiction in favor of government by the beneficiaries he chooses." App. 34a; *accord South Dakota I*, 69 F.3d at 882 ("By its literal terms, the statute permits the Secretary to [take] a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls."). In so doing, the Secretary exercises the power "to determine who writes the law, and thus indirectly what the law will be, for particular plots of land." App. 33a.

VII. A Divided D.C. Circuit Denies Rehearing *En Banc*.

MichGO filed a timely petition for rehearing *en banc*, and the D.C. Circuit ordered Respondents to file a response on the issue of whether Section 5 violates the nondelegation doctrine. Although the Court ultimately declined *en banc* review, Chief Judge David B. Sentelle and Judge Thomas B. Griffith joined Judge Janice Rogers Brown, indicating that they would have granted the petition. App. 85a.

VIII. The D.C. Circuit Panel Grants a Stay.

Following denial of the petition for rehearing *en banc*, Respondents rejected MichGO's request to refrain from taking the Tribe's land in trust pending this Court's decision on MichGO's petition for certiorari. Respondents opposed MichGO's subsequent stay motion, arguing that there was no reasonable

probability that four Justices of this Court would vote to grant certiorari. Apparently rejecting that argument, the same panel that ruled 2-1 against MichGO on the merits unanimously granted MichGO's stay motion. App. 87a.

IX. Chief Justice Roberts Denies the Tribe's Application to Vacate the Stay.

The Tribe filed an application to the Chief Justice seeking to vacate the D.C. Circuit's stay order. Again, the Tribe argued that there was no "reasonable probability" that four Justices would vote to grant certiorari. Chief Justice Roberts promptly denied the Tribe's motion, leaving the stay in place until the Court resolves MichGO's petition. App. 89a.

REASONS FOR GRANTING THE PETITION

I. AS RECOGNIZED BY THE EIGHTH CIRCUIT IN *SOUTH DAKOTA I*, JUDGE BROWN, AND NO LESS THAN 24 STATES, SECTION 5 OF THE IRA IS A RARE EXAMPLE OF A STANDARDLESS DELEGATION. THE STATUTE IS AN IDEAL VEHICLE FOR THIS COURT TO REAFFIRM THE NONDELEGATION DOCTRINE'S CONTINUING VITALITY.

The nondelegation doctrine is one of the cornerstones of separation of powers jurisprudence,

Mistretta v. United States, 488 U.S. 361, 371 (1989), existing since the days of Locke. *See* John Locke, *Second Treatise of Government* 87 (R. Cox ed. 1982) ("The legislat[ure] can have no power to transfer their authority of making laws, and place it in other hands."). The doctrine is codified in the Constitution's text, which vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States," U.S. Const. art. 1, § 1, and the "text permits no delegation of those powers." *Whitman*, 531 U.S. at 472. To avoid an unconstitutional delegation when conferring decision-making authority on an agency, Congress is required to articulate, "by legislative act," an intelligible principle to direct the person or body authorized to act. *Id.* at 473 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

It has been nearly 75 years since this Court last struck down a statute on nondelegation grounds, *see Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), leaving the doctrine's continuing viability in doubt. But the present case – which involves a statute enacted by the same depression-era Congress that enacted the unconstitutional legislation in *Panama Refining* and *A.L.A. Schechter* – provides the ideal vehicle to affirm the doctrine's continued vitality. As the Eighth Circuit observed in *South Dakota I*: "It is hard to imagine a program more at odds with separation of powers principles" than Section 5 of IRA. 69 F.3d at 885.

A. This Court Should Grant the Petition to Resolve a Conflict with Decisions of this Court.

Finding no intelligible guiding principle in Section 5's text, the majority below purported to infer such a principle from "the purpose and factual background of the IRA and section 5's statutory context." App. 13a. But the panel majority's approach – which mirrors that of the other circuits that have analyzed Section 5's constitutionality – "differs radically from [this] Court's analytical process in nondelegation challenges." App. 30a (Brown, J., dissenting). That is because "even in a nondelegation challenge, a court must find meaning for an ambiguous phrase *in some relevant text*." App. 31a (Brown, J., dissenting) (emphasis added) (discussing this Court's decisions in *Intermountain Rate Cases* and *American Power & Light Co.*). "Here, by contrast, the majority perceive[d] a mood of economic development, which Congress did not articulate, and the majority justifies this mood by its own assessment of Congress's good intentions." App. 31a (Brown, J., dissenting).

The Circuits' willingness to rely on statutory background and context to restrain Executive branch authority is particularly suspect where, as here, these sources do not even uniformly endorse the judicially defined purpose of "economic self-sufficiency." App. 25a-26a (Brown, J., dissenting) (noting, for example, that it is difficult to infer a principle of economic "self-support" in a statutory structure that "actually installs a paternalistic scheme of government

support"). To the contrary, as Judge Brown noted, Section 5's background and context lend themselves to any number of potential "intelligible principles":

> Making a different selection from the same smorgasbord, I might posit quite different principles – to provide land for landless Indians; to acquire trust lands to be used for farming; to supplement grazing and forestry lands; to provide lands in close proximity to existing reservations; to consolidate checkerboard reservations. All of these goals would be reasonable, but none can be derived from the text of the IRA. *The very fact that so many standards can be proposed merely highlights the fact that the statute itself fails to describe how the power conveyed is to be exercised.*

App. 28a (emphasis added).

Similarly misplaced is the panel majority's examination of IRA's legislative history, which, in the majority's view, "underscores [the statute's] purpose of addressing economic and social challenges facing American Indians by promoting economic development." App. 17a (citations omitted). Under this Court's precedent, legislative history can further illuminate an intelligible principle ensconced in the statutory text, but legislative history cannot supply one where the statute is silent. *See, e.g., Mistretta*, 488 U.S. at 376 n.10 (using legislative history to add content to the statutory factors); *Whitman*, 531 U.S. at 472 (Congress must articulate an intelligible

principle "by legislative *act*") (emphasis added). Here, inferring *any* Congressional purpose "would be contrary to the plain text of § 5, which gives the Secretary unfettered discretion over such decisions." App. 31a (Brown, J., dissenting). Moreover, as is nearly always the case, the legislative history does not point in a single direction. *See, e.g., South Dakota I*, 69 F.3d at 883 (reviewing the legislative history and concluding that Congress enacted Section 5 for the purpose of providing homestead or agrarian lands for landless Indians).

It is the complete lack of any discernible intelligible principle in Section 5's *text* that distinguishes this statute from all others this Court has upheld over nondelegation challenges in the past 75 years. Section 5 does not contain even the very broad "public interest," "public health," "fair and equitable," or "just and reasonable" standards that have previously represented the outer limits of a constitutional delegation of legislative power. *See, e.g., Whitman*, 531 U.S. at 475-76 (statute required EPA "to set air quality standards at the level that is 'requisite' . . . to protect the public health with an adequate margin of safety"); *Yakus v. United States*, 321 U.S. 414, 420 (1944) (statute directed agency to set prices that are "fair and equitable"); *Federal Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 600-01 (1944) (statute directed agency to set rates that are "just and reasonable"); *National Broad. Co. v. United States*, 319 U.S. 190, 225 (1943) (statute directed agency to grant broadcast licenses in the "public interest"). In

contrast, Section 5 simply identified the beneficiaries on whose behalf the government should hold the land: "for Indians." 25 U.S.C. § 465. "[W]hen Congress authorize[d] the Secretary to acquire land in trust 'for Indians,' it [gave] the agency no 'intelligible principle,' no 'boundaries' by which the public use underlying a particular acquisition may be defined and judicially reviewed." *South Dakota I*, 69 F.3d at 883. Because Section 5 lacks any statutory standard allowing the Judicial branch to measure an agency's action and discern whether that action is in accord with Congressional will, this Court should hold Section 5 unconstitutional.

B. This Court Should Also Grant the Petition to Resolve a Circuit Conflict.

The Eighth Circuit in *South Dakota I* was the first appellate court to consider Section 5's constitutionality. Unable to discern an intelligible principle, the court was forced to conclude that Section 5 "define[s] no boundaries to the exercise of this [land acquisition] power." 69 F.3d at 882. "Indeed," the court observed, Section 5 would "permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." *Id.* "The result is an agency fiefdom." *Id.* at 885.

Before the Eighth Circuit's ruling, the Secretary of the Interior had taken the position that IRA land acquisitions were not subject to judicial review. *South Dakota I*, 519 U.S. at 920 (Scalia, J., dissenting).

Following the decision, the Department of the Interior promptly changed course and promulgated a new regulation providing for judicial review. The United States then petitioned this Court to vacate and remand the Eighth Circuit's decision, and this Court granted that request. *Id.* at 920-21.

In dissent, Justice Scalia, joined by Justices Thomas and O'Connor, urged the Court to hear the merits of the nondelegation challenge, finding it "inconceivable that this reviewability-at-the-pleasure-of-the-Secretary could affect the constitutionality of the IRA in anyone's view, including that of the Court of Appeals." *Id.* at 922-23. As 16 state *amici* aptly noted in support of the petition for certiorari in *Carcieri*, "No other court has challenged [the Eighth Circuit's conclusion in *South Dakota I*], or found any significant limitation on the trust power in the text of the IRA." Brief of the States of Alabama *et al.* as Amici Curiae Supporting Petitioners, *Carcieri v. Kempthorne*, No. 07-526, at 21 (Nov. 21, 2007).

On remand, a different Eighth Circuit panel upheld Section 5's constitutionality. *South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 799 (8th Cir. 2005) [*South Dakota II*]. The *South Dakota II* panel invoked the same suspect historical and statutory "context" and legislative history that Judge Brown thoroughly discredited in her dissenting opinion. 423 F.3d at 797-99. And a primary motivator appeared to be the fact that this Court has struck down only two statutory provisions on nondelegation grounds, and not since 1935. *Id.* at 795. In fact, one or more of the

threads of this questionable analytical triumvirate – historical/statutory context, legislative history, and the length of time since the last successful nondelegation challenge – can be found in every circuit decision holding Section 5 constitutional. *See, e.g.,* App. 15a-20a; *Roberts*, 185 F.3d at 1137; *Carcieri*, 497 F.3d at 42-43.

The Eighth Circuit's decision in *South Dakota I* and Judge Brown's dissent below directly conflict with the suspect holdings of the First, Eighth, Tenth, and D.C. Circuits. But the conflict does not end there. In *Florida Department of Business Regulations v. United States Department of Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986), the Eleventh Circuit expressly held that Section 5 was an unreviewable exercise of discretion because the statute "does not delineate the circumstances under which exercise of this discretion is appropriate." *Id.* at 1256. Though not specifically resolving a nondelegation challenge, the Eleventh Circuit's decision in *Florida* is wholly consistent with the reasoning of *South Dakota I* and Judge Brown's dissent, furthering the split among the circuits. Given the post-*Whitman* trend in favor of upholding the statute, the split is unlikely to deepen. Further percolation in the lower courts will therefore not be beneficial unless and until this Court reaffirms the nondelegation doctrine's continuing vitality.

C. The Issues Presented by this Case Are of National Importance.

1. The current economic and political climate demonstrates the need for a constitutional check against unbridled delegations of legislative power.

"It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded." *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). That is why commentators have continued to urge this Court to revitalize the nondelegation doctrine, just as the Court used *United States v. Lopez*, 514 U.S. 549 (1995), to remind Congress that its powers under the Commerce Clause were in fact limited. *See* Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 356 (1999) ("In the most extreme cases, open-ended grants of authority should be invalidated. . . . A Supreme Court decision to this effect could have some of the salutary effects of the *Lopez* decision in the Commerce Clause area, offering a signal to Congress that it is important to think with some particularity about the standards governing agency behavior."); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 351 (2002); *see also* Petition for Writ of Certiorari, *United States v. Roberts*, No. 99-991174, at 28 (Jan.

12, 2000) ("The importance of [whether Section 5 violates the nondelegation doctrine] is beyond cavil.").

The need for such a revitalization takes on special importance in the context of legislative proposals to address the current economic crisis. Some have compared the economic climate to the panic that gripped the country during the Great Depression, and it is no coincidence that it was Great Depression-era legislation that this Court last found violated the nondelegation principle. This Court's invalidation of Section 5 would have the important effect of forcing Congress to consider intelligible guiding principles as it grants unprecedented authority.

Of course, the mischief that can be wrought by an agency acting without an intelligible limiting principle can also be observed in non-crisis situations. For example, in *Shivwits*, 428 F.3d at 969-70, the Secretary accepted into trust two parcels of land that a tribe purchased using a loan from an advertising company. The tribe then leased the property back to the advertiser so the advertiser could construct billboards that would have otherwise been prohibited by state and local regulations. The transaction was deliberately structured to assist a private (non-tribal) company in evading state and local law; yet, the Secretary did not hesitate to take the land in trust.

This Court should take the opportunity presented by Section 5's bald statutory language to revitalize an important constitutional doctrine that still has an important role to play in our government

of separated powers. Indeed, even if the Court agrees with conventional wisdom that the nondelegation principle is a constitutional doctrine in permanent exile, then the doctrine should be given a proper, public burial.

2. The constitutional validity of Section 5 itself has independent, fundamental significance.

In *Whitman*, this Court held that the scope of discretion which can be delegated to administrators, consistent with the nondelegation doctrine, is dependent on the importance and potential impact of the program at issue. 531 U.S. at 475. Here, the monumental importance of Section 5 can hardly be overstated.

In its Petition for Certiorari in *South Dakota I*, the United States informed this Court that IRA is "one of the most important congressional enactments affecting Indians," "the cornerstone of modern federal law respecting Indians." Petition for Writ of Certiorari, *South Dakota v. U.S. Dep't of the Interior*, No. 95-1956 at 15, 16 (June 3, 1996). That statement is undeniably true. Because of IRA, the Bureau of Indian Affairs manages more than 50 million acres of land on behalf of more than 560 recognized Indian tribes.

The United States in *South Dakota I* also rejected as "unpersuasive" the state's argument that

Section 5's constitutionality lacks "national importance." Reply Br., *South Dakota v. U.S. Dep't of the Interior*, No. 95-1956 at 1 (Aug. 30, 1996). Again, that statement is undeniably true. When the Secretary takes land in trust, he strips away the host state's sovereignty and jurisdiction and places them in the hands of a competing sovereign, insulating the land from state and local taxation, 25 U.S.C. § 465 para. 4, and from state regulation, *see Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 915 (1st Cir. 1996). "Thus, the trust acquisition authority is a power to determine who writes the law, and thus indirectly what the law will be, for particular plots of land. The consequences of the Indian country designation are profound." App. 33a (Brown, J., dissenting).

In sum, one of the greatest powers – the evisceration of state jurisdiction – is coupled with an unlimited delegation of authority – to provide land "for Indians." In the United States' own words, "This Court has the overarching responsibility for determining conclusively whether Congress has overstepped constitutional limitations." Petition for Writ of Certiorari, *South Dakota v. U.S. Dep't of the Interior*, No. 95-1956 at 4 (June 3, 1996).

Importantly, the significance of Section 5's constitutionality is exponentially greater than the harm alleged in this particular case, which involves the environmental and societal impacts of a casino drawing more than 3 million visitors annually to a rural

community of only 3,000 residents. The next land-in-trust decision could involve, for example, the proposed placement of a tribal nuclear waste facility, exempt from any state or local zoning laws. Would the Congress that enacted IRA have approved of *that* proposed land use, even in the name of economic development? There is no intelligible principle to guide such an inquiry.

Ironically, as originally proposed, IRA contained standards which very likely would have rendered it constitutional.[2] While the original bill tried to articulate basic policy choices and impose real boundaries, the bill was gutted because legislators could not agree on its purpose. *Compare* Housing

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[2] The original draft of the bill provided for Indian lands in Title III. *Readjustment of Indian Affairs: Hearings on H.R. 7902 before the House Committee on Indian Affairs*, 73d Cong., 2d Sess., 8 (1934) (hereinafter House Hearings). Section 1 set out a detailed declaration of policy. *Id.* Section 6 required the Secretary to "make economic and physical investigation and classification of the existing Indian lands, of intermingled and adjacent non-Indian lands and of other lands that may be required for landless Indian groups or individuals" and to make "such other investigations as may be needed to secure the most effective utilization of existing Indian resources and the most economic acquisition of additional lands." *Id.* at 8-9. The Secretary was further required to classify areas which were "reasonably capable of consolidation" and to "proclaim the exclusion from such areas of any lands not to be included therein." *Id.* at 8. Section 8 allowed the tribe to acquire the interest of any "non-member in land within its territorial limits" when "necessary for the proper consolidation of Indian lands." *Id.* at 9.

Hearings at 1-14 *with* 48 Stat. 984 (1934).[3] Because Congress deliberately eliminated all intelligible standards from the original bill's text, it can hardly be said that Congress articulated such standards in the 1934 legislative history. While Congress is empowered to enact legislation to address societal problems, it is Congress's responsibility to devise solutions that pass constitutional muster, and to specify those solutions in the statutory text, rather than ceding that authority to the Executive branch.

3. Indian gaming has created an enormous industry that is exempt from state and local regulation and taxation.

Casino gambling is "one of the nation's fastest growing industries." Nicholas S. Goldin, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gambling*, 84 Cornell L. Rev. 798, 800 (1999). From 1996 to 2006, tribal gaming revenues quadrupled from $6.3 billion to $25 billion, according to the National Indian Gaming Commission.[4] And the stratospheric growth shows no sign of slowing, as

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[3] The detailed statement of general policy for the Act as a whole was eliminated. Section 1 was entirely deleted. Section 7, the predecessor to 25 U.S.C. § 465, was stripped of standards and renumbered Section 5.

[4] *See* http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/19962006revenues.pdf.

hundreds of tribes seek federal recognition, nearly all of them receiving significant financial backing from non-Indian investors hoping to reap substantial profits from casino management contracts. Iver Peterson, *Would-Be-Tribes Entice Investors*, N.Y. Times, Mar. 29, 2004, at A1.

As tribal gaming has become more widespread, so have the costs. "[S]tates now facing the biggest budget deficits are also the states with the largest number of tax-exempt Indian casinos and tax-evading tribal businesses." Jan Golab, *The Festering Problem of Indian "Sovereignty": The Supreme Court ducks. Congress sleeps. Indians rule.*, The American Enterprise, Sept. 2004, at 31. This regime raises serious federalism concerns, as noted by both Judge Brown in her dissent and the Eighth Circuit in *South Dakota I*. App. 34a ("[Section] 5 allows the Secretary, by taking land in trust for Indians, to oust state jurisdiction in favor of government by the beneficiaries he chooses."); 69 F.3d at 882 ("By its literal terms, the statute permits the Secretary to [take] a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls."). This Court should review the constitutionality of the Secretary's unlimited power to create islands of foreign sovereignty within states' borders.

II. UNDER THIS COURT'S PRECEDENTS, MICHGO IS ENTITLED TO THE BENEFIT OF ANY CHANGE IN LAW RESULTING FROM THE COURT'S DECISION IN *CARCIERI*.

MichGO requests that the Court grant certiorari on a second substantial question, the *Carcieri* issue that is already pending before the Court. That issue is whether the Secretary has the authority under Section 5 to take land in trust for Indian tribes that were not federally recognized in 1934, the year IRA became effective. *See* 25 U.S.C. § 479 (defining "Indian" as a member of any federally recognized Indian tribe "*now* under federal jurisdiction") (emphasis added). If the answer is "no," the land-in-trust decision in this case is invalid because the Tribe was not federally recognized in 1934. Although MichGO did not raise this argument in the District Court due to the overwhelming case law that had rejected it, this Court's precedents entitle MichGO to the benefit of any change in the law that results from *Carcieri*.

A. This Court's Precedents Support Applying Any New Rule Announced in *Carcieri* to this Pending Case.

It is well settled that a federal court must apply the law in effect at the time it renders its decision. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full

retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Id.* at 97. Accordingly, once the Court issues its decision in *Carcieri*, the decision will apply to all pending cases, including this one.

MichGO attempted to raise the *Carcieri* issue in the D.C. Circuit immediately after this Court granted certiorari. The Tribe argued that MichGO had waived the issue by failing to raise it below, and the D.C. Circuit refused to consider it. But the Tribe's position is inconsistent with this Court's precedents concerning intervening changes of law. The Court has held that, to be effective, a waiver must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). A party does not waive a "known right" by failing to raise an issue that only became apparent as a result of an intervening court decision following trial. *See, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143-44 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Uebersee Finanz-Korporation, A.G. v. McGrath*, 343 U.S. 205 (1952); *Hormel v. Helvering*, 312 U.S. 552 (1941); *Vanderbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941).

As Justice Black explained in *Standard Industries, Inc. v. Tigrett Industries, Inc.*, 397 U.S. 586 (1970) (judgment affirmed by an equally divided Court), "we have frequently allowed parties to raise issues for the first time on appeal when there has been a significant change in the law since the trial.

The principle has not been limited to constitutional issues, and the Court has permitted consideration on appeal of statutory arguments not presented below." *Id.* at 587 (Black, J., dissenting) (citing cases). "In deciding whether such new arguments can be considered, we have primarily considered three factors: first, whether there has been a material change in the law; second, whether assertion of the issue earlier would have been futile; and third, whether an important public interest is served by allowing consideration of the issue." *Id.* at 587-88.

Applying these standards, the Court has allowed parties to raise new issues for the first time on appeal when a decision in another case has changed the legal landscape following trial. *See, e.g., Curtis Publishing*, 388 U.S. at 143-44; *Rosenblatt*, 383 U.S. at 87-88; *Uebersee Finanz-Korporation,* 343 U.S. at 212-13; *Hormel*, 312 U.S. at 558-60; and *Vanderbark*, 311 U.S. at 542-43. In *Curtis Publishing*, for example, the defendant in a libel suit raised the defense of substantial truth but not any constitutional defenses. 388 U.S. at 137. Shortly after trial, this Court decided *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which constitutionalized state libel law and required public officials to prove that defamatory statements were made with "actual malice." *Id.* at 279-80. The defendant immediately brought *New York Times* to the attention of the trial court, but the court denied a motion for a new trial and the Court of Appeals affirmed, holding that the defendant had waived the defense by failing to raise it at trial. *See id.* at 138-39.

This Court granted certiorari and reversed. *See id.* 143-44. The Court reasoned that the failure to raise a defense at trial "prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground." *Id.* at 143. The Court emphasized that, at the time of trial, "there was strong precedent indicating that civil libel actions were immune from general constitutional scrutiny," and thus it was reasonable for a lawyer trying a libel case to assert only state law defenses." *Id.* at 143-44. "We would not hold that [the defendant] waived a 'known right' before it was aware of the *New York Times* decision. It is agreed that [the defendant's] presentation of the constitutional issue after our decision in *New York Times* was prompt." *Id.* at 145; *accord Hormel*, 312 U.S. at 558-60 (allowing the government to raise new statutory argument on appeal following intervening Supreme Court ruling; any other holding "would defeat rather than promote the ends of justice"); *Rosenblatt*, 383 U.S. at 87-88 (holding that plaintiff was entitled to retrial of libel suit tried before *New York Times*); *Uebersee Finanz-Korporation*, 343 U.S. at 212-13 (permitting plaintiff to raise new argument created by "novel holding" of intervening Supreme Court decision).

The same is true here. If this Court decides the first question presented in *Carcieri* in Rhode Island's favor, the decision will effect an intervening change in law that MichGO could not have reasonably anticipated. MichGO cannot be said to have waived a "known right or privilege" by failing to raise a futile

argument. *See Curtis Publishing*, 388 U.S. at 145 & n.10 (noting that "it is almost certain that [the trial judge] would have rebuffed any effort to interpose constitutional defenses" before the *New York Times* ruling); *Youakim v. Miller*, 425 U.S. 231, 235 (1976) (permitting plaintiffs to raise a supremacy clause argument for the first time on appeal when it would have been futile to raise the issue below).

B. Applying *Carcieri* Here Works No Unfairness and Advances the Public Interest.

Allowing MichGO to raise the *Carcieri* issue will not prejudice the Tribe or Federal Defendants. MichGO promptly raised the issue in the Court of Appeals as soon as this Court announced its grant of certiorari in *Carcieri*. *See Curtis Publishing*, 388 U.S. at 145. Moreover, there is no dispute regarding the Tribe's recognition status – both the Tribe and the Federal Defendants concede that the Tribe was not federally recognized in 1934.

As in *Curtis Publishing*, the lower courts here did not have the benefit of whatever ruling this Court might make in *Carcieri*. To hold that MichGO waived the argument would "defeat rather than promote the ends of justice," *Hormel*, 312 U.S. at 559, because it would result in the government taking land in trust for the Tribe when the Tribe was not recognized in 1934 and is thus ineligible under the statute. It would be incongruous for an issue of such magnitude not to

apply to this pending case simply because the issue did not become apparent until after the District Court issued its ruling. The Tribe should not be permitted to escape the impact of *Carcieri* when that decision will affect all other tribes with pending land-in-trust applications or that apply for land under Section 5 in the future, as *Harper* requires. 509 U.S. at 97.

Finally, allowing MichGO to raise *Carcieri* will cause no inefficiency or delay. The case presents a pure legal question and there is no factual dispute about the Tribe's recognition status. If the Court rules in Rhode Island's favor in *Carcieri*, the decision will be dispositive here because it is undisputed that the Tribe was not federally recognized in 1934.

In sum, MichGO respectfully requests that the Court apply *Carcieri* here and summarily reverse and remand to the D.C. Circuit. If necessary, MichGO requests that the Court hold this petition in abeyance until the Court has issued its ruling in *Carcieri*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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