No. _____

In The

Supreme Court of the United States

CONFEDERATED TRIBES AND
BANDS OF THE YAKAMA NATION,

Petitioner,

v.

YAKIMA COUNTY AND CITY OF TOPPENISH,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States reassumed Pub. L. 83-280 criminal jurisdiction over crimes involving Indians within the Yakama Reservation from the State of Washington pursuant to 25 U.S.C. § 1323, on April 19, 2016. Years later, federal officials re-interpreted the scope of that federal reassumption to allow the State of Washington to once again exercise criminal jurisdiction over Indians within the Yakama Reservation any time a non-Indian is involved in the crime.

The question presented is:

Can the United States change the scope of its reassumption of Pub. L. 83-280 jurisdiction in Indian Country years after the reassumption became effective under 25 U.S.C. § 1323 without the Yakama Nation's prior consent required by 25 U.S.C. § 1326?

PARTIES TO THE PROCEEDING

Petitioner Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") was the plaintiff in the district court proceeding and appellant in the court of appeals proceeding. Respondents Yakima County and City of Toppenish were the defendants in the district court proceeding and appellees in the court of appeals proceeding.

RELATED CASES

Confederated Tribes and Bands of the Yakama Nation v. Klickitat County, et al., No. 1:17-cv-03192 (August 28, 2019), *appeal argued*, Nos. 19-35807, 19-35821 (9th Cir. November 20, 2020).

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PETITION FOR WRIT OF CERTIORARI

The Yakama Nation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at *Confederated Tribes and Bands of the Yakama Nation v. Yakima County, et al.*, 963 F.3d 982 (9th Cir. 2020) and reproduced at App. 1-22. The District Court for the Eastern District of Washington's order is reproduced at App. 23-46.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit entered judgment on June 29, 2020. App. 1-22. This Court extended the time for filing this petition to November 25, 2020. Sup. Ct. Misc. Order (March 19, 2020).

STATUTES INVOLVED

25 U.S.C. § 1323(a) provides:

The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of title 18, section 1360 of title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

25 U.S.C. § 1326 provides:

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

INTRODUCTION AND STATEMENT OF THE CASE

A. The Treaty Of 1855 And Public Law 83-280

The Yakama Nation is a sovereign, federally recognized Native Nation pursuant to its inherent sovereign rights and the rights reserved in the Treaty with the Yakamas, U.S.-Yakama Nation, June 9, 1855, 12 Stat. 951. The United States and the Yakama "head men" negotiated this treaty at the Walla Walla Treaty Council. There, Territorial Governor Isaac Stevens pushed the Yakamas to cede certain rights to more than ten million acres of land the Yakamas had occupied since time immemorial. In return, Stevens promised that "[t]he Great Father . . . desires to make arrangements so [the Yakama Nation] can be protected from these bad white men, and so they can be punished for their misdeeds. . . . " App. 47. In reference to the lands reserved by the Yakama Nation following this cession, he stated "we want an agent to live" on the reserved lands "who shall be your brother, and who shall protect you from bad white men." App. 49.

Articles II and VIII of the Treaty capture the United States' promises concerning criminal jurisdiction. Article II details the Yakama Nation's right to the "exclusive use and benefit" of their Reservation, and that outsiders would not "be permitted to reside upon the said Reservation" without the permission of the tribe and its trustee. 12 Stat. 952. Article VIII states that the Yakama Nation "agree not to shelter or conceal offenders against the laws of the United States,

but to deliver them up to the authorities for trial." 12 Stat. 954. The United States subsequently assumed criminal jurisdiction concurrent with the Yakama Nation within the Yakama Reservation. 18 U.S.C. §§ 1152, 1153; 25 U.S.C. § 1301(2).

Despite these Treaty promises, in 1953 Congress passed Public Law 280. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588. Public Law 280 authorized the states to assume limited criminal and civil jurisdiction over Indians in Indian Country without an impacted Native Nation's free, prior, and informed consent. *Id.* The United States then abandoned this federal termination-era policy in favor of supporting self-determination for Native Nations. Specifically, Congress amended Public Law 280 to allow states to retrocede jurisdiction back to the United States. 25 U.S.C. § 1323. Congress reasoned in its 1968 amendments that such retrocessions would be a solution to the "unilateral application of State law to . . . tribes without their consent." S. REP. NO. 90-841 at 11-12 (1967).

B. Public Law 83-280 Across Indian Country

Public Law 280 has been criticized as an affront to Native sovereignty across Indian Country since its inception, and rightfully so. The law has been disastrous. Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997) ("This is a story of law gone awry."). Public Law 280 created jurisdictional

vacuums where no government possesses jurisdiction, or where jurisdiction exists but no government has the means or the will to exercise their jurisdiction. *Id.* at 1418. But where state law enforcement does intervene, "gross abuses of authority are not uncommon." *Id.* These impacts are not theoretical and are part of the story of this case. The epidemic of missing and murdered indigenous women across Indian Country is a direct result of laws like Public Law 280 and the policies that support it. Sarah Deer & Elizabeth Ann Kronk Warner, *Raping Indian Country*, 38 COLUM. J. GENDER & L. 31, 50-52 (2019).

C. Public Law 83-280 In Yakama Indian Country

The State of Washington assumed limited civil and criminal jurisdiction within Yakama Indian Country without the Yakama Nation's consent. WASH. REV. CODE § 37.12.010. On fee lands within the Yakama Reservation, the State assumed the full measure of Public Law 280 jurisdiction. *Id.* On trust land within Yakama Indian Country, the State only assumed jurisdiction over Indians for compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and the operation of motor vehicles on public streets, alleys, roads, and highways. *Id.* The Yakama Nation unsuccessfully challenged the State's unilateral assumption of jurisdiction before this Court in *Wash. v. Conf. Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979).

For over four decades, Washington had the ability to create a process to retrocede Public Law 280 jurisdiction back to the United States, but it did not authorize tribal retrocession requests until 2012. WASH. REV. CODE § 37.12.160. Once enacted, the Yakama Nation immediately requested the State's full retrocession of Public Law 280 jurisdiction within Yakama Indian Country, except for mental illness jurisdiction. Two years later, Washington Governor Jay Inslee approved the Yakama Nation's request in part, issuing Proclamation By The Governor 14-01 ("Proclamation 14-01"). App. 50-54. Proclamation 14-01 retrocedes criminal jurisdiction within the Yakama Reservation while retaining "jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims." App. 53.

Shortly thereafter, Governor Inslee wrote a letter asking the United States to amend the language of Proclamation 14-01. App. 55-58. Instead of retaining jurisdiction over criminal offenses involving "non-Indian defendants *and* non-Indian victims," Governor Inslee asked the United States to effectively revise Proclamation 14-01 to allow Washington to maintain jurisdiction over "non-Indian defendants *and/or* non-Indian victims." App. 56-57.

D. Facts And Proceedings In This Case

1. Acceptance Of Partial Public Law 83-280 Jurisdiction

The United States accepted Proclamation 14-01 as written, reassuming Public Law 280 jurisdiction on

October 20, 2015. 80 Fed. Reg. 63583 (Oct. 20, 2015). The day before the Department of the Interior ("DOI") published the relevant federal register notice, United States Assistant Secretary of Indian Affairs, Mr. Kevin Washburn, sent the Yakama Nation a letter detailing his decision to accept the state's retrocession. App. 61-72. Assistant Secretary Washburn denied Governor Inslee's request to revise Proclamation 14-01, stating "it is the content of the Proclamation that we hereby accept in approving retrocession." App. 71. He also provided for a six-month implementation period before federal reassumption of jurisdiction took effect. App. 70.

At no point during this implementation period was Governor Inslee's re-envisioned "and/or" acknowledged or recognized by anyone in the federal family, and even state officials appeared to understand there would be no re-writing of Proclamation 14-01. In fact, the opposite occurred. The United States Attorney for the Eastern District of Washington sent correspondence that explained the state would no longer have criminal jurisdiction over offenses between non-Indians and Indians within the Yakama Reservation. App. 90-92. The Yakima County Sheriff developed presentation materials for his deputies with the same message. App. 78-89. DOI then implemented retrocession on April 19, 2016. On the day of implementation, Governor Inslee pleaded with the United States by letter asking, once again, that Proclamation 14-01 be read according to his cover letter, rather than by its plain language. App. 95-98. The United States refused, noting Governor

Inslee's "subsequent description of the State's intended jurisdictional scheme on the Yakama Reservation is one of concurrent Federal jurisdiction, which conflicts with the legal effects of retrocession." App. 100.

In a memo, reviewed and approved by the United States Department of Justice ("DOJ") before it was issued, DOI Principal Deputy Assistant Secretary of Indian Affairs, Mr. Lawrence Roberts, sent law enforcement guidance on retrocession's effect. App. 73-77. Mr. Roberts confirmed DOI's position that following retrocession the state held no jurisdiction over crimes involving Indians within the Yakama Reservation, which he confirmed by including the following chart, App. 77:

Criminal Jurisdiction On The Yakama Reservation Post-Retrocession		
Victim	Defendant	
	Indian	**Non-Indian**
Indian	Tribe: Yes Federal: Yes State: No	Tribe: No* Federal: Yes State: No
Non-Indian	Tribe: Yes Federal: Yes State: No	Tribe: No Federal: No State: Yes
Victimless**	Tribe: Yes Federal: Yes State: No	Tribe: No Federal: No State: Yes

The Yakama Nation worked closely alongside DOI, DOJ, the state, and local law enforcement to successfully implement retrocession in accordance with the United States' understanding of its scope. Two years later, everything changed after a state court re-interpreted a federal statutory process in an opinion bereft of federal legal analysis. *See State v. Zack*, 2 Wn. App. 2d 667 (2018), *review denied*, 191 Wn.2d 1011 (2018).

2. Re-Interpretation Of Washburn Decision

Nearly two years after retrocession, a state court of appeals disregarded the procedural history above and determined that Washington retained jurisdiction over crimes between non-Indians and Indians within the Yakama Reservation. *Id*. Within months, the new federal administration's DOJ Office of Legal Counsel issued a memorandum ("OLC Memo") adopting the state court's reasoning in direct conflict with DOI's position in accepting and implementing retrocession over the preceding two years. *See* The Scope of State Criminal Jurisdiction over Offenses Occurring on the Yakama Indian Reservation, Slip Op. O.L.C. (July 27, 2018).[1] The United States did not consult with or notify the Yakama Nation before issuing its new position, nor

[1] The United States issued this memorandum during active federal litigation between the Yakama Nation and Klickitat County concerning the scope of retrocession, undermining the Yakama Nation's arguments in that case. *Confederated Tribes and Bands of the Yakama Nation v. Klickitat County, et al.*, No. 1:17-cv-03192 (August 28, 2019), *appeal argued*, Nos. 19-35807, 19-35821 (9th Cir. November 20, 2020).

did it provide any explanation for its legal authority to change the scope of a retrocession years after it was accepted and codified in the federal register.

The United States further repudiated its prior position and guidance on retrocession in the course of this case. Three days before the hearing on the Yakama Nation's motion for preliminary injunction in this case, DOI Assistant Secretary of Indian Affairs, Ms. Tara Sweeney, issued a four-sentence letter purporting to withdraw DOI's prior guidance on retrocession's scope. App. 102-03. Ms. Sweeney identifies the DOJ Office of Legal Counsel's memorandum—issued years after retrocession went into effect and seven months before Assistant Secretary Sweeney's letter—as the catalyst for her decision. App. 102. Again, the Yakama Nation was not consulted or notified before Ms. Sweeney's action.

3. Facts Underlying This Dispute

On September 26, 2018, City of Toppenish Police Officers responded to the theft of a government-owned "bait car" within the exterior boundaries of the Yakama Reservation. App. 24-25. The vehicle was tracked to a Yakama Member-owned fee parcel where Toppenish Police apprehended a vehicle passenger whom they knew to be an enrolled Yakama Member, and arrested this enrolled Member despite the objections of Yakama Nation Police that the City of Toppenish lacked jurisdiction. *Id.*

Toppenish Police asked Yakama Nation Police to obtain a search warrant through the Yakama Nation Tribal Court to search the Yakama Member-owned fee parcel. App. 25-26. Yakama Nation Police declined, citing insufficient evidence to establish probable cause of a crime. *Id.* Over the protests of Yakama Nation Police, Toppenish Police sought and obtained a search warrant to search the Yakama Member's property. *Id.* Toppenish Police did not disclose to the Yakima County Superior Court Judge that the property owner was an enrolled Yakama Member. The Toppenish Police Department's arrest of an enrolled Yakama Member within the Yakama Reservation, and Yakima County's issuance of a search warrant for a Yakama Member-owned fee parcel within the Yakama Reservation, gave rise to this dispute.

4. District Court Decision

The Yakama Nation sued Respondents in the United States District Court for the Eastern District of Washington seeking declaratory and injunctive relief to stop Respondents' exercise of jurisdiction over crimes involving Indians within the Yakama Reservation. The Yakama Nation filed a motion for preliminary injunction, arguing that the United States reassumed Public Law 280 criminal jurisdiction over all Indians within the Yakama Reservation from the State under 25 U.S.C. § 1323. Respondents argued that the State only intended a partial retrocession of criminal jurisdiction, and that the United States had recently changed its position on the scope of retrocession

consistent with Respondents' position. In the absence of any dispute regarding any material fact, the district court converted the motion for preliminary injunction into a dispositive motion, denied the Yakama Nation's motion, and entered judgment in favor of Respondents. App. 34-46.

The district court reasoned that the United States did not clearly delineate the scope of its reassumed Public Law 280 jurisdiction. App. 39. The district court interpreted Proclamation 14-01 and Governor Inslee's subsequent letter, reviewed the state appellate court's decision in *State v. Zack*, and found that reading Proclamation 14-01 to conclude that the state had retroceded its Public Law 280 jurisdiction over all crimes except those involving non-Indian defendants *and* non-Indian victims was inconsistent with the text of Proclamation 14-01 and the state's intent. App. 39-45.

5. Ninth Circuit Decision

On appeal, a panel of the Ninth Circuit affirmed. The Ninth Circuit applied federal rules of interpretation to Proclamation 14-01, specifically the word "and" as used by Governor Inslee in paragraphs 2 and 3 of the proclamation. App. 15-21. Finding that the word "and" must be read in the disjunctive form, rather than conjunctive form, the Ninth Circuit explained that the word "and" can only be read as meaning "or" given the context of the paragraph within which the phrase is located. App. 20. The Ninth Circuit also determined that it did not need to apply Indian law canons of

interpretation that ambiguities be resolved for the benefit of the Yakama Nation because its interpretation was the only plausible interpretation of Proclamation 14-01. *Id.* The Yakama Nation now seeks review from this Court.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Decision Misinterprets A Vital Element Of Federal Indian Law.

The Ninth Circuit erred when it failed to uphold the United States' original intent in reassuming Public Law 280 jurisdiction in the Yakama Reservation. Pursuant to 25 U.S.C. § 1323, a retrocession is final upon acceptance, thereby cementing the scope of such retrocession on a date certain. That scope can only be changed pursuant to the process outlined in 25 U.S.C. § 1326, which now requires tribal consent through a special election. The Ninth Circuit erred when it failed to adhere to 25 U.S.C. §§ 1323 and 1326. Instead, it accepted the United States' changed interpretation of retrocession contrived years after retrocession was accepted, which is incompatible with the statutory process for retrocession and the policy of ensuring its finality on a date certain.

The issue of finality in a retrocession's scope is a matter of first impression for the Court. This case strikes at the significant and reasonable reliance interests that tribes, the United States, states, and local jurisdictions have in the finality of Public Law 280

retrocessions. These significant interests are captured in the policy codified at 25 U.S.C. § 1326, setting forth the pathway for subsequent jurisdictional changes and requiring tribal consent. The Ninth Circuit's failure to hold the United States accountable to its original intent in accepting retrocession and the statutory requirements of 25 U.S.C. §§ 1323 and 1326 merits clarity and resolution by this Court.

1. Changes To The Scope Of An Accepted And Implemented Retrocession Years After The Retrocession Became Final Is A Matter Of First Impression.

A retrocession's finality upon federal acceptance under 25 U.S.C. § 1323 raises a matter of first impression, but the Court is not without strong and persuasive legal authority. Precedent on a retrocession's *acceptance* and *validity* provide both relevant guidance and a federal-focused framework that support the need for finality in a retrocession's *scope*.

"The word 'retrocession' refers to a complete act." *Omaha Tribe of Neb. v. Walthill*, 334 F. Supp. 823, 833 (D. Neb. 1971). Congress recognized that the acceptance of retrocession demonstrates an event grounded in "the importance of certainty in the allocation of jurisdiction," that occurs through proper implementation of the federal procedure. *Latender v. Israel*, 584 F.2d 817, 823 (7th Cir. 1978) (discussing importance of an orderly transfer of governmental functions after an acceptance of retrocession); *see also*

United States v. Strong, 778 F.2d 1393, 1395-96 (9th Cir. 1985) (determining jurisdiction of crimes up to date of retrocession's acceptance). With multiple parties invested in the transfer of jurisdiction, a retrocession's acceptance date provides the firm pillar that local governments rely on when making jurisdictional determinations after a retrocession. To allow local governments and federal policymakers to topple this pillar two years after a retrocession's acceptance imposes unwanted uncertainty and provides the "breakdown in the administration of justice" that Congress sought to remedy when it amended Public Law 280 and codified the retrocession process. S. REP. NO. 90-841 at 11-12 (1967).

Courts have determined that federal actions, determinations, interpretations, and federal intent at the time of acceptance control the resolution of questions in regard to the *validity* of a retrocession. *See United States v. Lawrence*, 595 F.2d 1149, 1151-52 (9th Cir. 1979) ("The acceptance of the retrocession by the Secretary, pursuant to the authorization of the President, ma[k]e the retrocession effective, whether or not the Governor's proclamation was valid.") (citing *Oliphant v. Schlie*, 544 F.2d 1007, 1012 (9th Cir. 1976), rev'd. on other grounds sub nom.); *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Walthill*, 334 F. Supp. at 832 (if a state official acts "beyond their power" when offering a retrocession, the Secretary is "entitled to rely thereon for purposes of the acceptance" the parameters of that facially valid offer, and if invalid, it is the state official that "must answer to the

people of the state for their negligence."). These cases show that even where states violate their own constitutions in requesting a retrocession, and where the federal government does not accept a retrocession in the manner and scope that the state intended or requested, it is the federal action and intent at the time of acceptance that is dispositive.

This principle must apply to a retrocession's *scope*. The successful implementation of retrocession naturally requires a collective and firm understanding of the scope of that acceptance. Here, DOI accepted retrocession and issued a jurisdictional matrix so all impacted parties understood the scope of the federal government's acceptance. Comparable to the cases cited above, the Secretary here relied on the plain terms of Proclamation 14-01 and "[t]he acceptance of retrocession by the Secretary, pursuant to the authorization of the President, made the retrocession effective." *Lawrence*, 595 F.2d at 1151 (citations omitted). The jurisdictional matrix issued pursuant to that acceptance must therefore firmly set the scope of that acceptance. If, in fact, the Governor acted "beyond [his] power," that is not the Yakama Nation's burden to bear. *Walthill*, 334 F. Supp. at 832. "[I]t is the state official that must answer to the people of the state for [his] negligence." *Id*.

The Yakama Nation waited decades for the State to pass the laws necessary to correct the State's unilateral and non-consensual assumption of Public Law 280 jurisdiction in Yakama Indian Country. It properly followed federal and state procedures, and after finalizing

retrocession, the Yakama Nation worked tirelessly with federal, state, and local jurisdictions to successfully implement retrocession according to the United States' expressed original intent. To allow the unilateral and non-consensual reinterpretation of an accepted and implemented retrocession, and to allow the federal courts to affirm that reinterpretation, contradicts Congressional intent by undermining the finality of retrocession required by 25 U.S.C. § 1323.

2. Finality And Reliance Interests For Indian Country Should Prevail.

Tribes and their citizens should not endure unsolicited federal re-interpretations that reverse significant and hard-fought jurisdictional changes within their reserved lands. Retrocession is a one-time event between a state and the United States under 25 U.S.C. § 1323. "The federal government, having plenary power over the Indians, had the power to prescribe any method or event it desired to trigger its own reassumption of control over Indian affairs within a state. In fact, the triggering event could have been devoid of any mention of state action at all." *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1296 (N.M. 1996) (citing *United States v. Brown*, 334 F. Supp. 536, 540 (D. Neb. 1971)). "Further, the policy and intent of this statute strongly favors federal jurisdiction." *Id.*, citing *Walthill*, 334 F. Supp. at 834. "Construing the statute to permit the United States to accept an invalid state retrocession for purposes of finality [therefore] does not compromise the intent of the statute which is to

permit the United States to regain jurisdiction over civil and criminal causes of action involving Indians on their reservations." *Id.*; *cf. Langley v. Edwards*, 872 F. Supp. 1531, 1535 (W.D. La. 1995), *aff'd mem.*, 77 F.3d 479 (5th Cir. 1996).

Federal, tribal, and local officials involved in the implementation of a retrocession expend significant resources relying on the finality of retrocession. Retrocession requires "large sums of money and manpower" to reassume jurisdiction over a reservation, and each party expends these resources in reliance on DOI's acceptance of that retrocession. *See Brown*, 334 F. Supp. at 540; *Lawrence*, 595 F. Supp. at 1151; *see also Walthill*, 334 F. Supp. at 827-28.

Final agency decisions represent calculated choices that regulated parties must be able to rely on. Agencies, like DOI, specialize in the subject matter assigned thereto. Their final decisions consequently provide expectation and reliance interests to regulated parties. "Agencies (unlike courts) have 'unique expertise,' often of a . . . technical nature, relevant to applying a regulation . . . " to certain circumstances. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2413 (2019) (citations omitted). "Agencies (unlike courts) can conduct factual investigations, can consult with affected parties, [and] can consider how their experts have handled similar issues over the long course of administering a regulatory program." *Id.* The President "delegated and empowered" the Secretary to "accept a retrocession," who then delegated this authority to the Secretary of the Interior. Exec. Order No. 11435, 3 C.F.R. § 752 (1966-1970). It is DOI's

"unique expertise" that allows it to make retrocession decisions.

Here, DOI considered multiple interests and variables when accepting and implementing Washington State's retrocession. It concluded the retrocession process under the statutory framework by reassuming all jurisdiction whenever a crime involved an Indian. App. 61-77. The Yakama Nation and affected parties must be able to trust and rely on that final decision made pursuant to DOI's expertise.

The United States' reversal years later was a reinterpretation of retrocession that is impermissible under the federal statutory framework. DOJ issued its reinterpretation during the pendency of litigation. DOI subsequently chose to retract its prior interpretation days before what became a dispositive motion hearing in this case. These acts conflict with this Court's recent understanding that "a court may not defer to a new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties." *Kisor*, 139 S.Ct. at 2418 (citations omitted). A complete reversal regarding jurisdiction within Yakama Indian Country exemplifies that "unfair surprise." The lower courts should have therefore maintained DOI's original interpretation of the scope of retrocession when it was implemented.

3. The Yakama Nation's Consent Is Now Required To Obtain Retroceded Jurisdiction Within Its Indian Country.

Retrocession became final upon DOI's acceptance in 2015. Under 25 U.S.C. § 1326, the United States cannot give Public Law 280 jurisdiction back to the State at any point thereafter without the Yakama Nation's prior consent. The Yakama Nation's opposition to the unsolicited cession of federal jurisdictional authority has been clear for decades. *See Yakima Indian Nation*, 439 U.S. 463. The Yakama Nation's challenge to Public Law 280 failed in this Court, but the Yakama Nation waited patiently for the State to implement the Congressional fix that is retrocession. When the Washington Legislature codified its retrocession process, the Yakama Nation immediately petitioned for retrocession to rectify the injustice of Public Law 280. The Yakama Nation followed diligently every process, every regulation, and the decision was published as a final agency action in the federal register. 80 Fed. Reg. 63583 (Oct. 20, 2015). That retrocession cannot be changed, in scope or otherwise, unless the moving party properly follows the procedures outlined in 25 U.S.C. § 1326.

Washington State and the United States must now obtain the Yakama Nation's consent before changing jurisdiction within Yakama Indian Country under Public Law 280. The state must do as the Yakama Nation did for four decades; it must patiently wait and follow the proper procedures outlined by Congress if it seeks that jurisdiction back. The state may now

acquire jurisdiction from the Yakama Nation "only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose." 25 U.S.C. § 1326. This conclusion compliments the idea of retrocession, which is to benefit the Indian, and honors the Congressional intent that is to avoid the mistake of the "unilateral application of State law to . . . tribes without their consent." S. REP. NO. 90-841 at 11-12 (1967).

B. The Ninth Circuit's Decision Conflicts With This Court's Precedent On Deference Owed To Agency Interpretations.

The Ninth Circuit improperly deferred to agency reinterpretations of a final and implemented retrocession. This deferral directly conflicts with this Court's rule against deference to agency decisions and interpretations that are inconsistent or do "not reflect the agency's fair and considered judgment." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984); *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (agency rules and

interpretation "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"). There exists a need, however, for courts to rein in an agency's new interpretation or action that "conflicts with a prior one." *Kisor*, 139 S. Ct. at 2418 (citations omitted); *see Christopher*, 567 U.S. at 155-56.

DOI's original acceptance and guidance deserve deference. DOI accepted Washington State's retroceded jurisdiction according to the plain terms of Proclamation 14-01. App. 71. BIA memoranda and a jurisdictional matrix outlined the scope of this acceptance. App. 73-77. The Yakama Nation, DOI, BIA, and DOJ then implemented retrocession consistent with the agency's decision and understanding at that time.

This Court's position is clear that deference is unwarranted when there is reason to suspect that the agency's interpretation conflicts with a prior interpretation or when it appears that the interpretation is nothing more than a "convenient litigating position," or a "'*post hoc* rationalization' advanced by an agency to defend past agency action against attack." *Christopher*, 567 U.S. at 155 (citing *Auer*, 519 U.S. at 462; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994); *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988)).

The lower courts' use of agency deference is accordingly an error of law, as the reinterpretations do not reflect fair and considered judgment and conflict

with a prior interpretation. *See Christopher*, 567 U.S. at 155-56. Here, a new federal administration's Office of Legal Counsel issued the OLC Memo during the pendency of litigation on the scope of retrocession, and two years after the implementation of retrocession, that reversed completely the position that the United States broadcast through several officials and two agencies at the time of DOI's original acceptance of retrocession. Secretary Sweeney then adopted the OLC Memo's reinterpretation, and issued a letter that improperly withdrew previous DOI guidance days before a dispositive motion hearing in this case. App. 102-03. The District Court adopted the reasoning of the OLC Memo and Secretary Sweeny's letter, and the Ninth Circuit affirmed the District Court's mistake.

The decision to defer to either the OLC Memo or Secretary Sweeney's Letter conflicts directly with this Court's precedent. Secretary Sweeney's Letter, issued *on the eve* of the dispositive hearing in this very case, "appeared [to be] nothing more than a 'convenient litigation position,' or [an attempt to] defend past agency action against attack." *Christopher*, 567 U.S. at 155; *see also Bowen*, 488 U.S. at 213 ("Deference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate."). Both the OLC Memo and Secretary Sweeney's Letter directly contradicted DOI and DOJ's past guidance and statements, and they uprooted policies already in place. Moreover, by adopting the OLC Memo's interpretation, the Sweeney Letter effectively withdrew the former BIA guidance memorandum by imposing

legally binding requirements that shifted the jurisdictional scope within the Yakama Nation's territory and an already implemented retrocession. This act, which undoubtedly carries the force of law, cannot avoid the time-consuming process of notice and comment. *Kisor*, 139 S.Ct. at 2420-21 (explaining legislative rules that reverse policy and provide the force of law must go through notice and comment to be valid); *see also Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087-92 (9th Cir. 2003) (invalidating an agency interpretation that was issued without the requisite procedures).

The Ninth Circuit failed to follow this Court's directives of agency deference. Instead, the Ninth Circuit deferred to an unlawful agency action disguised as an interpretation. The Ninth Circuit erroneously deferred to DOI's reinterpretation of the scope of an already accepted retrocession when DOI's act clearly emulates "precisely the kind of 'unfair surprise' against which [this Court's] cases have long warned." *Christopher*, 567 U.S. at 156 (citations omitted); *see Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (deferring to an agency's interpretations of its own rule "frustrates the notice and predictability purposes of rulemaking"). The Ninth Circuit's decision therefore conflicts directly with this Court's directive on deference owed to agency interpretations.

C. This Case Is Exceptionally Important Because It Exacerbates Public Safety Challenges In Indian Country.

State assumption of criminal jurisdiction under Public Law 83-280 complicated the jurisdictional framework across Indian Country. Prior to the passage of Public Law 83-280, only tribes and the federal government possessed jurisdiction over crimes involving Indian defendants or victims in Indian Country. 25 U.S.C. § 1301(2); 18 U.S.C. §§ 1152, 1153; *United States v. Lara*, 541 U.S. 193, 210 (2004). Conversely, this Court held—in a decision that should be revisited by this Court—that tribes may not generally exercise criminal jurisdiction over non-Indians, even if a crime is committed against an Indian in Indian Country. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211-12 (1978). Until Public Law 280's enactment, the only sovereign responsible for holding non-Indian perpetrators of crime against Indians within Indian County was the federal government. *Williams v. United States*, 327 U.S. 711, 714 (1946).

The State of Washington's particularly confusing intrusion into this jurisdictional framework under Public Law 280 suddenly required law enforcement to also determine land status and type of crime before exercising jurisdiction. WASH. REV. CODE § 37.12.010. Jurisdiction shifted between the Yakama Nation, United States, and Washington State for crimes on fee lands versus trust lands, for certain types of crimes, and depending on the participation of Indians and non-Indians as defendants or victims. Jurisdictional

gaps arose as governments abdicated their responsibilities on a case-by-case basis. Entire law review articles were written regarding the need to correct the extreme complexity of jurisdiction within Washington Indian Country in a way that honors Tribal Sovereignty. *See* Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority Over Indian Country Granted By Public Law 280*, 87 WASH. L. REV. 915 (2012); M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction To Its Consent-Based Grounds*, 47 GONZ. L. REV. 663 (2011). Put bluntly, this jurisdictional framework is legally absurd and morally reprehensible, and Native people are consequently left to suffer.

These jurisdictional complications and their resulting impacts on Native sovereignty and public safety have subjected Public Law 280 to heavy criticism. Supporters of amendments to Public Law 83-280 cited the lack of state prosecution of Non-Indians for crimes they committed in Indian Country. In 1967, the United States Senate's Subcommittee on Constitutional Rights found that legislation was necessary to remedy Public Law 280 in part due to the states' failure to prosecute offenses in Indian Country. S. REP. NO. 841 at 12 (1967). The need to create a mechanism for reversing Public Law 280 and its detrimental impacts was confirmed by Congress's passage of the retrocession amendment. 25 U.S.C. § 1323. Three decades later, DOJ found that continued criticisms of Public Law 83-280 typically focus on lack of federal funding for state law enforcement in Indian Country and on the difficulties state authorities faced due to uncertainty

regarding the scope of state jurisdiction and unfamiliarity with tribal communities. U.S. Dep't of Just., *Public Law 280 and Law Enforcement in Indian Country-Research Priorities*, 7-8 (2005).

Today, Indian Country continues to battle the public safety threats that non-Indian perpetrators, and the failure to apprehend and prosecute those perpetrators, cause. When investigating this threat, DOJ found that research into the exact impact of Public Law 280 is hampered by the lack of documentation by state and local authorities as well as the lack of separation of statistics between Public Law 280 and non-Public Law 280 jurisdictions. *Public Law 280 and Law Enforcement in Indian Country-Research Priorities* at 3. Notwithstanding the difficulties of compiling a thorough statistical analysis, the damage resulting from the jurisdictional problems Public Law 280 created has been inflicted most tragically on Native women and girls. Native women are *at least* twice as likely as non-Native women to experience domestic violence, dating violence, and sexual violence. *See* Jane M. Smith & Richard M. Thompson II, Cong. Research Serv., R. 42488, Tribal Criminal Jurisdiction over Non-Indians in the Violence Against Women Act (VAWA) Reauthorization and Save Native Women Act at 1 (2012). Most Native women who report these crimes report that their attacker was non-Indian. *See id.*; Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 457 (2005). Awareness of this crisis has grown in recent years and was one reason that

Congress recognized tribal authority over non-Indian perpetrators of sexual violence in its 2013 reauthorization of the Violence Against Women Act. Pub. L. No. 113-14; S. REP. NO. 112-153 (2012). The federal government is increasing its efforts to analyze and address the continued threat of violence against Native women and girls, most recently with the passage of Savannah's Act and the Not Invisible Act. Pub. L. No. 116-165; Pub. L. No. 116-166.

The Ninth Circuit's ruling perpetuates an untenable and confusing jurisdictional framework within the Yakama Reservation, and directly conflicts with the United States' original understanding of retrocession. Far more concerning is that the Ninth Circuit's decision installs states—whose failures led Congress to understand the need for retrocessions of Public Law 280 jurisdiction—as the ultimate arbiters of Public Law 280 jurisdiction across Indian Country. This violates the principles of federalism upon which this Country is founded. Such state control within federal lands, and the devastating abuses resulting therefrom, is precisely what retrocession under 25 U.S.C. § 1323 was intended to remedy. The United States' understanding of its own reassumption of federal Public Law 280 jurisdiction within federal lands under federal law must therefore control. The Ninth Circuit's decision should be reversed.

CONCLUSION

The Ninth Circuit's decision ignores the United States' original intent in reassuming Public Law 280 jurisdiction within the Yakama Reservation, supports the United States' reinterpretation of retrocession years after acceptance, and exacerbates the public safety crisis that 25 U.S.C. §§ 1323 and 1326 were intended to address. The Court should grant certiorari.

Respectfully submitted,

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