No. 19-

IN THE

Supreme Court of the United States

THE CHEROKEE NATION,

Petitioner,

v.

DAVID BERNHARDT, IN HIS OFFICIAL CAPACITY, ET AL.,

Respondents,

AND

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, ET AL.,

Intervenors/Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Secretary of the Interior exceeded his statutory authority by taking land located within the reservation boundaries of one Indian Tribe and placing the land in trust for another Tribe, despite the objections of the first Tribe and in violation of a regulatory prohibition and the United States' treaty promises to the first Tribe.

2. Whether the Court should hold this petition pending its disposition of *Maine Community Health Options* v. *United States*, No. 18-1023 (argued Dec. 10, 2019), because this case raises the same issue concerning implied repeals effected by appropriations laws and the proper standard for determining what law to apply.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Cherokee Nation was plaintiff-appellee below. Respondents here are David Bernhardt, in his official capacity as Secretary of the Interior, U.S. Department of the Interior; Tara Sweeney, in her official capacity as Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior; and Eddie Streater, in his official capacity as Eastern Oklahoma Regional Director, Bureau of Indian Affairs. Individuals in these positions were defendants-appellants below. Intervenors/Respondents, United Keetoowah Band of Cherokee Indians in Oklahoma and United Keetoowah Band of Cherokee Indians in Oklahoma Corporation, were intervenors-defendants below.

LISTING OF DIRECTLY RELATED PROCEEDINGS

Counsel are unaware of any additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cherokee Nation ("the Nation") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion is reported as *Cherokee Nation* v. *Bernhardt*, 936 F.3d 1142 (10th Cir. 2019), and reproduced at Petition Appendix ("App.") 1a-35a. The Tenth Circuit's order denying the petition for rehearing and rehearing en banc is unpublished and reproduced at App. 59a-60a. The decision of the District Court for the Eastern District of Oklahoma is reported at *Cherokee Nation* v. *Jewell*, No. CIV-14-428-RAW, 2017 WL 2352011 (E.D. Okla. May 31, 2017), and reproduced at App. 36a-58a.

JURISDICTION

The Tenth Circuit entered judgment on September 5, 2019, App. 2a, and denied the petition for rehearing and rehearing en banc on November 8, 2019, *id.* at 59a-60a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Indian Reorganization Act of June 18, 1934; the Oklahoma Indian Welfare Act; the United States' 1866, 1846 and 1836 Treaties with the Cherokee; section 151 of 25 C.F.R; Public Law 102-154, an Act making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1992 and other purposes; and Public Law 105-277, an Act making

omnibus consolidated and emergency appropriations for the fiscal year ending September 30, 1999, and for other purposes, are reproduced at App. 61a-98a.

INTRODUCTION

This case involves the United States' unprecedented assertion of unilateral authority to take land into trust for one tribe within the boundaries of another Tribe's treaty-protected territory—specifically, the assertion of the right to take land into trust for the benefit of the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") *within the boundaries of the Cherokee Nation's centuries-old treaty territory* and over that Nation's vehement objection.

The exercise of trust-acquisition authority in this context is a breathtaking infringement on the Nation's sovereignty. It also directly contravenes this Court's decision in *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), violates the United States' treaty obligations, and overrides a longstanding regulatory requirement demanding tribal consent to trust-acquisitions that would allow a tribe to assert sovereignty within the boundaries of another tribe's reservation.

The Tenth Circuit held that the Secretary of the Interior has authority to take land into trust for UKB Corporation under the Oklahoma Indian Welfare Act ("OIWA"), 49 Stat. 1967 (1936). Critically, however, the OIWA simply incorporates the Indian Reorganization Act ("IRA"). And, in *Carcieri*, 555 U.S. 379, this Court held that the IRA authorizes trust land acquisitions only for the benefit of tribes under federal jurisdiction in 1934. UKB was *not* under federal jurisdiction in 1934—indeed, it did not even exist as a tribe until ten years later—and thus the Tenth Circuit's decision that the Secretary had such authority contravenes *Carcieri*.

The court also upheld the Secretary's acquisition of this land for the benefit of UKB despite the Cherokee Nation's refusal to consent to it, abrogating the Nation's treaty rights to sovereignty and quiet possession of its reservation lands and the specifically-negotiated treaty terms under which other tribes might enter Cherokee territory. The court of appeals did so despite the absence of any express Congressional statement authorizing that treaty violation, again in contravention of this Court's decisions requiring a clear statement of Congress's intent whenever it abrogates a treaty. See, *e.g.*, *Herrera* v. *Wyoming*, 139 S. Ct. 1686, 1698 (2019).

Finally, the decision also held that an Appropriations Rider, which requires "consultation" with the Cherokee Nation prior to the expenditure of agency funds to take land into trust within the Nation's reservation boundaries, somehow worked an implied repeal of a longstanding agency regulation mandating that the Nation must *consent* to any such acquisition. The decision is thus contrary to this Court's precedent establishing a heavy presumption against an implied repeal in this setting, particularly when the law involved is an appropriations law. Indeed, this question—whether the court of appeals contravened this Court's established precedent concerning when appropriations laws repeal other laws by implication—is presently before the Court in *Maine Community Health Options* v. *United States*, No. 18-1023 (consolidated with *Moda Health Plan, Inc.* v. *United States*, No. 18-1028, and *Land of Lincoln Mutual Health Insurance Co.* v. *United States*, No. 18-1038) (argued Dec. 10, 2019) (jointly, "*Maine Community Health Options*"). At the very least, the petition should be held pending resolution of those cases.

Because the issues presented involve the *Oklahoma* Indian Welfare Act and concern land located in Oklahoma, it will be virtually impossible for an inter-Circuit conflict to develop on the important interpretive questions presented with regard to that statute. But the case creates a series of important conflicts within federal law. It contravenes *Carcieri* and creates a conflict between the IRA and the OIWA and thus between all other tribes and the Oklahoma tribes, any of which may be affected by this deviation of the OIWA regime from the IRA regime. The Tenth Circuit's decision also violates the Cherokee Nation's federally-protected treaty rights to its territorial sovereignty that have been recognized by numerous courts. See *infra* p. 18. It carves out a Cherokee-only exception to a decades-old regulation that protects the territorial sovereignty of all tribes within their reservation boundaries, and it does so based on an appropriations rider that does not even mention the regulation.

To the Nation's knowledge, the Secretary's action here is unprecedented. The United States has never required a tribe to allow another tribe to assert sovereignty within its sovereign boundaries without its consent. This breathtaking outcome is an important and unprecedented infringement on the Nation's sovereign rights, guaranteed to result in years of conflict and litigation, and thus worthy of immediate review.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 5101 *et seq.*[1] "was designed to improve the

[1] Title 25 of the U.S. Code was reclassified in 2016, and the IRA's provisions were renumbered.

economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains." 1 *Cohen's Handbook of Federal Indian Law* § 1.05 (Nell Jessup Newton et al. eds., 2012). It authorized the Secretary of the Interior "to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. § 5108. Of critical importance here, the IRA defines "Indian" to 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 . . . all other persons of one-half or more Indian blood.

Id. § 5129 ("section 5129").

This Court interpreted the IRA's definition of "Indian" in *Carcieri*, 555 U.S. 379. The issue was whether the Narragansett Tribe was a "recognized Indian tribe now under Federal jurisdiction" within the meaning of section 5129. *Id.* at 382. Based on "the ordinary meaning of the word 'now'" and "the natural reading of the word within the context of the IRA," the Court held that "the term 'now under Federal jurisdiction' in [section 5129] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934," *Id.* at 388, 389, 395. Thus, the IRA's definition of "Indian" applies only to tribes under federal jurisdiction in 1934.

Relevant here, the IRA also expressly stated that certain of its provisions (sections 4, 7, 16-18) were *not* applicable to Oklahoma tribes, including the provisions of the IRA that provided a right for tribes to organize and adopt constitutions, to establish tribal corporations and to participate in a revolving credit fund. 25 U.S.C. § 5118.

Enacted two years after the IRA, in 1936, the OIWA extended to Oklahoma tribes the provisions of the IRA from which they had been excluded. It stated that "[a]ny recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws." 25 U.S.C. § 5203. It authorized the Secretary of the Interior to issue such a tribe or band "a charter of incorporation." And it allowed the charter to grant to the incorporated group "the right to participate in the revolving credit fund and to enjoy any other rights or privileges *secured to an organized Indian tribe under the Act of June 18, 1934* (48 Stat. 984)." *Id.* (emphasis added). The "Act of June 18, 1934" is the IRA. Thus, in 1936, Oklahoma tribes were granted the "rights or privileges secured to an organized Indian tribe" under the IRA.

B. The Cherokee Nation and UKB

The Cherokee Nation is a federally recognized Indian tribe located in Oklahoma, and with over 383,000 citizens is the largest Indian tribe in the United States. In the 1830s, the United States forced the Nation to remove from its Georgia homeland to present-day Oklahoma. By the mid-19th century, most members of the Cherokee Nation had been forcibly moved to the Indian Territory in what is today eastern Oklahoma. *Cohen's Handbook of Federal Indian Law*, *supra*, § 1.03.

Treaties between the United States and the Nation entered in 1835, 1846 and 1866 defined the boundaries of the Nation's territory and guaranteed the Nation's sovereign title to and authority over those lands. See Treaty with the Cherokee, Cherokee-U.S., Dec. 29, 1835, 7 Stat. 478 ("1835 Treaty of New Echota"); Treaty with the Cherokee, Cherokee-U.S., Aug. 6, 1846, 9 Stat. 871 ("1846 Treaty of Washington"); Treaty with the Cherokee, Cherokee-U.S., July 19, 1866, 14 Stat. 799 ("1866 Treaty of Washington"). The 1866 Treaty also meticulously delineated the conditions under which other tribes might, *with the Nation's consent*, be settled within the Nation's territory. 1866 Treaty of Washington, *supra*, art. 15. Since that time, the Nation has exercised governmental authority within its treaty-recognized reservation boundaries. See, *e.g.*, *Cherokee Nation* v. *Journeycake*, 155 U.S. 196 (1894).

UKB is today also a federally recognized Indian tribe located in Oklahoma. Significantly, however, until 1946 UKB existed only as a voluntary social or political organization of individual Cherokee. See *Keetowah–Organization as Band*, I Op. Solic. on Indian Aff. 774 (U.S. Dep't of Interior July 29, 1937). In 1946, Congress enacted legislation pursuant to the OIWA recognizing UKB as a tribe, Act of Aug. 10, 1946, 60 Stat. 976; and in 1950, the Interior Department approved a corporate charter allowing UKB to create UKB Corporation. 10th Cir. Appellee's App. 83-90.

C. UKB's Attempt to Assert Sovereignty Over Land Within the Cherokee Reservation's Boundaries

In June 2004, UKB submitted an application to the Bureau of Indian Affairs, Eastern Oklahoma Region ("Region"), asking the United States to take into trust

a 76-acre tract of land in Cherokee County (the "Subject Parcel") under section 5 of the IRA. The Subject Parcel sits entirely within the Cherokee Nation's 1866 Treaty territory.[2] App. 2a-3a. The Nation opposed UKB's application.

In 2006, the Region issued a decision declining to take the land into trust. App. 4a. UKB appealed that decision to the Interior Board of Indian Appeals ("IBIA"). *Id.* The Assistant Secretary for Indian Affairs ("Assistant Secretary") directed the Region to request a remand and reconsider the application in light of certain findings he had made. *Id.* at 4a-5a. In August 2008, the Region again denied UKB's application and again UKB appealed. *Id.* at 5a.

Shortly thereafter, the Assistant Secretary took jurisdiction over the appeal. App. 5a. In a series of decisions, he vacated the Region's denial of the application and remanded the matter to the Region for reconsideration consistent with his instructions. *Id.* After *Carcieri* was decided, he stated that UKB should be permitted to amend its application to assert "alternative authority" for taking the Subject Parcel into trust—specifically, that UKB *Corporation* instead of UKB should take the land into trust and that it should invoke the Secretary's authority under section 3 of the OIWA, instead of section 5 of the IRA. *Id.* The Assistant Secretary believed that the OIWA would authorize trust acquisitions that under *Carcieri*, the IRA would not.

In light of the Assistant Secretary's decisions (which were binding on the Region on remand, 25

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[2] For purposes of the Secretary's trust land regulations, the term "Indian reservation" includes both reservation land and former reservations lands of a tribe in Oklahoma. 25 C.F.R. § 151.2(f).

C.F.R. § 2.20(c)), the Region reversed itself and found that section 3 of the OIWA provided statutory authority for the United States' acquisition of the Subject Parcel in trust for UKB Corporation. App. 6a.

The Region also decided that the United States could do so without the Cherokee Nation's consent, relying on a 1999 Appropriations Rider and concluding that the Rider implicitly repealed a decades-old regulatory requirement that the United States obtain consent from a sovereign tribe before taking land within that tribe's reservation or former reservation boundaries into trust for another tribe. App. 7a-8a. The Region stated its continued concern that intractable jurisdictional conflicts would arise between UKB and the Cherokee Nation if the Parcel were placed into trust and that the Region's resources would be insufficient to provide services in the Parcel, but it acknowledged that the Assistant Secretary's contrary decision that these concerns were insufficient to deny the application was binding. *Id.* at 9a-10a. The Nation appealed that decision to the IBIA, which dismissed the appeal for lack of jurisdiction.

D. Proceedings Below

Thereafter, the Nation filed suit in the Eastern District of Oklahoma, challenging the decision as arbitrary, capricious and contrary to law under the Administrative Procedure Act and the IRA. App. 37a. The Nation asserted, *inter alia*, that the Secretary lacked authority to take land into trust for UKB Corporation without the Nation's consent, and that doing so violated the IRA, the OIWA, the Cherokee Nation's treaties with the United States, and the longstanding regulation forbidding the Government's acquisition of trust land for one tribe within the reservation boundaries of another sovereign tribe. *Id.* See 25 C.F.R. § 151.8.

The district court agreed with the Nation. It first explained that the OIWA "points to the IRA," and therefore the IRA's definition of "Indian"—which this Court had held was confined to those tribes under federal jurisdiction in 1934—applies to the OIWA. App. 52a. The court observed that the Government had failed to explain the relationship between *Carcieri* and the OIWA, and remanded for the Region to address "the question of how any acquisition for []UKB or []UKB Corporation is affected by *Carcieri*." *Id.* at 53a. The district court also held that "Congress did not override the consent requirement [*i.e.*, the regulatory requirement for tribal consent for the Government to take land into trust for another tribe within the first tribe's reservation boundaries] with the passage of the 1999 Appropriations Act." *Id.* at 54a. Further, the district court held that the Government's decision to take land into trust for another tribe without the Cherokee Nation's consent violated the United States' treaties with the Nation. *Id.* at 55a-56a. Finally, the court concluded that the Region's failure to consider the resource issues and the jurisdictional conflicts between UKB and the Nation that would result from allowing UKB to assert sovereignty over land within the Nation's boundaries was arbitrary and capricious because it "failed to consider an important aspect of the problem and offered an explanation that ran counter to the evidence." *Id.* at 57a, 58a.

The court of appeals reversed. It held that "the Secretary of the Interior has authority to take the Subject Parcel into trust under section 3 of the [OIWA]," and that the agency was "not required to consider whether the UKB meets the IRA's definition of 'Indian.'" App. 3a-4a. Further, it concluded that a regulatory provision clearly stating that the land may be

taken into trust within a reservation "only when the governing body of the tribe having jurisdiction over such reservation consents in writing" had been impliedly repealed by an appropriations rider which forbids trust acquisitions within the Cherokee reservation without "consultation" with the Nation. *Id.* at 20a-24a. The court likewise concluded that the United States' treaties with the Cherokee Nation do not forbid this unconsented acquisition of land in trust for another tribe within the Nation's treaty boundaries. *Id.* at 25a-28a. Finally, it held that the agency's application of its criteria for taking land into trust was not arbitrary and capricious, and that the agency had adequately considered the potential jurisdictional conflict between UKB and the Nation and the Region's lack of resources to provide services to UKB in the Subject Parcel. *Id.* at 28a-29a.

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT INCORRECTLY INTERPRETED THE OIWA TO AUTHORIZE THE SECRETARY TO TAKE LAND INTO TRUST FOR UKB CORPORATION IN A MANNER THAT CONFLICTS WITH SUPREME COURT PRECEDENT.

The Tenth Circuit's decision incorrectly resolves an "important federal question" relating to the rights and privileges extended to Oklahoma Indians and tribes by the OIWA "in a way that conflicts with" a decision of this Court. See Sup. Ct. R. 10(c). In 1936, the OIWA extended to Oklahoma Indians and tribes the rights and privileges granted by the IRA from which those Indians and tribes had initially been excluded. Congress thus put Oklahoma Indians and tribes on an equal footing with other Indians and tribes.

In *Carcieri*, this Court definitively interpreted the scope of the IRA, holding that it "limits the exercise of the Secretary's trust authority under [section 5 of the IRA] to those members of tribes that were under federal jurisdiction at the time the IRA was enacted [in 1934]." 555 U.S. at 390-91. Yet the court of appeals here held that the OIWA—a law which simply extended the IRA's rights and privileges to the previously excluded Oklahoma Indians and tribes—grants Oklahoma Indians and tribes rights and privileges *beyond* those the IRA grants to others. It decided that the OIWA authorized the Secretary to exercise his trust authority to take land into trust for tribal corporations of Oklahoma tribes, for the benefit of those tribes, including tribes which were not under federal jurisdiction at the time the IRA was enacted. This result directly contravenes this Court's decision in *Carcieri* and Congress's intent that all Indians and tribes receive the *same* rights and privileges. Tribes in Oklahoma that came under the United States' jurisdiction after 1934 will now receive rights and privileges that similarly-situated tribes in other States will not receive. This outcome is directly contrary to *Carcieri*.

The OIWA was enacted to fill a hole left by section 13 of the IRA. That section had *excluded* Oklahoma tribes from some of the key benefits the IRA conferred on other tribes, including the right to reorganize their governments and the right to charter tribal corporations. 25 U.S.C. § 5118. Section 3 of the OIWA corrected these omissions:

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such

> organized group a charter of incorporation . . . . Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and *to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934* [the IRA] . . . .

Id. § 5203 (emphasis added). The best reading of this section is that it extends the IRA's tribal government and corporate charter provisions to Oklahoma tribes—the very rights and privileges denied to them by section 13 of the IRA.

The OIWA's legislative history confirms Congress's intent, stating: "[T]hese sections will permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the Indian Reorganization Act of June 18, 1934." H.R. Rep. No. 74-2408, at 3 (1936). And in 1980, the Secretary, too, issued regulations construing the OIWA to place IRA and OIWA tribal corporations on an *identical* and equal footing. See 25 C.F.R. § 151.2(b). Indeed, as the Secretary's regulations also reflect, the Secretary is without specific Congressional authorization to acquire lands in trust for *either* type of tribal corporation.

In sum, the OIWA provides that Oklahoma tribes, Indians and corporations have the *same* rights under the IRA as all others covered by the IRA—no more and no less.[3]

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[3] The OIWA's "rights or privileges" language assured that OIWA tribal corporations would enjoy the same rights or privileges as those enjoyed by IRA tribal corporations, such as protection against the involuntary disposition of shares in tribal

Section 5 of the IRA authorizes the Secretary to take land into trust only to provide land for "Indians" and to be held "in trust for the Indian tribe or individual Indian for which the land is acquired." 25 U.S.C. § 5108. Section 19 of the IRA defines "[t]he term 'Indian' as used in this Act [to] include all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*." *Id.* § 5129 (emphasis added). The OIWA does not alter any of these provisions, nor provide any other definition of "Indian" for use in determining the scope of the rights and privileges that the OIWA confers on Oklahoma Indians and tribes through its incorporation of the IRA provisions.

In *Carcieri* this Court resolved the meaning of the IRA and the scope of the Secretary's authority to acquire land in trust under section 5 of the IRA by interpreting the IRA's definition of the word "Indian." Applying "settled principles of statutory construction," the Court held that the phrase "tribe[s] now under Federal jurisdiction," as used in 25 U.S.C. § 5129, meant tribes under federal jurisdiction *in 1934*. 555 U.S. at 387-88.

Moreover, in an analysis directly relevant here, this Court expressly held that when the rights and privileges of the IRA are incorporated by reference into another statute, as they are in the OIWA, the IRA's temporal limitations on the "Indians" who are cov-

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corporate assets, 25 U.S.C. § 5107 (IRA § 4); funding of expenses for organizing Indian chartered corporations, *id.* § 5112 (IRA § 9); access to the revolving loan fund for economic development purposes, *id.* § 5113 (IRA § 10); assurance that corporate charters would include provisions regarding purchase, management, and disposal of property, *id.* § 5124 (IRA § 17); and protection against revocation of a corporate charter except by Act of Congress, *id.*

ered also carry over. *Id.* at 393-95. This Court therefore expressly rejected the argument that a provision of the Indian Land Consolidation Act, 25 U.S.C. § 2202, extended IRA section 5's rights and privileges to post-1934 tribes. 555 U.S. at 394. In words that are perfectly apt here, the Court reasoned that "the plain language of [the ILCA] does not expand the power set forth in [section 5 of the IRA] . . . [n]or does [the ILCA] alter the definition of 'Indian' in [section 19 of the IRA], *which is limited to members of tribes that were under federal jurisdiction in 1934*." *Id.* (emphasis added). The same is true of the OIWA—its incorporation of the IRA carries with it the IRA's definition of "Indian," and thus is limited strictly to tribes under federal jurisdiction in 1934.

But here, the Tenth Circuit concluded that section 3 of the OIWA authorized the Secretary to take land into trust for an *Oklahoma* tribal corporation even if that tribe came under federal jurisdiction *after* 1934. App. 17a-20a. This reading of the OIWA—again, which simply incorporates the IRA's provisions by reference—cannot be squared with *Carcieri's* definitive reading of the definition of "Indian" and the scope of the IRA.

It also has the anomalous consequence of allowing post-1934 tribes in Oklahoma, but only in Oklahoma, to charter a corporation to take land into trust for their benefit, while *no other post-1934 tribes in any other State of the Union may do so*. Thus, if allowed to stand, this decision could work a substantial expansion of the Secretary's authority to take land into trust for post-1934 tribes *but only in Oklahoma*. Congress did not intend this incongruous outcome when it enacted the OIWA, a statute intended simply to provide Oklahoma tribes with rights equal to—but not superior to—those held by tribes in other States.

Accordingly, the Tenth Circuit has incorrectly resolved an important question of federal law in conflict with existing precedent of this Court.

II. THE TENTH CIRCUIT INTERPRETED THE OIWA IN A MANNER THAT ABROGATES THE CHEROKEE NATION'S TREATY RIGHT TO SOVEREIGNTY WITHIN ITS RESERVATION BOUNDARIES WITHOUT ITS LEGALLY REQUIRED CONSENT.

A. The Tenth Circuit's Decision Violates The Nation's Treaty Rights.

The Tenth Circuit rejected the Nation's argument that reading the OIWA to allow the Secretary to grant sovereignty over land within its reservation boundaries to another tribe, over the Nation's objection, would abrogate the Nation's treaty right to its sovereignty within its treaty boundaries. The court stated that it did "not read the Treaty's terms as prohibiting the UKB's application without Nation consent." App. 25a.

On its face, this reading of the Nation's treaties is implausible: Allowing another tribe to assert sovereignty within the Nation's reservation boundaries is inherently inconsistent with the Nation's treaty right to sovereignty, particularly when the relevant treaties address the settlement of other tribes on reservation lands. In addition, the court failed to apply this Court's instruction that treaty rights may not be abrogated without a clear and express statement of Congressional intent to do so. One searches the OIWA in vain for any indication of such intent. The court of appeal's failure to recognize that the OIWA may not be interpreted to annul the Nation's treaty right to sovereignty therefore presents another "important federal question" that has been resolved in a

manner that conflicts with this Court's teachings. Sup. Ct. R. 10(c).

When the United States forced the Nation to relocate to what is now Oklahoma, it agreed in Article 2 of the Treaty of New Echota that the Nation would be removed to a territory "guarantied and secured to be conveyed by patent" to the Nation. See 1835 Treaty of New Echota, *supra*, art. 2. The United States further agreed that this land "shall, in no future time *without their consent*, be included within the territorial limits or jurisdiction of any State or Territory" and that the United States would secure to the Nation "the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country." *Id.* art. 5 (emphasis added). The Treaty of New Echota "clearly and unequivocally recognizes tribal self-government" for the Cherokee Nation. See *EEOC* v. *Cherokee Nation*, 871 F.2d 937, 938 (10th Cir. 1989).

After the Civil War, the United States reaffirmed these rights in Article 31 of the 1866 Treaty of Washington, guaranteeing to the Nation the "quiet and peaceable possession of their country." 1866 Treaty of Washington, *supra*, art. 26. In detailed language, Article 15 of the 1866 Treaty also secured to the Nation two means by which it could *voluntarily* admit other tribes into its territory, one in which the new tribe would assimilate into the Cherokee Nation, and the other in which the new tribe would retain its independent sovereignty. See *Journeycake*, 155 U.S. 196; *Cherokee Nation of Okla.* v. *Norton*, 389 F.3d 1074 (10th Cir. 2004). Nothing in the treaty, however, contemplates the admission of another tribe over the Nation's objection; indeed, the treaty necessarily creates the opposite inference.

The 1866 Treaty of Washington is the successor to the United States' previous treaties with the Cherokee Nation, and states that "[a]ll provisions of treaties heretofore ratified and in force, and not inconsistent with the provisions of this treaty are hereby reaffirmed and declared to be in full force." 1866 Treaty of Washington, *supra*, art. 31. Thus, the Cherokee Nation's right to self-government and sovereignty within its reservation boundaries remained in "full force" following the 1866 Treaty of Washington. These treaty provisions guaranteed the Nation the right "to exist as an autonomous body" in what is now Oklahoma. *Talton* v. *Mayes*, 163 U.S. 376, 379-80 (1896). They guaranteed that the Nation would have "virtually complete sovereignty over their new lands." *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 635 (1970).

The Cherokee Nation's treaty right to sovereignty has been repeatedly reaffirmed, specifically in decisions rejecting UKB's attempted assertions of sovereignty within the 1866 Treaty territory, because "the Cherokee Nation's sovereignty is preeminent to that of the UKB in Cherokee Nation Indian Country." *United Keetoowah Band of Cherokee Indians* v. *Mankiller*, 2 F.3d 1161, 1993 WL 307937, at *2 (10th Cir. 1993) (unpublished table decision); *id.* at *4 ("This court has previously decided that the Cherokee Nation is the only tribal entity with jurisdictional authority in Indian Country within the Cherokee Nation."); *id.* at *5 ("[T]he relief requested by the Plaintiff herein directly affects the sovereignty and fundamental jurisdiction of the Cherokee Nation . . . .").[4]

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[4] *See* App. 56a ("[T]he 1866 Treaty guaranteed the Cherokee Nation protection against [UKB's assertion of jurisdiction within the reservation]."); Transcript of Preliminary Injunction Hearing at 14:10-14, *Cherokee Nation* v. *Salazar*, No. 12-cv-493-GKF-

The Tenth Circuit, however, rejected the argument that the Nation's treaty right to territorial sovereignty prohibited the Secretary from allowing another tribe to exercise sovereignty within the Nation's boundaries over the Nation's objection. It focused not on the Nation's sovereignty, but on treaty language granting the Nation "protection against domestic feuds and insurrections, and against hostilities of other tribes," and held that granting UKB sovereignty did not violate such provisions. App. 27a (quoting 1866 Treaty, art. 26, 14 Stat. 799, 803). The court believed that "hostilities of other tribes" would have "contemplated warlike hostilities, not mere civil disagreements," *id.*, but failed to read these provisions in context and as this Court requires.

The court of appeals' analysis is wholly inconsistent with this Court's teachings about treaty interpretation. First, it is utterly implausible that the Cherokee Nation would have understood a promise that it would exercise sovereignty within its reservation boundaries as allowing the United States to permit another tribe likewise to exercise sovereignty within those boundaries. It is similarly implausible that the Nation would not consider such an assertion of sovereignty to be a "hostilit[y] of another tribe," see App.

TLW (N.D. Okla. Aug. 12, 2013), ECF No. 92 ("The administrative agency's decision [to take into trust a two-acre parcel] appears to have ignored the Department of Interior's own previous decisions, case law, and the legal history of the Cherokee Nation, including its treaty rights."); *Buzzard* v. *Okla. Tax Comm'n*, No. 90-C-848-B, slip op. at 8-9 (N.D. Okla. Feb. 24, 1992) (concluding that UKB is not an heir to the Cherokee Nation), *aff'd*, 992 F.2d 1073 (10th Cir. 1993); *United Keetoowah Band of Cherokee Indians in Okla.* v. *Sec'y of Interior*, No. 90-C-608-B, slip op. at 6 (N.D. Okla. May 31, 1991) (noting the Secretary recognized that Cherokee Nation jurisdiction over 1866 Treaty reservation lands is superior to that of UKB).

26-a27a, particularly when the Treaty set forth specific measures for the consensual admission of other tribes into Cherokee Reservation, see 1866 Treaty of Washington, *supra*, art. 15. Treaties must be "construed, not according to the technical meaning of [their] words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Washington* v. *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (quoting *Jones* v. *Meehan*, 175 U.S. 1, 11 (1899)), *modified sub nom. Washington* v. *United States*, 444 U.S. 816 (1979) (mem.). See also *Wash. State Dep't of Licensing* v. *Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring in the judgment) ("When we're dealing with a tribal treaty, . . . we must 'give effect to the terms as the Indians themselves would have understood them.'" (quoting *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999))).[5]

Second, this Court has repeatedly held that a treaty right can be abrogated only by a clear and express statement by Congress. *Herrera*, 139 S. Ct. at 1698; *United States* v. *Dion*, 476 U.S. 734, 738-39 (1986). Indeed, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Dion*, 476 U.S. at 739 (quoting *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 412-13 (1968)). Con-

[5] As is the case here, in resolving the pending cases of *Sharp* v. *Murphy*, No. 17-1107 and *McGirt* v. *Oklahoma*, No. 18-9526 (neither yet set for argument), this Court will be required to determine whether a tribe's treaty rights have been in essence abrogated by Congressional actions or statements that are alleged to have disestablished the Muscogee (Creek) Reservation. Thus, the Court's decision there may confirm that the Tenth Circuit erred by failing to require a clear Congressional statement before abrogating the Nation's treaty rights here.

gress made no such clear statement in the OIWA. Nothing in the OIWA provides the clarity that would be required to find that Congress abrogated the Treaties entered into with the Cherokee Nation and authorized the Secretary to permit other tribes to exercise *sovereignty* on land within the Cherokee reservation in direct contravention of the Cherokee Nation's will.

This Court's recognition of the importance of the trust relationship between the United States and Indians has frequently resulted in its review of cases involving the meaning, application, and violation of an Indian tribe's treaty rights. See, *e.g.*, *Mille Lacs Band*, 526 U.S. at 175-76; *Montana* v. *United States*, 450 U.S. 544, 547 (1981); *Puyallup Tribe* v. *Dep't of Game*, 391 U.S. 392, 393 (1968). This case involves an unprecedented abrogation of tribal sovereignty that was solemnly promised in a treaty, through use of an interpretive framework that wholly disregards this Court's teachings. Review is warranted.

B. The Tenth Circuit's Decision Treats An Appropriations Law As An Implied Repeal Of A Regulation That Has Long Protected Indian Tribes' Right To Sovereignty Within Their Reservations.

For decades, the Department of the Interior's regulations governing the acquisition of lands in trust for Indian tribes have provided that "[a]n individual Indian or tribe may acquire land in trust status on a reservation other than its own *only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition*." 25 C.F.R. § 151.8 (emphasis added). The purpose of this regulation was and remains the promotion and protection of tribal self-determination. See *infra* p. 23. The Tenth Circuit, however, held that this regulation

requiring the Nation's consent was implicitly repealed for trust acquisitions within the Cherokee Nation by an appropriations rider that requires "consultation" with the Nation before the Secretary may acquire lands in trust within the Nation's boundaries. App. 20a-24a.

Like the Nation's treaties, the regulation at issue protects the Nation's sovereignty over its treaty territory. In holding that the regulation was silently abrogated by an appropriations rider, the Tenth Circuit contravened this Court's teachings about how to assess whether an appropriations rider implicitly but silently repeals other laws. This question, too, is therefore worthy of review.

Initially, this question is already before this Court in *Maine Community Health Options* v. *United States*, No. 18-1023, and the two other cases consolidated with it. Like petitioner here, the petitioners in those cases argue that "this Court has recognized for more than two centuries[that] a 'repeal by implication ought not to be presumed' unless the statutory language makes it 'necessary and unavoidable.'" Brief for Petitioners at 27-28, *Moda Health Plan, Inc.* v. *United States*, No. 18-1028 (U.S. Aug. 30, 2019) (quoting *Harford* v. *United States*, 12 U.S. (8 Cranch) 109, 109-10 (1814) (Story, J.) and citing numerous other cases). And, petitioners continue, "[t]hat rule 'applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act." *Id.* at 28 (quoting *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 190 (1978)). Thus, where "Congress wishes to alter substantive law through an appropriations measure, it must do so clearly and textually, using 'words that expressly, or by clear implication, modif[y] or repeal[] the previous law.'" *Id.* at 29 (alterations in original) (quoting *United States* v. *Langston*, 118 U.S. 389, 394 (1886) and

citing *Minis* v. *United States*, 40 U.S. (15 Pet.) 423, 445 (1841) (Story, J.)). Petitioners argue that if these interpretive rules are applied, the Court will conclude that the appropriations law at issue did not repeal or amend section 1342 of the Affordable Care Act.

The Cherokee Nation is making a closely analogous argument here. It contends that the 1999 Appropriations Rider did not repeal the regulation at issue, and that the Tenth Circuit failed to use this Court's established test for determining whether an appropriations law works such a repeal. If the Court does not grant the petition outright, it should hold this case pending decision in *Maine Community Health Options* v. *United States* and the cases consolidated with it.

As the Court's grant of the petitions in *Maine Community Health Options* suggests, however the question presented here is independently worthy of review. The Tenth Circuit's approach to the interpretive question contravenes this Court's precedent, and it results in an anomalous outcome that also violates an Indian tribe's treaty rights and deeply infringes its sovereignty.

As noted above, for 40 years controlling regulations have required consent from the sovereign tribe before "[a]n individual Indian or tribe may acquire land in trust status on *a reservation other than its own*." 25 C.F.R. § 151.8 (emphasis added). This provision was included in the regulations "to support tribal self-determination." *Land Acquisitions*, 45 Fed. Reg. 62,034, 62,035 (Sept. 18, 1980). This regulation has safeguarded the rights of Indian tribes, including the Cherokee Nation's treaty right, to be free of conflicting claims of tribal sovereigns within a tribe's territory by precluding the Secretary from taking land into

trust for any other tribe within that territory against the tribe's will.

In 1992, Congress enacted a rider to the Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-154, 105 Stat. 990, 1004 (1991), providing (in part) that "*[no] funds [shall] be used* to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without the consent of the Cherokee Nation," *id.* (emphasis added). The 1992 Rider was adopted to address concerns that, if UKB began providing services to Cherokee citizens within the Nation's territory, it would have the effect of "creat[ing] a duplicative or competing Cherokee tribal government, or . . . supplant[ing] the Cherokee Nation's governance." H.R. Rep. No. 102-116, at 58 (1991).

In 1999, Congress amended the 1992 Rider to read that "*no funds shall be used* to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without consultation with the Cherokee Nation." Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-246 (1998) (emphasis added). The House Report stated that this amendment was intended to allow the Bureau of Indian Affairs to deal with entities asserting jurisdiction in the Nation's territory, including UKB, "on issues of funding" while "prevent[ing] these tribes from establishing trust holdings within the Cherokee[Nation]'s original boundaries without Cherokee consultation." H.R. Rep. No. 105-825, at 1209 (1998) (Conf. Rep.).

Nothing in the 1999 Rider addressed the broader regulatory requirements that apply to trust acquisitions generally; nor did it purport to rescind the decades-old regulatory requirement that a sovereign

tribe's consent must be obtained in order for the Secretary to take land into trust for another tribe within that sovereign's reservation or former reservation. See 25 C.F.R. § 151.8. The consultation requirement was simply a condition on the BIA's expenditure of agency funds.

Yet the court of appeals found that, without mentioning the regulation, the 1999 Rider somehow "carve[d] out an exception" to 25 C.F.R. § 151.8 for the Cherokee Nation's reservation lands. App. 23a. The court acknowledged the argument that "[c]ourts will not construe an appropriations act to amend substantive law unless it is clear that Congress intended to change the substantive law." *Id.* at 22a n.16 (alteration in original). But, it nonetheless found that Congress had enacted an implied repeal of the regulation, saying (without supporting citation) that "Congress clearly intended the 1999 Appropriations Act to enact a substantive change in the requirements for taking lands within the original boundaries of the Cherokee territory into trust," *id.*, including the consent requirements of 25 C.F.R. § 151.8.

The court believed that the doctrine disfavoring repeals by implication was not implicated because "the 1999 Appropriations Act carves out an exception to section 151.8." App. 23a. But this reasoning is circular. The Appropriations Rider does not mention the regulation; it is, accordingly and necessarily, a repeal by implication. In addition, the Appropriations Rider and the regulation are easily reconciled: the former requires "consultation" and the latter requires consent. That is, the former requires consultation with the Cherokee Nation before the government can spend appropriated funds to process an application to take land for another tribe into trust within Cherokee territory, while the latter requires consent before the

government can actually take land into trust within the boundaries of a tribal sovereign. The court of appeals thus contravened this Court's instructions that implied repeals are heavily disfavored and will only be found in cases where "the later statute expressly contradict[s] the original act or unless such a construction is absolutely necessary . . . in order that [the] words [of the later statute] shall have *any meaning at all*." *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (alterations and omission in original) (emphasis added) (internal quotation marks omitted); see also *Branch* v. *Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) ("An implied repeal will only be found where provisions in two statutes are in '*irreconcilable conflict*,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" (emphasis added) (quoting *Posadas* v. *Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936))). Moreover, this general rule "applies with especial force" when, as here, the implied repeal would come from an appropriations act. See *United States* v. *Will*, 449 U.S. 200, 221-22 (1980).

As already shown, the consultation requirement in the 1999 Rider is not in "irreconcilable conflict or inconsistency" with the regulation's consent requirement. In the absence of any clear indication Congress intended the 1999 Rider to repeal 25 C.F.R. § 151.8, the strong presumption against repeals by implication controls—a presumption that operates with unique force in circumstances where this implied repeal would also abrogate the Nation's treaty rights and violate its sovereignty within its reservation boundaries.

III. THE QUESTION PRESENTED IS IMPORTANT.

Other than the Cherokee Nation, the Nation is aware of no instance where the government has forced a tribe to accept another tribe's exercise of sovereignty within the boundaries of its territory. This unprecedented consequence of the court's interpretation of the OIWA independently supports the argument that the issue presented is important and worthy of Supreme Court review. See Sup. Ct. R. 10(c).

This is a matter of considerable consequence. The Cherokee Nation occupies all or portions of 14 counties in eastern Oklahoma, adjacent to the City of Tulsa. As noted, it has over 383,000 tribal citizens and is the largest Indian tribe in the United States. While its tribal land estate has been severely reduced over the past century, it retains several thousand acres in trust within its reservation and which it governs through the enactments of the Nation's Tribal Council, including measures concerning law enforcement, environmental quality and economic development. Like many Oklahoma tribes, the Nation enjoys a close bilateral working relationship with both the State of Oklahoma and with several city and county governments. Cf., *e.g.*, Brief of *Amici Curiae* Former Oklahoma Officials at 13-21, *Carpenter* v. *Murphy*, No. 17-1107 (U.S. Sept. 26, 2018). The introduction of a new and independent tribal sovereign government within the Nation's territory under terms not subject to Nation control threatens to upset this balance and massively disrupt a status quo that has provided peace and predictability for the reservation community and the surrounding community, alike.

Moreover, existing disagreements between the Cherokee Nation and UKB will only be heightened by the Tenth Circuit's decision, as both tribes seek juris-

diction over the numerous aspects of governance within the Nation's reservation boundaries. See, *e.g.*, Complaint, *United Keetoowah Band of Cherokee Indians of Okla.* v. *Barteaux*, No. 4:20-cv-00008-GKF-JFJ (N.D. Okla. filed Jan. 8, 2020) (UKB's broadside attack on the Cherokee Nation's child welfare department). The resulting jurisdictional uncertainty and controversy will give rise to significant political, economic and human costs in an area that can ill afford them.

* * * *

The net effect of the Tenth Circuit's decision is to abrogate the Cherokee Nation's treaty right to exercise exclusive tribal sovereignty over its treaty territory without a clear Congressional statement authorizing this abrogation. The court did so by misinterpreting the OIWA in a manner that contravenes the Supreme Court's decision in *Carcieri*, by authorizing an outcome that violates the Nation's treaty rights, and by finding an implied repeal of the longstanding federal regulation that protects tribal sovereignty as against other tribes within its territory. These are important questions whose incorrect resolution has unfair and profound consequences for the Nation and are worthy of Supreme Court review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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