No. 19-937

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

REPLY BRIEF

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INTRODUCTION

The Secretary of the Interior ("Secretary") baldly asserts that he has authority to take into trust for the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") land that lies wholly *within the boundaries of the Cherokee Nation's treaty territory* despite the Nation's strong objection to this infringement of its sovereignty. Neither respondent disputes that this unilateral assertion of authority is unprecedented.

This exercise of trust-acquisition authority interprets the Oklahoma Indian Welfare Act ("OIWA"), Act of June 26, 1936, ch. 831, 49 Stat. 1967, in a way that cannot be reconciled with this Court's decision in *Carcieri* v. *Salazar*, 555 U.S. 379 (2009). It also violates the United States' treaty obligations, and breaches a longstanding regulatory requirement that a tribe must consent to trust-acquisitions that allow another tribe to assert sovereignty within its reservation boundaries.

As demonstrated *infra*, respondents' contrary arguments cannot withstand scrutiny. The OIWA's text and history demonstrate that *Carcieri*'s definition of "Indian" applies and that the Secretary lacks authority to take land into trust to benefit UKB. There is no reasonable prospect of a conflict on this important question because the OIWA applies only to Oklahoma tribes. Absent this Court's review, this incorrect reading of the federal law will stand.

Moreover, the legal prohibition on the Secretary's acquisition of lands within the historic treaty territory of the Nation without its consent is embodied in both treaties with the Nation and a regulation that protects tribal sovereignty. The Government's assertion (Gov. Opp. 17) that the Nation failed to assert below that the

Secretary's acquisition violated *all* treaty provisions the petition cites is wrong and beside the point. The Nation relied on the cited provisions in the Tenth Circuit to demonstrate that the acquisition violated its treaty rights. That court ignored some of these provisions and misconstrued another in allowing the Secretary's action. Doing so violated this Court's instruction that courts may not abrogate treaty obligations without an express statement of Congress's intent to do so. See, *e.g.*, *Herrera* v. *Wyoming*, 139 S. Ct. 1686, 1698 (2019).

Further, the petition demonstrated that an appropriations rider—that requires "consultation" with the Nation before the Secretary expends funds to take land into trust within its historic reservation boundaries—cannot be treated as repealing by implication an established regulation mandating that the Nation *consent* to any such acquisition. Indeed, this Court recently reaffirmed its presumption against such an implied repeal in *Maine Community Health Options* v. *United States*, 140 S. Ct. 1308 (2020).

The Government waves away this precedent, arguing that it applies to implied repeals of statutes, not of regulations. Gov. Opp. 20-21. But regulations promulgated pursuant to statutory authority and after notice and comment rulemaking have the "force and effect of law." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302-03 (1979) (quotations omitted). The presumption against implied repeal should apply with equal force in that setting. At the least, this Court should grant, vacate and remand ("GVR") this case for reconsideration of the implied-repeal holding based on *Maine Community Health*.

Finally, a theme running through both oppositions is that the Court should not grant the petition because the Nation and UKB are similarly situated as tribes

"whose members descend from the historical Cherokee Nation," Gov. Opp. 2; see also UKB Opp. 1. The petition cited authorities demonstrating that this suggestion is meritless, Pet. 18-19 n.4.

The Nation is the "historical Cherokee Nation." It was removed to what is now Oklahoma on the Trail of Tears, where it exercised governmental authority and signed treaties with the United States, and was later coerced into agreeing to allotment of its treaty-guaranteed lands. Congress then expressly continued the Nation's government in existence in the Five Tribes Act, Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 137, 148, with no limitation. After surviving suppression of its political operations, the Nation reorganized under new constitutions. UKB, by contrast, was a social group of Cherokee formed after removal, see *Keetowah-Organization as Band*, I Op. Solic. on Indian Aff. 774 (U.S. Dep't of Interior July 29, 1937), which exercised no sovereign authority until Congress unilaterally recognized it as a tribe in 1946, Act of Aug. 10, 1946, ch. 947, 60 Stat. 976.

The decision below is worthy of immediate review.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT.

In *Carcieri*, this Court definitively interpreted the definition of "Indian" in the Indian Reorganization Act ("IRA"), holding that the IRA's rights and privileges were limited "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. The petition demonstrated that the OIWA extended the IRA's rights and privileges to Oklahoma Indians and tribes originally excluded from the IRA; but that, in so doing,

the OIWA clearly embraced the IRA's definition of "Indian" as interpreted in *Carcieri*. Pet. 14-15. Indeed, the OIWA does not otherwise define "Indian."

The Tenth Circuit, however, refused to apply *Carcieri*'s interpretation of "Indian." Instead, it incorrectly held that under the OIWA, Oklahoma Indians and tribes, unlike Indians and tribes elsewhere in the nation, are entitled to the IRA's rights and privileges, Pet. App. 16a-20a, even if they were not "under federal jurisdiction at the time the IRA was enacted" in 1934, 555 U.S. at 390-91.

The Government's response is twofold. First, it states that the Nation "does not suggest that Congress expressly incorporated the IRA's definition of 'Indian' into the OIWA." Gov. Opp. 12 (citation omitted). Respectfully, that is precisely what the Nation argues—that the OIWA's express text provides the newly covered Oklahoma tribes only with the "rights or privileges secured *to an organized Indian tribe under [the IRA],*" 25 U.S.C. § 5203 (emphasis added), and that this text limits the Oklahoma Indians and tribes covered to those covered under the IRA.

In arguing to the contrary, the Government relies heavily on the OIWA's reference to "*[a]ny* recognized tribe or band of Indians." Opp. 12 (alteration in original). But a fair reading of this phrase in context seriously undercuts the Government's argument. The section authorizes "[a]ny" tribe or band to organize and the Secretary to issue charters of incorporation to organized tribes or bands, but it then defines what a charter may convey and to whom: "the right … *to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934* [the IRA]." 25 U.S.C. § 5203 (emphasis added). This language, combined with the absence of any competing definition

of "Indian," makes clear that the OIWA simply extended the IRA's tribal government and corporate charter provisions to similarly situated Oklahoma Indians and tribes.

The Government also argues that *Carcieri* recognizes "Congress's ability to so expand the Secretary's authority" beyond the definition of "Indian" in the IRA. Gov. Opp. 12. To be sure, Congress has such authority; it simply did not exercise it in the OIWA. Enacted in 1936, the OIWA was intended to cure the omission of Oklahoma tribes from the IRA, not to provide Oklahoma tribes with treatment more favorable than that accorded to tribes elsewhere.

The Government further notes that *Carcieri* cites examples of statutes where Congress broadened the Secretary's land-acquisition authority to tribes outside the IRA's definition of Indian. Gov. Opp. 12. The referenced provisions, however, severely damage the Government's cause for all state *in terms* that specific statutory provisions "apply" or that specific tribes have become "eligible" for statutory benefits. See *id.* In marked contrast, the OIWA contains no definition of "Indian"; it does not state in terms that the statutory benefits apply to specific Oklahoma tribes. It simply cures an omission in the IRA.

The Government next disparages the Nation's argument that *Carcieri* recognizes that federal statutes that incorporate the IRA also incorporate the IRA's definition of "Indian." But *Carcieri*'s discussion of the Indian Land Consolidation Act ("ILCA") is on point. ILCA provided that the relevant IRA provision "shall apply to *all tribes* notwithstanding the provisions" of another section that had allowed tribes to opt out of the IRA. 555 U.S. at 394-95 (emphasis added) (quoting 25 U.S.C. § 2202). This Court held that this provision

did not "alter the definition of 'Indian' … which is limited to members of tribes that were under federal jurisdiction in 1934." *Id.* Similarly here, the OIWA's extension of the IRA's rights and benefits to "[a]ny recognized tribe or band of Indians residing in Oklahoma" does not alter the IRA's definition of Indian.

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. The Tenth Circuit's contrary reading of the OIWA cannot be squared with *Carcieri*.

II. THE DECISION BELOW ABROGATES THE NATION'S TREATY RIGHTS WITHOUT ITS LEGALLY REQUIRED CONSENT.

A. The Decision Below Violates The Nation's Treaty Rights.

The petition demonstrated that the Nation's treaties prohibit the United States from allowing another tribe to assert sovereignty within the Nation's reservation boundaries. Pet. 16-26. In finding otherwise, the Tenth Circuit contravened this Court's repeated teaching that treaty rights may not be abrogated without a clear and express statement of Congressional intent to do so.

The Government's responses seek to evade the critical points. First, the Government focuses on a single clause in a treaty—wherein the United States promised to "protect[]" the Nation "against hostilities of other tribes," Gov. Opp. 15 (citing Treaty with the Cherokee, art. 26, July 19, 1866, 14 Stat. 799, 806 ("1866 Treaty"))—and argues that this promise extended only to physical hostilities, and that granting UKB sovereignty did not violate it. *Id.* at 16.

Initially, it is implausible that the Nation would have understood a promise of protection from "hostilities" in territory over which it had sovereignty as allowing the United States to grant another tribe sovereignty within its reservation boundaries.

This Court has made clear that "[w]hen we're dealing with a tribal treaty, … we must 'give effect to the terms as the Indians themselves would have understood them.'" *Wash. State Dep't of Licensing* v. *Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring in the judgment) (quoting *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999)). In *Cougar Den*, this Court held that a fuel tax violated a tribe's treaty right "to travel upon all public highways" so that the tribes could "continue to fish, to hunt, to gather food, and to trade." *Id.* at 1011-13, 1015-16 (plurality opinion). Clearly, the parties to that treaty did not have a "fuel tax" in mind when protecting the tribe's right "to travel upon all public highways"; yet, that right foreclosed the fuel tax. Here, similarly, the Nation and the United States may not have had land-acquisition regimes in mind when they negotiated the Nation's rights to sovereignty and protection from "hostilities of other tribes," but those provisions foreclose land-acquisition regimes that violate those tribal rights.

Third, the argument ignores numerous other provisions of the relevant treaties. As the petition explains, when the United States forced the Nation to relocate to what is now Oklahoma, it agreed that the reservation land "shall, in no future time *without their consent*, be included within the territorial limits or jurisdiction of any State or Territory." Pet. 17 (quoting and discussing 1866 Treaty, art. 5 (emphasis added)). Moreover, 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.* (quoting and discussing 1866 Treaty, art. 5). See also 1866 Treaty, art. 26 (guaranteeing the Nation the "quiet and peaceable possession of their country"). Article 15 of the 1866 Treaty expressly addressed two ways in which the Nation could *voluntarily* admit other tribes into its territory. *Id.* at art. 15. The clear import of these provisions in combination *forecloses* the Tenth Circuit's view—that the United States could authorize another tribe to assert sovereignty over lands within the Nation's historic reservation over the Nation's objection. 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).

The Government counters that the Nation failed to raise the remaining relevant treaty provisions below, and therefore that arguments based on these provisions are not before this Court. Gov. Opp. 17. The insinuation of waiver is wrong.

Preliminarily, the Nation's Tenth Circuit brief contains a "plain language" argument about the importance of Article 15 of the 1866 Treaty and its "mechanism whereby other tribes might be settled within Cherokee country," asserting that the Treaty "provided for[] Cherokee consent to the location of other tribes within its borders." Appellee's Opening Brief at 39-40, *Cherokee Nation* v. *Bernhardt*, 936 F.3d 1142 (10th Cir. 2019) (No. 17-7042), 2018 WL 564792 at *39-40. That brief also discusses the United States' treaties

with the Nation, including the 1835 treaty provisions recognizing the Nation's "right of self-government in the Treaty Territory which would 'in no future time without their consent, be included within the territorial limits or jurisdiction of any state or territory." *Id.* at 3 (quoting Treaty with the Cherokee, art. 5, Dec. 29, 1835, 7 Stat. 478, 481 ("1835 Treaty")). See also *id.* at 9 (discussing 1866 Treaty's "guarantee[] to the people of the Cherokee Nation the quiet and peaceable possession of their country" as well as "protection against … hostilities of other tribes"); *id.* at 39-40 & n.12 (citing treaty provisions in arguing that acquiring land for UKB violated promises that the Nation would have "sovereign authority" over the lands). The brief expressly pressed the argument that the Secretary's actions here violated numerous aspects of the United States' treaties with the Nation. These arguments are properly before this Court. See also *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

Second, puzzlingly, the Government contends that the Nation's argument—based on the language of its treaties—is wrong because it "ignores the past 120 years of federal Indian policy and the transformation of the former Indian Territory in eastern Oklahoma." Gov. Opp. 17. What the Government ignores is that the Nation retains a treaty right to forbid other tribes to assert sovereignty over lands within its historic reservation boundaries, even if those lands were allotted to individual tribal members and thus are no longer reserved to the Nation *qua* Nation.

A treaty right can be abrogated only by a clear statement by Congress. *Herrera*, 139 S. Ct. at 1698. The OIWA contains no such statement. The Tenth Circuit's

decision permits other tribes to exercise *sovereignty* within the Nation's historic reservation in direct contravention of its will and its treaty rights.

B. This Court At Least Should Grant Or GVR In Light Of *Maine Community Health*.

The Government recognizes that the Department of the Interior's regulations authorize the acquisition of lands in trust for an Indian tribe "on a reservation other than its own *only when the governing body of the tribe having jurisdiction over such reservation consents*." 25 C.F.R. § 151.8 (emphasis added). It argues, however, that this regulation was implicitly repealed for trust acquisitions within the Nation's historic reservation boundaries by an appropriations rider and that *Maine Community Health* is irrelevant here. Both arguments are wrong.

First, the Government argues that Congress "expressly addressed" the consent requirement when it "amended" the appropriations rider's text to change a prohibition on using funds to take land into trust within the original Cherokee territory without "consent," into a prohibition on doing so "without consultation." Gov. Opp. 18 (quoting Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-246 (1998)).

The rider's language, however, does not even mention the regulation requiring consent, and the consultation language is entirely consistent with a continuing requirement of tribal consent. As this Court reaffirmed in *Maine Community Health*, "repeals by implication are not favored," 140 S. Ct. at 1323 (quoting *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974)), and

"[t]his Court's aversion to implied repeals is 'especially' strong 'in the appropriations context,'" *id.* (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992)). The language of an appropriations rider should not be read to repeal the regulation by implication unless that implication is "unavoidable." *Harford* v. *United States*, 12 U.S. (8 Cranch) 109, 109-10 (1814) (Story, J.).

Here, that is plainly not the case. Consultation and consent can comfortably co-exist. See also *Me. Cmty. Health*, 140 S. Ct. at 1323.

In the alternative, the Government argues that this Court's presumption against implied repeal via appropriations law applies only to statutes, and not to regulations, Gov. Opp. 21-22. The cases the Government cites involve implied repeal of one statute by the other, but certainly do not hold that the presumption is inapplicable to implied repeals of regulations. The regulation at issue was enacted long ago after notice and comment rulemaking. Regulations so enacted are denominated "legislative-type rule[s]," "issued by an agency pursuant to statutory authority," and they have the "force and effect of law." *Chrysler Corp.*, 441 U.S. at 302-03 (1979) (quotations omitted); see also *PDR Network, LLC* v. *Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019). The Government offers no reason that the presumption against implied repeal would not apply in this context.

This Court should grant the petition to consider this application of *Maine Community Health* here or GVR to allow the Tenth Circuit to address it in the first instance.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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