No. 16-572

IN THE

Supreme Court of the United States

CITIZENS AGAINST RESERVATION SHOPPING, ET AL.,

Petitioners,

v.

K. JACK HAUGRUD, ACTING SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

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

BRIEF OF RESPONDENT THE COWLITZ INDIAN TRIBE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Indian Reorganization Act, 25 U.S.C. § 461 *et seq*. (the "IRA" or the "Act") delegates to the Secretary of the Interior ("Secretary") authority to acquire land in trust for "Indians," 25 U.S.C. § 465 ("IRA Section 5"), and to proclaim such land to be a reservation, 25 U.S.C. § 467 ("IRA Section 7"), thereby providing the Secretary with the authority, *inter alia*, to provide land to landless "Indian" tribes. The statute defines "Indian" in three ways, the first of which includes "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," 25 U.S.C. § 479 ("IRA Section 19").[1] Petitioners challenge the Secretary's interpretation of this first definition. The Court of Appeals for the District of Columbia Circuit held that the definition is ambiguous, that the Secretary of the Interior's interpretation of the definition is reasonable, and accordingly that the familiar principles set forth in *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), bound the court to defer to the Secretary's interpretation. The questions presented are as follows:

1. Whether the United States Court of Appeals for the D.C. Circuit properly deferred to the Secretary's interpretation of the phrase "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," IRA Section 19, even though the Secretary did not require the Cowlitz

[1] For consistency, all statutory references are to the 2012 edition of the U.S. Code. In the next edition of the U.S. Code, the IRA will be reclassified as 25 U.S.C. § 5101 *et seq.*, and Sections 465, 467 and 479 will appear at 25 U.S.C. §§ 5108, 5110 and 5129, respectively.

Tribe to show it was "recognized" in 1934 when the IRA was enacted.

2. Whether the United States Court of Appeals for the D.C. Circuit properly deferred to the Secretary of the Interior's interpretation of the phrase "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," IRA Section 19, even though the Secretary, in finding that the Tribe was under federal jurisdiction in 1934, did not require a showing that in 1934 the Tribe was "located in Indian country—that is, on land over which the United States exercised jurisdiction to the exclusion of State jurisdiction."

CORRECTED IDENTIFICATION OF PARTIES TO THE PROCEEDING

The petitioners, who were plaintiffs in the district court and appellants below, are Citizens Against Reservation Shopping, Al Alexanderson, Greg and Susan Gilbert, Dragonslayer, Inc., and Michels Development, LLC. Mr. Alexanderson and Mr. and Mrs. Gilbert are residents of Clark County, Washington. Dragonslayer and Michels are corporate entities that own gaming (card room) operations in the City of La Center.

Respondents, who were defendants in the district court and appellees below, are the Secretary of the Interior; Stanley M. Speaks, in his official capacity as Regional Director, Northwest Region, Bureau of Indian Affairs; the Department of the Interior; the Bureau of Indian Affairs; the National Indian Gaming Commission; and Jonodev Osceola Chaudhuri, in his official capacity as Chair of the National Indian Gaming Commission. Petitioners also named Kevin Washburn in his official capacity as Assistant Secretary-Indian Affairs, but Mr. Washburn left the Department on December 10, 2015 to return to his position as Dean of the University of New Mexico Law School.

The Cowlitz Indian Tribe was an intervenor in the district court action and an appellee below, and is a respondent here.

The Confederated Tribes of the Grand Ronde Community of Oregon and Clark County, Washington were plaintiffs in the district court and appellants below, but declined to petition for certiorari.

The City of Vancouver, Washington was a plaintiff in the district court action and initially was an appellant below, but on June 16, 2016, the City moved to withdraw from the consolidated appeals, and on June 20, 2016, the Clerk of the U.S. Court of Appeals for the D.C. Circuit granted the motion.

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Respondent the Cowlitz Indian Tribe respectfully opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

INTRODUCTION

There is no compelling reason to grant certiorari. The court of appeals unanimously affirmed the district court in an unexceptional application of the familiar deference framework of *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). The decision below does not conflict with a decision of any other court of appeals on the questions presented; nor does

it conflict, even remotely, with any decision of this Court. The Secretary's interpretation of IRA Section 19, 25 U.S.C.§ 479, is a permissible and reasonable interpretation of the phrase "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." Far from being conjured from thin air, as petitioners suggest, it follows in lockstep the guidance furnished by Justices Breyer, Souter and Ginsberg in their concurring opinions in *Carcieri v. Salazar*, 555 U.S. 379, 396-401 (2009), and does not conflict in any way with the majority's opinion in that case. *Cf.* Sup. Ct. R. 10(c). Not coincidentally, and as Congress intended, the decision below also rights an egregious historical wrong. In short, it is difficult to imagine a case less worthy of this Court's attention.

Against the great weight of controlling authority and good sense, petitioners advance two arguments in favor of a writ. *First*, they claim that the decision below conflicts with relevant decisions of this Court because *Carcieri* requires a showing that the Tribe was "recognized" in 1934, and accordingly the court of appeals erred when it deferred to the Secretary's determination that "recognition" may be demonstrated at a time later than 1934. Pet. I (Question Presented 1). But the Court's decision in *Carcieri* did not concern whether a tribe was "recognized" in 1934, only whether it was "under Federal jurisdiction" in 1934. Indeed, the three concurring justices emphasized that "recognition" and "under Federal jurisdiction" are distinct legal concepts and that IRA Section 19 "imposes no time limit upon recognition." 555 U.S. at 398 (Breyer, J., concurring); *see also* 555 U.S. at 400 (Souter, J. joined by Ginsburg, J., concurring) (same). Petitioners also strain mightily to argue that, in

two other decisions, the Court required a showing of "recognition" in 1934, and that there is a conflict between the decision below and a decision each from the Fifth and Ninth Circuits. These claims are two parts wishful thinking and one part sleight of hand. As we explain below, the petitioners fail to demonstrate any plausible conflict on the question of whether a Tribe had to have been recognized in 1934.

Second, petitioners urge that the decision below conflicts with prior decisions of this Court purportedly requiring that a tribe must in 1934 have been "located in Indian country – that is, on land over which the United States exercised jurisdiction to the exclusion of State jurisdiction" in order to demonstrate that it was "under Federal jurisdiction." Pet. I (Question Presented 2). But the Court's precedent, in fact, forecloses petitioners' argument. In *United States v. John*, 437 U.S. 634, 649-50 (1978), the Court found that the IRA applied to the Mississippi Choctaw, even though that tribe had no reservation land base (*i.e.*, was not "located . . . on land over which the United States exercised jurisdiction") in 1934—a fact that may explain why petitioners barely mentioned this argument in the proceedings below. Petitioners' argument also is contrary to the plain statutory language of the first definition of Indian in IRA Section 19, which contains no restriction whatsoever relating to a tribe's "location" on certain lands.

The Cowlitz Indian Tribe respectfully requests the Court to deny petitioners' writ of certiorari.

STATEMENT OF THE CASE

The Cowlitz Indians have lived in what is now southwestern Washington State since time immemorial and held aboriginal title to the lands they occupied

there. Following failed treaty negotiations between the Cowlitz and the government, by Executive Order in 1863 the federal government unilaterally divested the Tribe of its title and right of occupancy to these lands, without reserving any land for the Tribe's benefit and without compensating the Tribe for the taking. In 2013, supported by a record painstakingly assembled over the course of three separate administrative proceedings documenting the continuous existence of the Cowlitz Tribe and a course of dealings with the federal government spanning more than a century, the Secretary of the Interior finally corrected this historical injustice by exercising the authority delegated to her by the Indian Reorganization Act of 1934 (the "IRA" or the "Act") to place approximately 157 acres in trust and proclaim it to be the Tribe's reservation.

The first of these administrative proceedings culminated in a January 4, 2002 determination by the Department of the Interior, through its Federal Acknowledgment Process, that Cowlitz "had a continuous political and community existence which commenced from at least" 1855, and was a federally recognized tribe. Pet. App. 287a-288a; *see also id.* 110a; *cf.* 25 C.F.R. § 83.3(a) (2000). The Secretary found, in a decision unchallenged by petitioners, that the Tribe had established, among other things, that the Cowlitz Tribe has been identified "as an Indian entity on a substantially continuous basis since 1855," that the Tribe's membership is descended from the historical Cowlitz, and that the Tribe met each of the criteria for federal acknowledgment established in 25 C.F.R. § 83.7(a)-(g) (2002). Final Determination to Acknowledge the Cowlitz Indian Tribe, 65 Fed. Reg.

8436-38 (Feb. 18, 2000); Reconsidered Final Determination of Federal Acknowledgment of the Cowlitz Indian Tribe, 67 Fed. Reg. 607-08 (Jan. 4, 2002).

On January 4, 2002, the Tribe submitted an application requesting that the Department take into trust 157 acres of land in Clark County, Washington. Pet. App. 110a-111a. In 2004 and 2006, the Tribe requested the Department of the Interior to proclaim the land as the Tribe's "initial reservation" pursuant to 25 U.S.C. § 467. Pet. App. 119a-121a & nn.1, 2.

On February 24, 2009, the Court decided *Carcieri v. Salazar*, holding that the Secretary has authority to acquire land in trust for "any recognized tribe now under federal jurisdiction" if the applicant tribe was "under Federal jurisdiction" in 1934 when the IRA was enacted. 555 U.S. 379, 395 (2009). Although the State of Rhode Island explicitly argued that the phrase should be interpreted to require recognition *in 1934*, the majority based its opinion only on the question of whether the Narragansett Tribe was "under Federal jurisdiction" *in 1934*. The concurring Justices Breyer, Ginsburg and Souter, however, did directly consider the question of recognition, rejecting the State's argument and writing in their concurring opinions that the IRA "imposes no time limit upon recognition." 555 U.S. at 400.

On December 17, 2010, the Secretary issued a decision accepting the Cowlitz land in trust for the Tribe and proclaiming it as the Tribe's reservation. Pet. App. 111a-112a. The petitioners and others challenged the Secretary's decision in the United States District Court for the District of Columbia. Following a remand based on unrelated issues, on April 22, 2013,

the Secretary issued a new decision to accept the land in trust for the Tribe and proclaim it as the Tribe's reservation. *Id.* 110a-412a. The Secretary concluded that the Cowlitz's federal acknowledgment in 2002 satisfied the recognition requirement, adopting the view of the *Carcieri* concurrence and finding that "the tribe need only be 'recognized' as of the time the Department acquires the land into trust." *Id.* 308a. The Secretary discussed that the term "recognition" has been used in many ways, but concluded that under any definition the Tribe's 2002 acknowledgment through the administrative federal acknowledgement process was sufficient. *Id.* 305a-308a.

With respect to jurisdiction, the Secretary applied a two-part test. The first part is

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

Id. 321a. The second part of the test asks whether federal jurisdiction remained intact in 1934. Drawing upon an abundance of evidence confirming federal jurisdiction over the Tribe prior to and continuing through 1934, the Secretary concluded that she had the authority under IRA Sections 5 and 7 to acquire the land in trust and proclaim it as the Tribe's reservation. *Id.* 326a-346a.

The district court affirmed the Secretary's decision in all respects. The district court found "that the term

'recognized' does not unambiguously refer to recognition as of 1934, but rather is an ambiguous statutory term." *Id.* 57a. The district court concluded that *Carcieri* is not to the contrary. "Had the *Carcieri* majority believed that an Indian tribe needed to be recognized as of 1934, it could have easily said so and made that part of its holding. However, the majority chose not to follow that course, and instead held only that the phrase 'now under federal jurisdiction' means tribes that were under federal jurisdiction in 1934." *Id.* 50a. Given the text of the statute, the legislative history, the statutory context and the concurring opinions of Justices Breyer, Souter and Ginsburg Justice, the district court found "the Secretary's interpretation of the term 'recognized' to be reasonable," and deferred to it. *Id.* 57a. The district court also found that the Secretary's two-part jurisdictional test is entitled to deference and that her determination that the Cowlitz were under federal jurisdiction in 1934 was supported by a "detailed and extensive historical review" of "[a]ll of this evidence, taken together." *Id.* 59a-73a.

The court of appeals affirmed the decision of the district court. With respect to recognition, the court of appeals deferred "to Interior's interpretation of the statute," finding that "[c]onsistent with Justice Breyer's concurrence in *Carcieri*, it was not unlawful for the Secretary to conclude that a 'tribe need only be "recognized" as of the time the Department acquires land into trust.'" *Id.* 15a-16a. The court of appeals considered and rejected each of petitioners' arguments, raised again in their petition for certiorari, that prior decisions by Interior were inconsistent. *Id.* 16a-20a. The court of appeals also deferred to the Secretary's two-part test on jurisdiction, finding the statute ambiguous and the Secretary's interpretation reasonable.

> We are not persuaded that the Secretary's interpretation is unreasonable for failure to require a formal, government-to-government relationship carried out between the tribe and the highest levels of the Interior Department . . . . The statute does not mandate such an approach, which also does not follow from any ordinary meaning of jurisdiction. Whether the government acknowledged federal responsibilities toward a tribe through a specialized, political relationship is a different question from whether those responsibilities in fact existed. And as the Secretary explained, we can understand the existence of such responsibilities sometimes from one federal action that in and of itself will be sufficient, and at other times from a "variety of actions when viewed in concert." [Pet. App. 321a.] Such contextual analysis takes into account the diversity of kinds of evidence a tribe may be able to produce, as well as evolving agency practice in administering Indian affairs and implementing the statute. It is a reasonable one in light of the remedial purposes of the IRA and applicable canons of statutory construction.

Id. 23a. Accordingly, the court of appeals affirmed.

REASONS FOR DENYING THE PETITION

I. THERE ARE NO COMPELLING REASONS TO GRANT CERTIORARI

There is no compelling reason to grant certiorari to review the decision of the court of appeals.

1. There is no circuit split. No other court of appeals has addressed the Secretary's authority to take land

into trust after *Carcieri*. No other court of appeals has even considered what it means to have been "recognized" in 1934, much less held that such recognition was necessary in 1934. The decision below does not conflict with *United States v. State Tax Comm'n of Miss.*, 505 F.2d 633 (5th Cir. 1974) or *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005). Neither case addresses the Secretary's interpretation of her power to take land into trust or analyzes whether to be a "recognized" tribe under Section 19, a tribe must have been recognized in 1934. The court of appeals in *State Tax Commission*, decided 35 years *before Carcieri* but not cited in any of the opinions in that decision, conclusorily states that "tribal status" is to be determined as of 1934. But *State Tax Commission* did not address the distinction between recognition and jurisdiction; it instead refers to "tribal status," a term found nowhere in the statute. 505 F.2d at 642. Moreover, *State Tax Commission* was implicitly rejected in *United States v. John*, when this Court concluded that the IRA applied to the Mississippi Choctaw, notwithstanding that that tribe had no reservation land base and was not considered by the Department of the Interior to be a recognized tribe in 1934 or for the following decade. *John*, 437 U.S. at 650 n.20.

Kahawaiolaa is so far from relevant that it was not cited by any party or by the court below. This should come as no surprise: no reported decisions discussing *Carcieri* or the land-into-trust process generally have cited *Kahawaiolaa*, which does not attempt to analyze or interpret IRA Section 19 or address the process of taking land into trust. Instead, after quoting Section 19, the *Kahawaiolaa* court merely observes that there "were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934, nor were there any

reservations in Hawaii." 386 F.3d 1271, 1280 (9th Cir. 2004). Nothing in *Kahawaiolaa* conflicts with the decision below.

2. The court of appeals affirmed the district court in a routine application of *Chevron* deference. No judge dissented and no rehearing was sought. The Secretary's interpretation of IRA Section 19 reflects the understanding of the term "members of any recognized Indian tribe" expressed by Justices Breyer, Souter and Ginsberg in their concurring opinions in *Carcieri.* Implicit in the *Carcieri* majority opinion, and explicit in Justice Breyer's concurring opinion (joined by Justices Souter and Ginsburg), is that "recognized" and "under Federal jurisdiction" carry separate meanings. Rhode Island repeatedly urged this Court to find that the Secretary's IRA authority is restricted to tribes both "federally recognized and under federal jurisdiction in 1934."[1] The Court instead relied exclusively on the "under Federal jurisdiction" requirement, and pointedly did not rely upon the absence of recognition as a reason to find that the Secretary lacked authority to take land in trust for the Narragansett Tribe. *Carcieri*, 555 U.S. at 391. The "statute, after all, imposes no time limit on recognition," *id.* at 398 (Breyer, J., concurring), and "[n]othing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content." *Id*. at 400 (Souter, J. & Ginsburg, J., concurring in part & dissenting in part). The court of appeals' decision below does not conflict with relevant decisions of this Court.

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[1] Brief for Petitioner Donald L. Carcieri, *Carcieri v. Kempthorne*, (No. 07-526), June 6, 2008, 2008 WL 2355773, at *13-15, *17-20, *23, *26, *31-32, *34.

3. There is no confusion in the lower courts. The petition and the briefs filed by petitioners' *amici* identify cases in the lower federal courts where these issues are now being considered.[2] That issues are being raised and considered in litigation in the district courts does not mean, as *amici* assert, that the "lower courts are clearly confused about how to apply *Carcieri*." That remains to be seen. Petitioners and their *amici* can only speculate about whether the lower courts will diverge in their application of *Carcieri*.[3] It is possible

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[2] Pet. 28 & n.4; Brief for California Tribal Business Alliance, Mooretown Rancheria of Maidu Indians, and United Auburn Indian Community as *Amici Curiae* Supporting Petitioners, at 21-22 & n.8 (cited herein as "Mooretown Rancheria Amicus"). The "California Tribal Business Alliance" is just a sobriquet for two California tribes, the Pala Band of Mission Indians and the Picayune Rancheria of the Chukchansi Indians. To the extent this amicus brief addresses the questions presented, it merely provides overlapping legal argument with the petition, not any novel or helpful perspective that can assist the Court. The other amicus brief, filed by California County governments, is transparently motivated by parochial concerns involving disagreements with local tribes over gaming, which should be addressed in the ordinary course of litigation. *See* Brief of The California State Association of Counties and Amador County, California as *Amici Curiae* Supporting Petitioners, at 2-3. No tribes or governments outside of California (and in particular, no tribes or governments in Washington State) have filed supporting amicus briefs, underscoring that the federal courts as a whole are processing the post-*Carcieri* questions in the ordinary course, and the federal courts in California will have a full opportunity to consider these questions in the litigation involving the erstwhile *amici*.

[3] It also bears noting that two of the cases emphasized by these *amici* were issued before the Secretary had issued her interpretation of Section 19 in the final Record of Decision in this case and the Department's Memorandum on *Carcieri*. *See* DOI Solicitor's Opinion M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act (Mar. 12, 2014); *cf.*

that the lower court decisions may eventually generate a circuit split, but it is equally likely that they may not and that, instead, the lower courts will embrace the well-reasoned approach taken by the court of appeals in this case. All that can be said with certainty now is that, under Rule 10(a), review by this Court is, at best, premature.

4. There is no public interest imperative. The petitioners contend that this case presents an important matter of public interest because jurisdictional allocations between states and tribes hang in the balance. Pet. 27. But *every* case challenging a decision by the Secretary to take land into trust for an Indian tribe implicates jurisdictional allocations between states and tribes. That fact does not render each such case a matter to be settled by this Court. Indeed, the State of Washington never objected to the Cowlitz land being taken into trust or designated as a reservation. While petitioners correctly note that, in the last seven years, the Secretary has taken 542,000 acres of land into trust, *id.* 27-28, they fail to own up to how little of that land was taken into trust for tribes affected by the Secretary's interpretation of "recognized" in Section 19. Each fee-to-trust decision is unique, and sweeping assertions about the total acreage involved in such decisions sheds no light at all on any issue germane to this case. Contrary to petitioners' arguments, size does not matter.[4]

KG Urban Enters., LLC v. Patrick, 693 F.3d 1, 11 (1st Cir. 2012), and *New York v. Salazar*, No. 5:08-CV-00633 LEK, 2012 WL 4364452 (N.D.N.Y. Sept. 24, 2012).

[4] To put petitioners' claimed acreage figures in perspective, both the 157 acres acquired in trust for Cowlitz and the claimed nationwide total of 542,000 acres over the last seven years are dwarfed by the 2,500 square miles (1.6 million acres)

5. The amicus briefs address issues not properly before the Court. In an attempt to inflate the significance of this case, the amicus brief filed by the two California tribes calling themselves the "California Tribal Business Alliance" conflates the issue of acquiring land in trust with the issue of whether such land is eligible for gaming, arguing that gaming tribes are "concerned about an expansive definition of 'Indian' that is being used in the case to authorize a large scale casino outside of the historic reservation and aboriginal territory of the Cowlitz." *See*, *e.g.*, Mooretown Rancheria Amicus at 2, 4. But the desire of some tribes to foreclose potential gaming competition is an especially poor reason for this Court to exercise its discretion to review the decision below. The definition of "Indian" under the IRA has nothing to do with whether the Cowlitz may use its trust land for gaming; that question is governed instead by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. (IGRA). While issues regarding IGRA were addressed below, the petitioners excluded them from the questions presented to this Court. "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14(1)(a). IGRA and gaming eligibility questions are not presented in the petition, and may not be raised by *amici*.[5]

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expropriated from the Tribe by previous actions of the federal government. *See* Pet. App. 347a, 377a.

[5] While themselves enjoying the benefits of the IRA and gaming revenues under IGRA, the erstwhile *amici* urge the Court to deny the same benefits to any tribe not included on the list of tribes that voted on the IRA. This restriction on trust acquisitions proposed by the *amici* would go far beyond what even the petitioners advocate, and has been rejected by Congress, which provided in the Indian Land Consolidation Act that all tribes, not just those that voted to accept the IRA, are eligible to have land

II. THE COURT OF APPEALS PROPERLY DEFERRED TO THE SECRETARY'S INTERPRETATION OF "ANY RECOGNIZED TRIBE"

The IRA delegates to the Secretary administrative authority to place land in trust and proclaim it to be a reservation for "any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. §§ 465, 467, 479; *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). The court of appeals determined that the IRA does not provide clear guidance on whether the term "recognized" refers to recognition in 1934, and the Secretary has interpreted the language of the statute that she is charged with administering. Pet. App. 11a-20a. Similarly, because neither the IRA nor *Carcieri* provide guidance on how to define "under Federal jurisdiction," the Secretary has developed a two-part inquiry to resolve this question. The court of appeals deferred to the Secretary's interpretations, finding them to be reasonable. *Id.* 19a-20a

Deference here is proper. The court of appeals employed the familiar analysis stated in *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Having determined that Congress had not directly spoken to the matter, the court of appeals analyzed whether the Department's interpretation is permissible. Pet. App. 11a-20a. The court determined that the Secretary's interpretation was reasonable, and, accordingly deferred to it. *Id.* 19a-20a. The court of appeals was "mindful of the 'governing canon of

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taken in trust under Section 5 of the IRA. 25 U.S.C. §§ 2201, 2202; *see New York v. Salazar*, No. 6:08-CV-644, 2009 WL 3165591, at *12-14 (N.D.N.Y. Sept. 29, 2009) (IRA applicable to all tribes, whether or not the tribe voted to accept the IRA, rejecting argument that Section 2202 applies only to tribes that already have land in trust).

construction requir[ing] that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted for their benefit.'" *Id.* 9a (quoting *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008) (quoting *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001)).

Based in part on the foregoing, the court of appeals correctly concluded that "[c]onsistent with Justice Breyer's concurrence in *Carcieri*, it was not unlawful for the Secretary to conclude that a tribe need only be recognized as of the time the Department acquires the land in trust." Pet. App. 15a-16a (quoting C.A. App. 255).

Petitioners claim that the court of appeals erred in deferring to the Secretary's interpretation. Although at least three members of this Court, the Secretary of the Interior, the District Judge and three Judges of the D.C. Circuit Court of Appeals all have found to the contrary, the petitioners contend that only their interpretation of the text in question conforms to "ordinary usage." Pet. 11. In support, they attempt to appropriate the discussion in *Carcieri,* where the Court pointed out that "now under Federal jurisdiction" should not be read as "now or hereafter" because Congress had used that formulation elsewhere in the statute, and thus must have meant only "now" when it used only that word in Section 19. *See Carcieri*, 555 U.S. at 389-90. But while Congress preceded "under Federal jurisdiction" with the qualifier "now," it imposed ***no*** similar restriction – neither "now or hereafter" nor "now" – on "recognized Indian tribe." Applying the same principles of construction invoked by petitioners, when Congress included "now" before "under Federal jurisdiction" and omitted "now" before "recognized Indian Tribe," Congress is presumed to

have acted "intentionally and purposely," so that "recognized Indian Tribe" was not meant to be conditioned by "now." At a minimum, the Secretary's interpretation of the phrase is "a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

Petitioners also attempt to argue that the second definition of "Indian" in Section 19 "confirms that recognition is to be determined as of 1934 because all three definitions of 'Indian' in Section 479 reflect the same temporal limitation." Pet. 13. The court of appeals rejected the petitioners' attempt to conflate the three definitions:

> [R]ecognition that occurs after 1934 "simply means, in retrospect, that any descendant of a Cowlitz Tribal member who was living on an Indian reservation in 1934 then met the IRA's second definition." Gov't Br. 47. As a concrete example, the District Court pointed to Cowlitz members who lived on the reservation of the Quinault Tribe in 1934. *Confederated Tribes*, 75 F. Supp. 3d at 400. Thus, the IRA's second definition does not overcome the ambiguity we see in the first definition.

Pet. App. 14a.

The Secretary's interpretation is also consistent with prior agency interpretation of the IRA. The Department's treatment of the Stillaguamish Tribe in 1976 supports the Secretary's interpretation at issue. As the court of appeals explained:

> The Stillaguamish Tribe's path to qualifying for IRA benefits actually shows that the IRA does not limit the benefits it confers only to tribes recognized as of 1934. Appellants point to Interior's 1976 decision denying the tribe's

> request to take certain land into trust, but that was not the end of the story. What they fail to mention is that Interior reconsidered this decision just a few years later, in 1980. In so doing, it concluded the opposite – that the Stillaguamish did in fact "constitute a tribe for the purposes of the IRA." J.A. 527. "It is irrelevant," explained the Department, "that the United States was ignorant *in 1934* of the rights of the Stillaguamish." J.A. 526 (emphasis added). The government even went so far as to say that it did not matter that it had "on a number of occasions … taken the position that the Stillaguamish did not constitute a tribe." J.A. 527. Indeed, there are several instances throughout history where the United States initially has determined that a tribe "had long since been dissolved," only to correct this misapprehension later in time. *See Carcieri*, 555 U.S. at 398-99 (Breyer, J., concurring). The Stillaguamish experience is therefore consistent with Interior's position vis-à-vis the Cowlitz.

Pet. App. 16a-17a.

Similarly, *Brown v. Commissioner of Indian Affairs*, 8 IBIA 183 (1980), a decision of the Interior Board of Indian Appeals, is consistent with the Secretary's interpretation here:

> The Board therefore did not offer a contrary interpretation of "recognized" in its discussion of the nephew's membership in the "Indians of the Quinault Reservation." Nor did the Board elsewhere hold that the IRA requires Cowlitz recognition in 1934. *See* Grand Ronde Br. 13.

> "[I]n the absence" back in 1980 "of any evidence that [the nephew] was or is now a member of any other federally recognized tribe," *id.* at 190, the Board was left to uphold the conveyance under the IRA's second definition, *see id*. Knowing what we know now, post-2002, the conclusion that the nephew could not rely on his membership in the as-yet unrecognized Cowlitz Tribe is unremarkable. This is especially true in light of the Stillaguamish opinion, issued that same year, which confirms that the government has sometimes mistakenly taken a position that an Indian group does not constitute a tribe.

Pet. App. 18a.

The petitioners claim that "the only time this Court addressed this question, it concluded that a tribe had to be recognized in 1934," relying on *United States v. John*, 437 U.S. 634 (1978).[6] Their reading of *John,* however, is largely an exercise in wishful thinking. *John* supports the conclusion that federal recognition in 1934 is, in fact, not required by the IRA. The *John* decision references the year 1934 when quoting Section 19 not for the proposition that a tribe must be federally recognized in 1934 for the IRA to apply, but rather to reject the State of Mississippi's argument that a 1944 reservation proclamation was ineffective because the IRA was not intended to apply to the Mississippi Choctaw. 437 U.S. at 649-50. "Assuming for the moment that authority for the proclamation

[6] *John* involved the federal Major Crimes Act, 18 U.S.C. § 1153, and did not address the Secretary's authority to take land into trust or involve the question of whether Mississippi Choctaw was a "recognized tribe now under Federal jurisdiction."

can be found only in the 1934 Act, we find this argument unpersuasive." *Id.* Rather than supporting the petitioners' argument, the Court's reasoning in *John* forecloses it.

Unsurprisingly, similar arguments failed to sway the *Carcieri* Court. The petitioner's brief in *Carcieri* advocated that the bracketed phrase in *John* "reflects the Court's understanding that the word 'now' restricts the operation of the IRA to tribes that were federally recognized and under federal jurisdiction at the time of the enactment." Pet. App. 19a. But *Carcieri* does not cite *John* in holding that "now under Federal jurisdiction" is restricted to 1934.[7]

Moreover, in 1994, Congress amended the IRA in a manner that rejected the petitioners' interpretation of *John*. As petitioners point out, the Assistant Secretary for Indian Affairs parroted the bracketed "[in 1934]" dicta from *John* in a January 14, 1994 letter to Congress justifying Interior's practice of allowing greater self-determination to "historic" tribes than to "non-historic" tribes. Pet. 16. In reaction, Congress soon thereafter amended the IRA to prohibit departments or agencies of the United States from making "any decision or determination pursuant to the Act of June 18, 1934 . . . with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes

[7] The petitioners emphasize that the Fifth Circuit in *John* held that the Mississippi Choctaw were not recognized in 1934 and therefore not subject to the IRA. Pet. 16-17 (citing *United States v. John*, 560 F. 2d 1202, 1212 (5th Cir. 1977)). However, on appeal this Court rejected the Fifth Circuit's conclusion, finding that even though the Indians were "merely a remnant of a larger group of Indians long ago removed from Mississippi," the Mississippi Choctaw were subject to the IRA. *John*, 437 U.S. at 653, 650 n.20.

the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. § 476(f) (1988), *amended by* 108 Stat. 709, Pub. L. 103-263, at § 5 (1994). The sponsors of this amendment decried as erroneous the Secretary's disparate classification of tribes. "Regardless of the method by which recognition was extended, all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority." 140 Cong. Rec. 6146-47 (May 19, 1994) (statement of Sen. McCain); *see also id*. at 6147 (Sen. Inouye). Needless to say, if the IRA is to be interpreted as petitioners contend, all that followed was less than useless.

III. THE INDIAN REORGANIZATION ACT DOES NOT REQUIRE A TRIBE TO HAVE A RESERVATION IN 1934 TO BE "UNDER FEDERAL JURISDICTION"

Petitioners claim that to be "under Federal jurisdiction" in 1934, "a tribe must have been located in Indian country – that is, on land over which the United States exercised jurisdiction to the exclusion of State jurisdiction." Pet. I (Question Presented 2). In essence, petitioners assert that the IRA only delegates authority to the Secretary to acquire new trust land for tribes that already had federal reservations in 1934. This argument literally has nothing to recommend it: it ignores the plain text of the IRA, and the clear purposes of the Act as articulated by its co-sponsors, decisions of this Court, later acts of Congress, and decades of action by the Bureau of Indian Affairs.

A. Congress Did Not Limit the First Definition of "Indian" to Reservation Tribes

Petitioners claim that the Secretary misconstrued IRA Section 19 because the legislative history shows that Congress included the phrase "now under Federal jurisdiction" in the first definition of Indian "to ensure that the IRA would be limited to reservation Indians . . . ." Pet. 25. But nothing in Section 19's first definition of "Indian" says anything like that, nor does anything in Section 5's delegation of the authority to acquire new trust lands, which explicitly allows the Secretary to acquire off-reservation lands.[8] In marked contrast, to meet Section 19's second definition of "Indian" Congress required a demonstration that the person descends from tribal members "residing within the *present boundaries of any Indian reservation*."[9] If Congress had intended to impose a similar limitation in the first definition of "Indian," it would have just said so. As the petitioners have conceded, Pet. 12,

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[8] Section 5 provides, *inter alia*:

> The Secretary of the Interior is 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.

25 U.S.C. § 465.

[9] 25 U.S.C. § 479 (emphasis added). Further, the second definition's broad language makes clear that "any Indian reservation" is not limited to federally reserved Indian lands. *See* William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 443-44 & n.95 (2017) (during the 1930s various Interior officials understood the second definition of "Indian" to include state reservations as well as federal reservations).

"[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 474 F.2d 720, 722 (5th Cir. 1972)); *see also Carcieri*, 555 U.S. at 389-390 (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)). Surely that is the case here.

To be sure, one purpose of the IRA was to halt the loss of tribal lands through allotment, and thereby "stop the alienation, through action by the Government or the Indian, of such lands." 78 Cong. Rec. 11,123 (June 12, 1934) (statement of Sen. Wheeler). But contrary to petitioners' depiction, this was only one of the IRA's purposes for delegating to the Secretary authority to take land in trust for Indian tribes. As Chairman Wheeler confirmed in presenting the IRA for consideration in the Senate:

> The second purpose [of the IRA] is to provide for the acquisition, through purchase, of land for Indians now landless who are anxious and fitted to make a living on such land. The Committee on Indian Affairs and the Bureau of Indian Affairs have found that there are many Indians who have no lands whatsoever, and are unable to make a living.

Id. The IRA's other primary co-sponsor, Representative Howard, echoed these comments three days later. *See* 78 Cong. Rec. 11,727 (June 15, 1934). And the Senate Report declared essentially the same purposes. S. Rep. No. 1080, at 2 (1934); *see also* H.R. Rep. No. 1804, at 6 (1934) (noting that the IRA would help to "make many of the now pauperized, landless Indians self-

supporting"); Felix S. Cohen, *Handbook of Federal Indian Law* 84 (1942). The Senate Report recommending enactment of the IRA declared that one of the "purposes of this bill" was to "provide for the acquisition, through purchase, of land for Indians, now landless, who are anxious and fitted to make a living on such land." S. Rep. No. 1080, at 1 (1934).[10]

Petitioners also advance a "statutory context" argument, claiming that the term "under Federal jurisdiction" is unambiguous because the IRA's purpose was to preserve and rebuild existing trust land and because there is a reservation residency requirement in the second definition of "Indian" in Section 19. Pet. 24-25. To support this assertion, they cite to a snippet of a statement by Representative Howard on June 15, 1934; the amicus briefs offer some additional fragments of legislative history along the same lines. But, as discussed above, the petitioners ignore Representative Howard's lucid explanation, from the floor of Congress on the same day, that the IRA "would permit the purchase of additional lands for landless Indians." 78 Cong. Rec. 11,727 (June 15, 1934).

Moreover, petitioners entirely fail to acknowledge that the statute itself disproves their statutory construction argument. In Section 7, Congress expressly authorized the Secretary to establish new Indian

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[10] Furthermore, even if petitioners were correct in their assertion that Indians had to live on a reservation in 1934 in order to have been under federal jurisdiction, there is record evidence, including a letter from the then-Commissioner of the Bureau of Indian Affairs, demonstrating that Cowlitz Indians were entitled to and did hold trust allotments on the Quinault Reservation in 1934. Pet. App. 335a. In other words, Cowlitz was "located" within "Indian Country" in 1934 because its members had allotment rights on a federal reservation at that time.

reservations. This authority would be meaningless if the purpose of the IRA was limited solely to the reacquisition of parcels of land lost through allotment within federal reservations that already existed in 1934. Petitioners' reading of the IRA therefore violates the very statutory construction principle they rely upon, that a statute should be construed if possible so as *not* to render any of its provisions superfluous. Pet. 14 (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

B. A Reservation Was Sufficient But Not Necessary to Show Federal Jurisdiction in 1934

The authority mustered by the petitioners does not stand for the proposition that a reservation was *necessary* in 1934 to show a tribe was under federal jurisdiction, but rather that a reservation was *sufficient* to show federal jurisdiction. *See* Pet. 20-22. So, for example, the petitioners rely on an 1894 decision of this Court for the unsurprising proposition that if the United States sets apart land for a reservation, it has authority to pass laws with respect to that land. Pet. 20 (discussing *United States v. Thomas*, 151 U.S. 577, 585 (1894)). The petition offers *United States v. McGowan*, 302 U.S. 535 (1938), and *United States v. Pelican*, 232 U.S. 442 (1914), for the unexceptional (and wholly irrelevant) proposition that when land is set aside for use of tribes, it is under government superintendence. *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), is cited for the proposition that land must be set aside and supervised by the United States for the U.S. to have primary civil and criminal jurisdiction—a principle that suggests

nothing about the intended interpretation of the IRA in 1934. Pet. 21.

Petitioners also claim that this Court in *Carcieri* "adopted" an "understanding of the IRA" that "equated land and direct supervision with jurisdiction." Pet. 19. This supposed equation is nowhere to be found. Instead, the Court treated the question of whether the Narragansett Tribe was under state jurisdiction as effectively conceded. "None of the parties or *amici*, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934." *Carcieri*, 555 U.S. at 395. Accordingly, the Court relied on Rhode Island's representation in its petition for a writ of certiorari to conclude that the Narragansett Tribe was not under federal jurisdiction in 1934. *Id.*

None of the case law relied on by petitioners supports their claim that Congress intended that a tribe had to live on reservation or other federally-protected lands to be considered under federal jurisdiction in 1934. In fact, this Court implicitly rejected such a proposition in *United States v. John*. Notwithstanding that the Mississippi Choctaw had *no* reservation and were *not* considered by the Department of the Interior to be a recognized tribe in 1934 or for years thereafter, the Court concluded that the IRA applied to the tribe. *John*, 437 U.S. at 650 n.20.

To accept the petitioners' interpretation of the IRA would render meaningless a subsequent act of Congress that depends on the assumption that the IRA applies to non-reservation tribes. IGRA, enacted with the purpose of promoting "tribal economic development, tribal self-sufficiency, and strong tribal government," 25 U.S.C. § 2701(4), generally permits Indian gaming only on lands held in trust or within a

reservation as of October 17, 1988. But IGRA Section 20 provides exceptions for tribes that did not have trust land when IGRA was enacted, and explicitly contemplates that tribes that receive federal recognition after its passage in 1988 are entitled to an "initial reservation" on which they may conduct gaming under the Act. *See id.* § 2719 (b)(1)(B)(ii)-(iii). This "initial reservation exception" and the related "restored lands" exception ensure "that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones." *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 974 (2004). These provisions of IGRA would be meaningless if the IRA only applied to tribes that already possessed reservations in 1934. The "meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000). "It is settled that 'subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.'" *Great N. Ry. Co. v. United States*, 315 U.S. 262, 277 (1942).

C. The Court of Appeals Correctly Found that the Record Was More Than Sufficient to Support the Secretary's Determination that the Cowlitz Tribe Was Under Federal Jurisdiction in 1934

The court of appeals (and the district court) properly upheld as reasonable the agency's determination, based on the administrative record before it, that the Cowlitz Tribe was under federal jurisdiction in 1934. There is little doubt that the Bureau of Indian Affairs (BIA) considered the Cowlitz to be under its jurisdiction in 1934. The record below contains voluminous

evidence that the BIA was exercising jurisdiction over the Cowlitz in the era when the IRA was enacted, including evidence showing BIA approval of Cowlitz attorney contracts, BIA supervision of land for Cowlitz members, BIA heirship determinations, supervision of education and financial matters, payment of medical expenses for Cowlitz members, supervision of Cowlitz tribal meetings, BIA intercession with state and local governments regarding Cowlitz federally-based fishing rights, and the listing of Cowlitz members on BIA census documents. Pet. App. 330a-339a; C.A. App. 3692-98, 3700-10, 3712-32. The administrative record includes 22 documents from 1917 to 1953 in which BIA officials explicitly state that BIA had jurisdiction over the Cowlitz Tribe. C.A. App. 3688-3692. Fifteen date from 1934 or before. *Id.*

Petitioners claim that at page 25a of its opinion the court of appeals mischaracterized "administrative findings that 'the Cowlitz were not a reservation tribe under Federal jurisdiction or under direct supervision.'" Pet. 19. In fact, as the court of appeals itself took pains to point out, it was not discussing "administrative findings," but rather a "lone sentence within an agency technical report." Pet. App. 25a. From this sentence the petitioners infer, without support, that in 1934 the members of the Cowlitz "lived on fee lands 'under state jurisdiction,' and thus were not 'under federal jurisdiction.'" Pet. 20. However, as the Tribe explained to the court of appeals, at least some tribal members lived on land held in trust by the federal government, as some of the Cowlitz lived on the Quinault reservation, and some lived on other trust allotments. Consequently, during the 1920s and 1930s the BIA exercised jurisdiction over the Cowlitz Indian Tribe by managing trust lands allotted to Cowlitz members including, in some cases, asserting a federal

trust interest to protect the lands from state or local attempts at taxation or foreclosure. Pet. App. 336a-339a. BIA could not have exercised this oversight if it lacked legal jurisdiction over the Cowlitz Tribe. The Bureau recognized this. For example, twice in 1927 the Superintendent of the BIA Taholah Indian Agency wrote letters stating that the Cowlitz people were under the jurisdiction of that agency. Pet. App. 331a.

Congress, too, repeatedly asserted jurisdiction over Cowlitz between 1915 and 1929, seeking to enact legislation allowing Cowlitz to bring claims against the United States for the wrongful taking of its aboriginal title lands without congressional authorization or compensation. C.A. App. 266, 3711, 3920-4000. In 1928 Congress passed H.R. 167, "a Cowlitz claims authorization bill." H.R. 167, 70th Cong. (1st Sess. 1928). While vetoed by President Coolidge, congressional passage of the bill is proof that Congress understood Cowlitz to be a tribe under its jurisdiction at that time. Congress also exercised its jurisdiction in the Act of March 4, 1911, 36 Stat. 1345, authorizing the Secretary to allot land on the Quinaielt reservation to members of tribes "affiliated with the Quinaielt and Quileute tribes" in the Treaty of Olympia of 1855. 12 Stat. 971. The Cowlitz Tribe was an intended beneficiary of the 1911 Act, and a Cowlitz member's right to an allotment on the Quinault reservation was based on his or her being a member of the Cowlitz Tribe—not on the person's status as an individual "Indian," as this Court confirmed in *Halbert v. United States,* 283 U.S. 753, 759-63 (1931).

Finally, petitioners contend that the unambiguousness of the word "jurisdiction" is reflected in a March 16, 1934 letter written by Commissioner of Indian Affairs John Collier, stating that the Cowlitz "have

no reservation under Governmental control" and "no tribal funds on deposit to their credit in the Treasury of the United States." Pet. 26. Commissioner Collier was one of the principal architects of the IRA, and he was particularly focused on the goal of providing federally protected lands to "homeless" Indians. Nonetheless, Commissioner Collier's letter did not purport to interpret the definition of Indian in the IRA, and it is unclear how the statements quoted by petitioners are relevant to the assessment of statutory ambiguity. C.A. App. 3675-76. In fact, Commissioner Collier wrote another letter on March 16, 1934, to the Superintendent of the Taholah Agency, in which he indicates that the Cowlitz are one of three tribes living on a reservation in Washington—*i.e.,* in "Indian Country"—and that the Cowlitz Indians living there "should be enrolled, if under your jurisdiction," as Cowlitz Indians. Pet. App. 335a. Petitioners fail to acknowledge this second letter, although they admitted below that enrollment is an indicator both of being "under Federal jurisdiction" and of "federal recognition."

Given the great weight of the evidence, the court of appeals correctly found that the record was more than sufficient to support the Department of the Interior's determination that the Cowlitz Tribe was under federal jurisdiction in 1934. Nothing in the court of appeals' opinion, or the underlying record and decision, merits further review by the Court.

CONCLUSION

For all the reasons set forth above, Respondent the Cowlitz Indian Tribe respectfully requests that the writ of certiorari be denied.

Respectfully submitted,

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