No. _____

In The
Supreme Court of the United States

COUNTY OF AMADOR, CALIFORNIA,

Petitioner,

v.

UNITED STATES DEPARTMENT OF INTERIOR,
IONE BAND OF MIWOK INDIANS, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Reorganization Act of 1934 permits the Secretary of Interior to take land into trust for certain Indian tribes, significantly impairing the jurisdiction of State and local governments like Petitioner Amador County. The 1934 Act, construed by this Court in *Carcieri v. Salazar*, 555 U.S. 379 (2009), provides that the only Indian tribes for whom land can be taken into trust are those consisting of "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction" in 1934.

Additionally, the Indian Gaming Regulatory Act ("IGRA") prohibits tribes from conducting gaming activities on lands that are acquired in trust on their behalf after the effective date of IGRA, October 17, 1988, with certain, narrow exceptions. One such exception is for "lands taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii).

In this case, the Department of Interior proposes to take land into trust for the Ione Band of Miwok Indians for gaming purposes.

The questions presented are:

1. Whether Congress intended the phrase "under Federal jurisdiction," as used in the 1934 Act, to encompass a tribe that, as of June 18, 1934, had no land held on its behalf by the federal government, either in trust or as allotments; was not a party to any treaty with the United States; did not receive

QUESTIONS PRESENTED – Continued

services or benefits from the federal government; did not have members enrolled with the Indian Office; and which was not invited to organize under the IRA in 1934 by the Secretary like other recognized tribes in Amador County; but for whom the federal government had unsuccessfully attempted to purchase land pursuant to a generic appropriation authorizing the purchase of land for unspecified "landless Indians" in California?

2. Whether the Secretary's authority to take land into trust for "members of any recognized Indian tribe now under Federal jurisdiction" requires that the tribe have been "recognized" in 1934, in addition to being "under Federal jurisdiction" at that time, or whether such "recognition" can come decades after the statute's enactment?

3. Whether the Secretary, having explicitly concluded that in enacting the Indian Gaming Regulatory Act Congress intended that Indian tribes "restored to Federal recognition" refers only to tribes that are "restored" pursuant to (a) congressional legislation, (b) a judgment or settlement agreement in a federal court case to which the United States is a party, or (c) "through the administrative Federal Acknowledgment Process under [25 C.F.R. § 83.8]," and having embodied that conclusion in a formal regulation, 25 C.F.R. § 292.10, can then act contrary to Congress's intention by "grandfathering in" a preliminary (*i.e.*, non-final) agency action treating Indians who do not meet the regulatory definition as "restored"?

PARTIES TO THE PROCEEDINGS

Petitioner County of Amador, California, was the plaintiff and the appellant in the proceedings below.

Respondents United States Department of the Interior, Secretary of Interior Ryan K. Zinke, and Acting Assistant Secretary of Indian Affairs Kevin K. Washburn (collectively "Department" or "Interior"), were defendants and appellees in the proceedings below.

Respondent Ione Band of Miwok Indians was an intervenor-defendant and appellee in the proceedings below.

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INTRODUCTION

The Ninth Circuit's decision, challenged herein, misinterprets the Indian Reorganization Act of 1934 ("the IRA"), which grants the Secretary of Interior ("the Secretary") authority to take land into trust "for Indians." 25 U.S.C. § 5108 (formerly 25 U.S.C. § 465). As Deputy Secretary of the Interior James Cason acknowledged in congressional testimony last year, Interior's interpretation, approved by the Ninth Circuit, is written so broadly that it can be used to justify approval of nearly any land-into-trust application and has never yet resulted, to his knowledge, in rejection of a land-to-trust application.[1]

The impacts of trust acquisition on local governments are profound. Indian trust lands are removed from state and local jurisdiction; those governments lose their taxing authority; their land use restrictions and environmental regulations do not apply; and their ability to protect the public on trust land is effectively eliminated. 25 C.F.R. § 1.4(a). Additionally, depending on the use to which the trust land is put – for example, when a large-scale, Las Vegas-style casino is approved under the Indian Gaming Regulatory Act ("IGRA") – trust decisions can adversely affect State and local

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[1] *See* House Subcomm. on Indian, Insular and Alaska Native Affairs, Oversight Hearing, "Comparing 21st Century Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act" (July 13, 2017) ("Oversight Hearing"), *video online at* https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=402340 (last visited Apr. 6, 2018), at 42:00-43:20.

governments with respect to their budgets, infrastructure, environment, public safety and emergency services. In such circumstances, counties like Petitioner have minimal ability to mitigate those adverse effects because neither they nor their States have any remaining authority over the trust lands. This can be true with respect to trust acquisitions on behalf of existing tribes, too, but the Ninth Circuit's expansive misinterpretation of the IRA, if adopted nationally, would raise the prospect of many more belatedly "recognized" tribes seeking trust lands at the expense of both the counties in which they are located and neighboring citizens within those counties.

The Ninth Circuit's decision also raises significant questions of administrative law – and, by extension, the separation of powers and due process – that sweep far more broadly than Indian law alone. It is blackletter law that administrative agencies are required to follow congressional statutes, construed with reference to congressional intent. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). In this case, the Secretary of Interior concluded, explicitly, that Congress did not intend to authorize tribes that were administratively recognized by the Department outside of its formal acknowledgment regulations, like the Ione Band, to take advantage of the "restored tribe" exception in IGRA. The Secretary expressly embodied that interpretation in a formal regulation, 25 C.F.R. § 292.10. Nevertheless, Interior disregarded Congress's intent in this case by purporting to "grandfather in" a preliminary (*i.e.*, non-final) determination that the Band was

a "restored tribe." The Ninth Circuit upheld this grandfathering on the theory that Interior reasonably *could have* concluded – even though it did not – that informally recognized tribes like the Band were "restored tribes." This essentially amounts to deference to an interpretation of the statute that Interior explicitly rejected, and it runs counter to pre-existing case law out of the D.C. Circuit and the Ninth Circuit itself, and also to this Court's holdings that an agency is bound by its regulations so long as they remain operative. *See Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U.S. 370, 389 (1932). The Ninth Circuit's conclusion effectively authorizes administrative agencies to disregard congressional intent and their own express regulations.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 872 F.3d 1012, and reprinted in the Appendix ("App.") at 1-41. The order denying Amador County's petition for rehearing en banc (App. 200-201) is unreported.

The Court of Appeals upheld a decision of the District Court for the Eastern District of California (App. 42-116), reported at 136 F. Supp. 3d 1193 (E.D. Cal. 2015). The District Court's decision in a related (but not consolidated) case, *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166 (E.D. Cal. 2015), is reprinted at App. 117-171 because that decision is

cross-referenced in the District Court decision at issue in this case.

The District Court upheld a Record of Decision issued by Interior on May 24, 2012 (*See* Pertinent Excerpts, App. 172-199).

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 2017. A timely petition for rehearing en banc was denied on January 11, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

As the basis for his authority to take land into trust for the Ione Band, the Secretary relies on Section 5 of the Indian Reorganization Act of 1934 (the "1934 Act" or the "IRA"), 25 U.S.C. § 5108, which authorizes him to accept land into trust for "Indians." Section 20 of the IRA, 25 U.S.C. § 5129, defines "Indian" in pertinent part as "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." This definition was construed by this Court in *Carcieri v. Salazar*, 555 U.S. 379 (2009) ("*Carcieri*"). Sections 5 and 19 of the 1934 Act are reprinted at App. 202-204.

Also pertinent is Section 20 of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719, reprinted at App. 205, which governs the circumstances under which tribes may conduct gaming on lands acquired after the date of IGRA's enactment, October 17, 1988. That provision contains an exception for "lands taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii).

Pertinent provisions of the Interior's "Final Rule: Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29354 (May 20, 2008)," 25 C.F.R. § 292.10 and § 292.26, are reprinted at App. 206-209. The former embodies the Secretary of Interior's interpretation of the term "Indian tribe that is restored to Federal recognition." The latter contains a "grandfathering" provision, pursuant to which Interior treated the Ione Band of Miwok Indians as a "restored tribe," notwithstanding the fact that it does not meet the regulatory definition contained in 25 C.F.R. § 292.10.

STATEMENT OF THE CASE

A. Historical Background

Amador County, California, is a small, rural county in the Sierra Nevada mountains and foothills, with a total population under 39,000 persons, and with limited road and related infrastructure and public services. There is already one large, Las Vegas-style Indian casino and hotel complex in the County at the

Jackson Rancheria; consequently, the County has faced demands on County resources, including the traffic it generates on narrow local roads, which creates serious public safety problems and traffic delays. A second, three-person tribe – the Buena Vista Rancheria – has also obtained permission from the Secretary to open another casino in Amador County. In this case, the County is challenging a 2012 decision by the Secretary to acquire trust lands for gaming purposes on behalf of a *third* tribe – the "Ione Band of Miwok Indians," a purported Indian "tribe" that Interior informally "reaffirmed" in 1994, rather than follow the federal acknowledgement regulations.[2]

The history of the Band as relevant to this Petition is a long, winding one.

In *Carcieri*, this Court held that the Secretary's authority to take land into trust on behalf of "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction" unambiguously refers to a recognized tribe "under Federal jurisdiction" on June 1, 1934, rather than a recognized tribe "under Federal jurisdiction" at the time the Secretary sought to take the land into trust. 555 U.S. at 391.

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[2] Though Interior had previously convinced a federal district court that those regulations were the exclusive means of administrative recognition, *see Ione Band of Miwok Indians v. Burris*, No. S-90-0993-LKK/EM (E.D. Cal. Apr. 23, 1992) (order granting summary judgment to federal defendants), the Department abruptly changed course in the face of political pressure from certain members of Congress.

The only interactions between the federal government and the asserted ancestors of the present-day "Ione Band's" members in 1934 were: (1) prior unsuccessful, abandoned efforts by a local BIA agent to obtain land for Ione-area Indians under a land-purchase program designed for landless California Indians "without regard to the possible tribal affiliation of the members of the group" (a fact that even Interior itself acknowledged was "not conclusive as to the Band's recognized tribal status");[3] (2) a claim that some members of the Band are descendants of Indians who negotiated a treaty with government in the mid-1800s, which was rejected by the Senate, though the treaty makes no mention of the Ione Band of Miwok Indians;[4] and (3) the inclusion of several Band-members' asserted ancestors on a list of Ione-area Indians in 1906, which did not distinguish those Indians' tribal affiliations.[5]

Crucially, the federal government has never – before 1934, after 1934, or even now – held land for the Ione Band or its members; it never provided services

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[3] *See* App. 83 (quoting 2006 Indian lands determination).

[4] *See* App. 69-70; *see also Robinson v. Jewell*, 790 F.3d 910, 917 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016) (an unratified treaty is a "legal nullity"); *Malone v. Bureau of Indian Affairs*, 38 F.3d 433, 438 (9th Cir. 1994) ("The California Indian population is unique in this country and must be understood in historical context. In the 1850s, Congress failed to ratify treaties that the Federal Government had entered into with Indian tribes in California. Thus, although they were eventually recognized in Federal law as individual 'Indians of California,' many California Indians are not members of federally recognized tribes.").

[5] *See* App. 69-70.

or benefits to Band-members before 1994; and unlike other Indians in Amador County – notably, the Jackson and Buena Vista Rancherias – the "Ione Band of Miwok Indians" was conspicuously not invited to organize as a "tribe" under the IRA upon its passage, though Section 18 of the IRA as originally enacted required the Secretary to hold a special election, within one year of the "passage and approval of the Act," for each Indian tribe then under Federal jurisdiction, to decide whether the tribe wished to be organized under the IRA and adopt a tribal constitution. Indian Reorganization Act, June 18, 1934, ch. 576, 48 Stat. 988, § 18.

Indeed, with the exception of a single inquiry in 1941 regarding the possibility of restarting the previously failed efforts to obtain land, there was no record of communication between the Ione-area Indians and the federal government from 1930-1970.

Starting in 1970, the Ione-area Indians began to organize in an attempt to become formally recognized by the federal government so that they could secure title to the land on which they had lived for decades, and to exempt themselves from property taxes.

In 1972, BIA Commissioner Louis Bruce sent a letter to Nicholas Villa, as the purported representative of the Band, in which Commissioner Bruce stated that "Federal recognition was *evidently* extended to the [Band]" at the time a purchase of 40 acres for the Band was contemplated between approximately 1915 and 1930, and stating that he intended to take the 40-acre

parcel into trust. (Emphasis added.) Various Departmental documents show that Commissioner Bruce made his determination without undertaking any effort to assess "the so-called 'Cohen criteria,' which was the Department's informal standard for recognition from 1942 to 1978." (1973 letter from Chief, Division of Tribal Gov't Servs. to Sacramento Area Director inquiring into the factual basis for recognizing Ione Band.)[6] Subsequent research, conducted in the early 1990s by the Bureau's Branch of Acknowledgment and Research (which is responsible for researching the historical bases for claims of federal tribal recognition),[7] concluded that the Bruce letter was "an administrative anomaly," because it was handled outside the normal administrative process (by Real Estate Services, rather than by Tribal Relations), and because it was based on "no evaluation of [the Band's] history and ancestry."

In light of the "anomalous" circumstances surrounding the Bruce letter, Interior did not treat it as conclusive, even at the time it issued, and no action was ever taken to formally recognize the Band or take the identified parcels into trust. In fact, extensive correspondence – both within the Bureau itself, and

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[6] "In connection with the tribal reorganization established under the IRA, the Department of Interior, under the guidance of Felix Cohen, the first solicitor of the BIA, developed five hierarchical considerations (known as the 'Cohen criteria') to determine whether a group constituted a tribe. . . ." *Allen v. United States*, 871 F. Supp. 2d 982, 990 (N.D. Cal. 2012).

[7] *See also Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 218 (D.C. Cir. 2013).

between the Bureau and the Band – reflected the Bureau's position that the Band's status remained under review and that the Band had the affirmative duty to establish that it was entitled to federal recognition.

In December 1978, Interior promulgated regulations establishing procedures whereby groups of Indians could attain federal "recognition" as "tribes." 25 C.F.R. §§ 83.1-83.13 ("the Acknowledgment Regulations" or "Part 83"). The BIA concurrently issued two lists. The first identified all federally-recognized Indian tribes (the "1978 List"). The second identified all groups whose petitions for recognition were on file at the BIA, but that were not federally-recognized tribes. The Ione Band was placed on the second list.

There is no record of communications between the Band and the Department between January 1979 and 1989, though the administrative record below indicates that members of the Band sought to collect historical information to attempt to justify their recognition under the regulations. In mid-1989, a faction of the Band's membership sought acknowledgement as a federally-recognized tribe by filing a "tribal" resolution with Interior, without proceeding through the regulatory acknowledgement process or providing the records and other materials required by those regulations. That effort was rejected.

In August 1990, the Ione Band sued Interior in the Eastern District of California, seeking to require recognition of the Band as a "tribe" and to have land taken in trust on its behalf. *Ione Band of Miwok Indians v.*

Burris, Civ. No. S-90-0993 LKK/EM (E.D. Cal.). In Paragraph 3 of the complaint, the Ione Band alleged that it "has been recognized by the United States as being under federal jurisdiction." The Band included similar allegations throughout the complaint. Among other things, the Band sought a declaration that it had been and remained a federally-recognized tribe with all the rights and sovereignty enjoyed by other Indian tribes.

In 1991, Interior moved for summary judgment on the ground that the Band failed to exhaust administrative remedies by applying for recognition through the BIA's acknowledgment regulations, and that the regulations were the sole mechanism for the Ione Band to gain federal recognition. Throughout briefing on that motion, the government expressly disputed the Band's claim to have been a federally-recognized tribe. And it disavowed the notion that the Bruce letter evidenced "recognition" of the Band, arguing that his statement that the Band had "evidently" been recognized before was merely an assumption, not a conclusion. The district court granted the United States's motion, agreeing that the Band must apply for recognition through the BIA's regulations, and holding that the acknowledgement regulations were the sole mechanism for the Ione Band to gain federal recognition.

Having lost its federal lawsuit, the Ione Band engaged in an extensive political lobbying effort. As related by Michael Lawson, Ph.D., an historian in the BIA's Branch of Acknowledgement and Research ("BAR"), in a declaration filed in the *Ione Band Lawsuit*, members of the Band told him as early as 1990

that "the group was planning to 'put the squeeze' on the Assistant Secretary (through Congressional pressure) for a decision that the group was recognized." It appears to have worked. The record between 1989 and 1994 shows extensive communications between Interior and members of Congress, and in early 1994, Assistant Secretary Ada Deer abruptly reversed the federal government's long-held position and relieved the Band of the requirement to proceed through the acknowledgement regulations.

Purporting to "clarify the United States' political relationship" with the Band, Assistant Secretary Deer wrote that she was "reaffirming the portion of Commissioner Bruce's letter which reads. . . . 'Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated.'" The Deer letter contains no mention of: (1) the contrary positions taken by the United States in the *Ione Band Lawsuit*; (2) the contrary conclusion of the BAR, which is specifically responsible for researching the historical bases for claims of federal tribal recognition; (3) a decision of the IBIA that the Band was never recognized and that proceeding through the regulations was the sole means of becoming recognized, *see* 22 IBIA 194 (Aug. 4, 1992); (4) the purposeful omission of the Band from the 1978 list of recognized tribes; or (5) the extensive correspondence both within the Department and with outside parties (including the President in a 1992 briefing paper), expressly concluding the Band had never attained

Federal tribal status. Notably, however, the Deer letter *does* mention meetings with members of Congress.

A contemporaneous file memorandum shows that Deer's action was also an administrative anomaly. The Deer letter issued without "program review and surname" (a process by which the Solicitor's office would review and endorse such communications), and that "file copies were not prepared for distribution" in advance.

In 2005, the Band applied to have a different plot of land taken into trust on its behalf, and for a determination that it could take advantage of the "restored lands of a restored tribe" exception in IGRA. In 2006, the Solicitor's office issued a preliminary decision that the Band could avail itself of the "restored tribe" exception, based on the premise that the *Ione Band Litigation* "terminated" the tribe, and the Deer letter "restored" it outside of the Part 83 regulatory process. Amador County immediately challenged that determination in federal court, but the case was dismissed on the ground that the determination would not be final agency action until the decision was made to take land into trust. *See County of Amador v. United States DOI*, 2007 U.S. Dist. LEXIS 95715 (E.D. Cal. Dec. 13, 2007).

In 2008, while the Band's trust application remained pending, the Secretary adopted regulations clarifying the scope of the "restored lands of a restored tribe" exception, which provided that a tribe was "restored to federal recognition" only if the tribe was (1) restored by congressional legislation; (2) restored

pursuant to a court judgment; or (3) formally recognized under Interior's Part 83 regulations. *See* 25 C.F.R. § 292.10. In adopting that regulation, the Secretary expressly rejected requests to include tribes administratively recognized outside the Part 83 process, like the Band, as inconsistent with Congress's intention in enacting IGRA. *See* App. 233-236.

However, the Secretary's regulations also contained a "grandfathering" provision that purported to allow Interior to ignore Congress's intention with respect to pending trust applications if Interior had previously issued a (preliminary, non-final) Indian Lands Determination. 25 C.F.R. § 292.26(b).

In 2009, Interior's Solicitor withdrew the 2006 Determination that the County had sought to challenge, but in 2012 a new Solicitor reinstated the Determination, and – relying solely on the grandfather clause – Interior issued the Record of Decision ("ROD"), agreeing to take land into trust for the Band for gaming purposes. *See* App. 172-199.

The Secretary concluded that the failed land acquisitions, an unratified treaty negotiated approximately 150 years ago, and inclusion of Ione-area Indians on a non-tribal-specific list, though each insufficient in itself to establish federal recognition and jurisdiction over the Band, reflect a "course of dealings" that demonstrate an intention by the Federal government to exercise authority over the "tribe," constituting "jurisdiction," and that post-1934 "recognition" was sufficient.

B. District Court Proceedings

Amador County filed a complaint challenging the ROD in the Eastern District of California on June 27, 2012, naming the Department, then-Secretary of Interior Ken Salazar, and then-Acting Assistant Secretary of Indian Affairs Donald Laverdure as defendants. The suit challenged the Secretary's authority to take land into trust on the Band's behalf under the IRA, and also to authorize gaming on land acquired in trust under IGRA's "restored lands" exception. A local citizens' group filed a parallel lawsuit, which was designated as "related" to the case on appeal herein. *No Casino in Plymouth v. Jewell*, No. 2:12-cv-01748-TLN-CMK (E.D. Cal.) ("*NCIP*"). The district court granted the Ione Band's unopposed motion to intervene in 2013.

The respective parties filed cross-motions for summary judgment, and in September 2015 the district court, without hearing, denied Amador County's motion and granted those of Interior and the Ione Band. (App. 42-116.) That same day, the court issued a parallel order denying summary judgment to the plaintiffs in *NCIP* and granting summary judgment to Interior and the Band in that case too. (App. 117-171.) (The two decisions cross-reference one another.)

C. Ninth Circuit Proceedings

Timely appeals were filed in both cases. On October 6, 2017, a three-judge panel of the Ninth Circuit affirmed the ruling of the district court in this case. (App. 1-41.) That same day, the Court of Appeals

reversed the judgment in the *NCIP* case and remanded it for dismissal based on the lack of standing. *See No Casino in Plymouth v. Zinke*, 698 Fed. Appx. 531 (9th Cir. 2017), *reh'g denied*, 2018 U.S. App. LEXIS 843 (9th Cir. Jan. 11, 2018).

The County timely petitioned for rehearing, but was denied on January 11, 2018. (App. 200-201.)

REASONS FOR GRANTING THE PETITION

It is no secret that ever since *Carcieri* was decided the Department of Interior (which lost that decision) has sought to undermine the limitations on the Secretary's authority articulated by this Court, and regain the authority Interior previously believed itself to have, to take land into trust on behalf of any Indian tribe without restriction.

Thus, Interior has repeatedly sought congressional alteration of the IRA – a so-called "*Carcieri* fix"[8]

[8] *See* Testimony of Kevin Washburn, Asst. Sec'y – Indian Affairs, before the Sen. Comm. On Indian Affairs, on "A Path Forward: Trust Modernization & Reform for Indian Lands," July 8, 2015, *available online at* http://www.indian.senate.gov/sites/default/files/upload/files/KWTestimonyTM%26Rindianlands-7-8-15%28Final%29.pdf (last visited Apr. 9, 2018) ("Washburn Testimony") (head of the BIA testifying in support of a "*Carcieri* fix" – legislation designed to overrule *Carcieri*); Tr. of BIA Carcieri Tribal Consultation: Arlington, Va., Wed., July 8, 2009, p. 17:6-11 (Comments of Acting Principal Assistant Secretary for Indian Affairs George Skibine), *online at* https://www.bia.gov/sites/bia.gov/files/assets/asia/pdf/idc-001871.pdf (last visited Apr. 9, 2018) (expressing goal to "acquire land into trust and to make sure that the *Carcieri*

– but having so far failed to convince Congress of the wisdom of such an alteration, the Department instead seeks to achieve the same result by means of a new, expansive statutory "interpretation" of the existing IRA. Since the decision in *Carcieri*, Interior has begun to construe the terms "under Federal jurisdiction" and "recognized" so broadly as to nullify the limits on Secretarial authority to acquire land for Indians that Congress intended to impose by defining the term "Indian" as it did.

I. Interior's Interpretation Of "Under Federal Jurisdiction," Accepted By The Ninth Circuit, Undermines The Limitation Congress Sought To Impose On The Secretary's Ability To Take Land Into Trust.

If the Ione Band could be deemed to have been "under Federal jurisdiction" in 1934 – with no federally supervised land, no treaty, no services, and no members enrolled with the Indian Office – then the term "jurisdiction" is essentially meaningless, and virtually any would-be tribe will qualify for land under the IRA. (Which appears to be the point, given Interior's well-known unhappiness with *Carcieri*.) Such open-ended authority to acquire land for nontreaty "tribes" that were not already living on federally-owned lands in 1934 is the very result Congress sought to avoid in adopting the definition of "Indian" in IRA § 19.

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decision . . . is not an impediment, cannot be – is not an impediment for such a goal").

A. The Legislative History Of IRA § 19 Indicates That In Adopting The IRA's Definition Of "Indian," Congress Intended To Limit The Secretary's Ability To Accept Land On Behalf Of Tribes Not Already Living On Federal Reservations, At Least In The Absence Of A Then-Operative Treaty.

In *Carcieri*, a majority of this Court held that "Congress left no gap in 25 U.S.C. § 479 for the agency to fill" when "it explicitly and comprehensively defined the term [Indian] by including only three discrete definitions." 555 U.S. at 391. Likewise, Justice Breyer's concurrence noted that "the provision's legislative history makes clear that Congress focused directly upon that language, believing it definitively resolved a specific underlying difficulty." *Id*. at 396 (Breyer, J., concurring).

As reflected in the legislative history of the IRA, the specific underlying difficulty Congress thought it was resolving by defining "Indian" was to prevent Indian "tribes" (other than treaty tribes) from taking advantage of the Act "unless they are enrolled [with the Indian Office] at the present time,"[9] or "[i]f they are actually residing within the present boundaries of an Indian reservation at the present time. . . ."[10] Neither was the case with respect to the Ione Band.

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[9] App. 219 (Chairman Wheeler).

[10] App. 221 (Commissioner Collier).

During consideration of the IRA, several Senators voiced concerns that (1) there were already a number of self-identified "Indians" and "tribes" on whose behalf the government owned land, but who really should not have been under federal supervision, and (2) concerns that the definitions of "Indian" and "tribe" in Section 19 were so broad that they threatened to create more such "Indians" and "tribes" who would be able to take advantage of the provisions of the Act, against the wishes of the Senators.[11]

As examples of the abuses the legislative sponsors wished to avoid, the bill's chief co-sponsor in the Senate, Senator Wheeler, noted that former Vice President Charles Curtis, whose claim to be an "Indian" was dubious, "ha[d] lands today under the supervision of the Department," which Senator Wheeler deemed "idiotic."[12] The Senator also pointed to the specific case of a so-called "tribe" in California, living on federal land, which in the Senator's estimation had no business being under federal supervision. He believed that "Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way."[13] Commissioner Collier, when asked if other such "Indians" would be able to take advantage of the Act replied, "If they are

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[11] App. 221-227.

[12] App. 220 & 222

[13] App. 226.

actually residing *within the present boundaries of an Indian reservation* at the present time."[14]

Senator Wheeler cautioned that the purpose of the IRA was not to deal with the problem of those "tribes" already (but improperly) under federal supervision.[15] Nevertheless, he and other Senators were anxious that the IRA not intensify the problem.[16] Thus, the legislative record contains a detailed discussion of the Catawba Indians in South Carolina, who did not then have a reservation. The question arose whether the Catawbas would be "Indians" within the meaning of the IRA. Senator Mahoney believed that they should be, because "the Catawbas certainly are an Indian tribe[,]" and he saw no reason "Why, if they are living as Catawba Indians, why should they limit them any more than we limit those who are on the reservation[.]"[17] Chairman Wheeler, however, disagreed, and Senator Mahoney suggested that the definitions of "Indian" and "tribe" would then need to be modified to avoid that result. It was in response to this suggestion that Commissioner Collier proposed the addition of the phrase "now under Federal jurisdiction," to modify the term "recognized Indian tribe."[18] In sum, the whole purpose of that phrase was to leave existing reservation Indians unaffected, but limit the ability of

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[14] App. 221 (emphasis added).

[15] App. 219-220.

[16] App. 221-227.

[17] App. 226.

[18] App. 226.

non-reservation Indians to bring themselves within the Act.

As "Representative Edgar Howard, who co-sponsored the IRA with Senator Burton Wheeler" observed, "For purposes of this act, [Section 19] defines the persons who shall be classed as Indian. *In essence, it recognizes the status quo of the present reservation Indians* and further includes all other persons of one-fourth Indian blood. . . ."[19,20]

B. Absent A Treaty, "Federal Jurisdiction" Over An Indian Tribe Unambiguously Meant Indians Living On Federally-Held Land In 1934.

The understanding of what it meant for a tribe to be "under Federal jurisdiction" in 1934 was far more limited than Interior's recent, more-expansive interpretation: in 1934, a tribe that did not live on Federally-reserved land and did not have a ratified treaty, executive order, or tribe-specific legislation, was not "under Federal jurisdiction."

Ample case law holds that the basis of federal jurisdiction over an Indian tribe is Congress's relationship

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[19] *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1220 n.10 (D. Haw. 2002), *aff'd*, 386 F.3d 1271 (9th Cir. 2004) (quoting Congressional Debate on Wheeler-Howard Bill (1934) in THE AM. INDIAN AND THE UNITED STATES, Vol. III (Random House 1973)) (emphasis in original).

[20] This separate "Indian blood" test is not at issue in this case. Interior proposes to take land into trust for the Ione Band and not individual Indians.

to the tribes as a guardian to a ward. *See, e.g.*, *United States v. Kagama*, 118 U.S. 375, 383-84 (1886) (Congress's ability to invest the federal courts with jurisdiction over a crime committed by one Indian against another on reservation lands was based on the fact that "These Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."); *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *In re Blackbird*, 109 F. 139, 143 (W.D. Wis. 1901) ("The true and unimpeachable ground of federal jurisdiction in such a case as this is that the Indians placed upon these reservations in the states are the wards of the government, and under its tutelage and superintendence, and that, congress having assumed jurisdiction to punish for criminal offenses, that jurisdiction is exclusive.").

Thus, it is significant that in 1925, the Comptroller General of the United States opined that:

> There exists no relation of guardian and ward between the Federal Government and Indians who have no property held in trust by the United States, have never lived on an Indian reservation, belong to no tribe with which there is an existing treaty, and have adopted the habits of civilized life and become citizens of the United States by virtue of an act of Congress. The duty of relieving the indigency of such Indians devolves upon the local authorities

> the same as in the case of any other indigent citizens of the State and county in which they reside.

See App. 210. Department officials were still relying on that opinion a decade later, when the IRA was adopted. *See* App. 213-215 (August 15, 1933 letter from then-Superintendent of Indian Affairs, Sacramento, O.H. Lipps, to then-Commissioner of Indian Affairs Collier, noting that Ione-area Indians "are classified as non-wards under the rulings of the Comptroller General because they are not members of any tribe having treaty relations with the Government, they do not live on an Indian reservation or rancheria, and none of them have allotments in their own right held in trust by the Government. They are living on a tract of land located on the outskirts of the town of Ione.").

In other words, it was well-understood at the time the IRA was adopted and first implemented that for a tribe to be "under Federal jurisdiction" (in the absence of a treaty or tribe-specific legislation) it was necessary for the tribe to have land held in trust on its behalf; otherwise, that tribe was subject to state and local jurisdiction like anyone else. And crucially, the legislative history of the IRA itself specifically noted, "Indians under Federal jurisdiction are not subject to State laws"[21] – an understanding consistent with the

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[21] *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings Before the Comm. on Indian Affairs on S. 2755 and 3645*, 73d Cong. 213 (1934) (testimony of Richard L. Kennedy, representing the Indian Rights Association).

long-standing case law of this Court. *See Ward v. Race Horse*, 163 U.S. 504, 507-08 (1896) (Indian who killed game outside the boundaries of a reservation in violation of Wyoming state laws could be prosecuted by the State); *Kennedy v. Becker*, 241 U.S. 556 (1916) (state could prosecute Indian for illegal spear-fishing off the reservation); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (citing congressional action dating back to 1834 – including the passage of the IRA – for the proposition that "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.").

C. Interior's Interpretation Of "Under Federal Jurisdiction" Is So Broad As To Cover Circumstances That Are Not "Jurisdictional" In Any Normal Sense Of The Word.

Interior's post-*Carcieri* interpretations of "under Federal jurisdiction" would create the very problem the drafters of the IRA sought to avoid. The Department has interpreted that phrase as broadly as possible, to mean that prior to 1934 the government had "taken an action or series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members – that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." (App. 25.) This expansive concept of "jurisdiction" has been broadly applied to mean virtually any contact with a tribe before

1934 – even in circumstances that are not "jurisdictional" in any normal sense of the word.

Indeed, just last year, Interior Deputy Secretary James Cason, in congressional testimony, acknowledged that this interpretation incorporates criteria that were "pretty loose."[22] He conceded that it was written so broadly that it could be used to justify approval of nearly any land-into-trust application. He told the House Subcommittee on Indian, Insular and Alaska Native Affairs that "[m]y concern about the Solicitor's opinion[23] is that the criteria are very wide and that it doesn't respond very particularly to the Supreme Court decision" in *Carcieri*, and that he was unaware of any tribe that had been found not to qualify. "So we have concerns about the current advice in the Solicitor's opinion, about being specific enough to actually distinguish between applications."[24] Yet those "pretty loose" criteria are exactly the ones used to justify taking land into trust for the Ione Band under the IRA.

Throughout the proceedings below, the government and the Band relied on the discussion of "under

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[22] *See* Oversight Hearing, note 1, *supra*, at 42:00-43:20.

[23] In 2014, the Solicitor incorporated the analysis of "under Federal jurisdiction" from the Ione ROD into an opinion, known as the M-37029 opinion, which was the subject of Mr. Cason's testimony. *See* Office of the Solicitor, "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act," Mar. 12, 2014, *available online at* https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf (last visited Apr. 6, 2018). Under this Court's ruling in *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000), such opinions are not entitled to *Chevron* deference.

[24] *Id*. at 54:00-55:00.

Federal jurisdiction" in Justice Breyer's *Carcieri* concurrence, which listed examples of "a 1934 relationship between the Tribe and Federal Government that could be described as jurisdictional, for example, a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office." 555 U.S. at 399 (Breyer, J., concurring). This list merely highlights the sweeping breadth of Interior's position. A treaty, tribe-specific appropriation, or enrollment reflects a formal "ward/trustee" relationship with the government that is a far cry from unsuccessful, abandoned attempts to try to purchase land for "landless Indians."

II. The Ninth Circuit's Holding That A Tribe Need Not Have Been "Recognized" Until After 1934 Conflicts With This Court's Precedents And Deepens A Circuit Split.

The IRA's definition of "tribe" encompasses "any recognized Indian tribe now under Federal jurisdiction." After *Carcieri* it is beyond dispute that the tribe must have been "under Federal jurisdiction" in 1934, but the Ninth Circuit acceded to Interior's assertion that "recognition" is a requirement that "can occur at any time." App. 22.

In reaching this conclusion, the Ninth Circuit joined the D.C. Circuit, *see Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 561-63 (D.C. Cir. 2016), *cert. denied sub nom. Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433

(2017), but that holding conflicts with precedents of this Court, the Fifth Circuit, and (ironically) the Ninth Circuit itself, in *United States v. John*, 437 U.S. 634 (1978); *United States v. Tax Comm'n*, 505 F.2d 633 (5th Cir. 1974); and *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005). Each of these latter cases – which predated *Carcieri* and the consequent pressure on Interior to evade that decision – held that the IRA, on its face, does not apply to Indians or tribes who were not both federally recognized and under federal jurisdiction as of 1934.

In *United States v. John*, this Court held that "[t]he 1934 Act defined 'Indians' not only as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction,' and their descendants who then were residing on any Indian reservation, but also as 'all other persons of one-half or more Indian blood.'" 437 U.S. at 650 (brackets added by the Court). The Court continued, "There is no doubt that persons of this description lived in Mississippi, and were *recognized* as such by Congress and by the Department of the Interior, *at the time the Act was passed*." *Id*. (emphasis added).[25]

John was decided four years after the Fifth Circuit's own analysis of whether recognition was temporally limited. In *United States v. Tax Comm'n*, the Fifth Circuit squarely held that: "The language of [25 U.S.C. § 479] positively dictates that tribal status is to be

[25] Again, this "blood" test is not at issue here. *See* note 20, *supra*.

determined as of June, 1934, as indicated by the words '*any recognized Indian tribe now under Federal jurisdiction*' and the additional language to like effect." 505 F.2d at 642.

The panel's holding in this case even conflicts with the Ninth Circuit's own precedents. After a detailed discussion of the text and history of Section 479, the District Court in *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213 (D. Haw. 2002), interpreted the "recognized tribe" test as a clear temporal limitation. *Id.* at 1221 & n.10. On appeal, the Ninth Circuit affirmed, holding that "by its terms, the Indian Reorganization Act did not include any Native Hawaiian group. There were no *recognized* Hawaiian Indian tribes *under federal jurisdiction in 1934*, nor were there any reservations in Hawaii." *Kahawaiolaa*, 386 F.3d at 1281 (emphasis added). This Court denied certiorari. 545 U.S. 1114 (2005).

The D.C. Circuit reached its decision in *Grand Ronde* by giving *Chevron* deference to Interior's interpretation of the IRA. 830 F.3d at 559-60. That was error, because it was inconsistent with this Court's ruling in *Christensen v. Harris County* that "[i]nterpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." 529 U.S. at 587.

In this case, the Ninth Circuit purported to apply *Skidmore* deference instead, but its conclusion was no

less erroneous. The panel's interpretation makes the term "recognized" meaningless, violating the rule that courts "are obliged to give effect, if possible, to every word Congress used." *Carcieri*, 555 U.S. at 391. If the language of Section 19 were understood to permit "recognition" at any subsequent time, the word "recognized" would not, in any way, qualify the word "tribe," because the mere decision by the government to accept land into trust would effectively recognize that tribe. Thus, Section 19 would be no different if it simply read, "The term 'Indian' . . . shall include all persons of Indian descent who are members of any ~~recognized~~ Indian tribe now under Federal jurisdiction."

The IRA's first definition of Indian originally included only the "recognized Indian tribe" requirement, and not the phrase "now under Federal jurisdiction." Yet addressing that original version, Chairman Wheeler – the IRA's Senate sponsor – stated that the IRA was being enacted "to take care of the Indians *that are taken care of at the present time*," App. 218; he again stated that Indians of "less than half blood" would not qualify as "Indian" "unless they are enrolled [with the Indian Office] *at the present time*," App. 219; Commissioner Collier stated that Indians would not qualify unless they "are actually residing within the present boundaries of an Indian reservation *at the present time*," App. 221; and the IRA's House sponsor explained that the IRA's "definition of 'Indian'" "recognizes the status quo of the present reservation Indians"[26] (emphases

[26] *See* note 19, *supra*, and related text (emphasis in original).

added). All this discussion preceded Commissioner Collier's proposal to add the language "now under Federal jurisdiction," App. 226, meaning the temporal limitation was understood to be implicit in the notion of a "recognized tribe" even before "now" was added to the statute.

III. This Court Should Grant The Petition To Resolve The Fundamental Question Of When, If Ever, An Administrative Agency May "Grandfather In" In Non-Final Agency Actions That Are Contrary To Congress's Statutory Intent As Embodied In The Agency's Own Interpretive Regulations.

It is undisputed that if the Ione Band were to initiate a land-to-trust application today, it would be unable to take advantage of the "restored lands" exception under IGRA because in 2008 the Secretary of Interior adopted regulations (25 C.F.R., Part 292, the "Part 292 Regulations") that foreclose a "tribe" that was administratively recognized outside the formal Part 83 Acknowledgment Process (as the Ione Band indisputably was) from availing itself of that exception. Specifically, 25 C.F.R. § 292.10 (App. 206-207), provides that to qualify as a "restored tribe" the tribe must have been restored by (1) congressional legislation, (2) a judgment or settlement agreement in a federal court case, to which the United States is a party, or (3) recognized "*through the administrative Federal Acknowledgment Process under § 83.8 of this chapter* [*Part 83.*]" (Emphasis added.)

The exclusion of informally-recognized tribes from Section 292.10's definition of "restored tribe" was no oversight; it was a conscious choice, designed to implement Congress's acknowledged intention in adopting IGRA. Following publication of the draft Part 292 regulations, the Secretary received comments suggesting that the regulations be amended to include tribes (like the Ione Band) that were purportedly "restored" pursuant to agency action outside the Part 83 regulations. The Secretary rejected those suggestions, stating: "We believe Congress intended restored tribes to be those tribes restored to Federal recognition by Congress or through the part 83 regulations. *We do not believe that Congress intended restored tribes to include tribes that arguably may have been administratively restored prior to the part 83 regulations.*" *See* App. 235 (emphasis added). The Secretary further elaborated:

> In 1988, Congress clearly understood the part 83 process because it created an exception for tribes acknowledged through the part 83 process. The part 83 regulations were adopted in 1978. These regulations govern the determination of which groups of Indian descendants were entitled to be acknowledged as continuing to exist as Indian tribes. *The regulations were adopted because prior to their adoption the Department had made ad hoc determinations of tribal status and it needed to have a uniform process for making such determinations in the future. We believe that in 1988 Congress did not intend to include within the*

> *restored tribe exception these pre-1979*[27] *ad hoc determination.* [sic] *Moreover, Congress in enacting the Federally Recognized Indian Tribe List Act of 1994 identified only the part 83 procedures as the process for administrative recognition.*

Id. (emphasis added).

The ROD in this case was issued after the regulations were adopted, and the Ione Band indisputably did not fall within the regulatory definition of a restored tribe. Nevertheless, Interior purported to retain the power to disregard Congress's plain intent. Its regulations contain a provision that a tribe could qualify as a "restored" tribe if – prior to the date of the adoption of the regulations – the tribe had a preliminary, non-binding opinion from the Department that it was a restored tribe, even if the opinion squarely conflicted with the criteria of the regulation quoted above and the congressional intention that it seeks to implement. *See* 25 C.F.R. § 292.26(b).[28]

Over the years, the Courts of Appeals – particularly the D.C. Circuit – have articulated a narrow set of circumstances in which an agency may "grandfather" past administrative practices that run contrary to

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[27] The ROD states that "in 1972, Commissioner Bruce sent a letter that amounted to recognition for the Tribe in accordance with the practices of the Department at the time." (App. 175.)

[28] In this action, the County does not challenge the legality of grandfathering agency actions that were already final upon the date the regulations were adopted, *see* 25 C.F.R. § 292.26(a), because those facts are not presented here.

congressional intent for equitable reasons. In *Natural Res. Defense Council, Inc. v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988) (hereafter "*NRDC*"), and *Sierra Club v. EPA*, 719 F.2d 436, 467 (D.C. Cir. 1983), that Court articulated the following "considerations governing an agency's duty to apply a rule retroactively":

> (1) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (2) the extent to which the party against whom the new rule is applied relied on the formed [sic] rule, (3) the degree of the burden which a retroactive order imposes on a party, and (4) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

NRDC, 838 F.2d at 1244 (quoting *Retail, Wholesale & Dept. Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) ("*Retail Union*")). The Ninth Circuit has "adopted the framework set forth by the D.C. Circuit in *Retail Union*" and *NRDC*. *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 518 (9th Cir. 2013) (en banc).

Below, Amador County argued at considerable length that these criteria were not met, and Interior really made no effort to argue otherwise. Indeed, in adopting the grandfathering clause the Department failed to consider the second, third, and fourth criteria altogether,[29] and its contention that a "tribe and

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[29] Because the Secretary only considered reliance in adopting and applying the grandfather provision, that is the only basis on which the ROD can be upheld. *Securities and Exchange Comm'n*

perhaps other parties *may have* relied on the" Indian lands determination that is grandfathered (App. 240) is inconsistent with the rule that there be a showing of "actual"[30] and "justifiable"[31] reliance by the affected party.

Nevertheless, in this case the Ninth Circuit panel accepted Interior's grandfather clause, departing from its own precedents and declining to apply the *NRDC* factors that it had previously adopted. The three-judge panel instead applied a far more expansive approach to grandfathering, concluding that (1) even though Interior expressly and specifically concluded that administrative "restoration" meant restoration through the formal part 83 process, and expressly rejected suggestions that tribes restored through an informal administrative process (like the Band) should not be included in that definition, *see* 73 Fed. Reg. at 29363, (2) because Interior could have reasonably reached the opposite conclusion, then (3) grandfathering was acceptable. Essentially, the panel deferred to an interpretation of IGRA that Interior rejected, which is an unprecedented application of the concept of deference.

In fact, the Ninth Circuit's reasoning conflicts with the established rule that an administrative agency cannot maintain two inconsistent interpretations of a

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v. Chenery Corp., 318 U.S. 80, 87 (1943) ("*Chenery*") (a court may not affirm the action of an administrative agency on grounds that the agency itself did not articulate).

[30] *Sierra Club*, 719 F.2d at 467; *NRDC*, 838 F.2d at 1248.

[31] *Williams Natural Gas Co. v. FERC*, 943 F.2d 1320, 1343 (D.C. Cir. 1991).

statute simultaneously. When agencies contemporaneously "set forth two inconsistent interpretations of the very same statutory term," as Interior has done, they act arbitrarily and capriciously. *United States Dep't of the Treas. IRS Office of Chief Counsel Wash., D.C. v. Fed. Lab. Rel. Auth.*, 739 F.3d 13, 21 (D.C. Cir. 2014); *Port of Seattle v. FERC*, 499 F.3d 1016, 1034 (9th Cir. 2007), *cert. denied*, 558 U.S. 1136 (2010).

It also conflicts with the established rule that agencies must abide by their own regulations. *Arizona Grocery Co.*, 284 U.S. at 389; *United States v. Nixon*, 418 U.S. 683, 696 (1974); *Service v. Dulles*, 354 U.S. 363, 372 (1957).

These fundamental rules of administrative law are essential to both the separation of powers and due process. If "grandfathering" is permitted under the broad theory adopted by the Ninth Circuit in this case, agencies are effectively authorized to ignore congressional intent, and to ignore their own rules. They are, effectively, authorized to "make it up as they go along." This Court should grant the petition for certiorari to clarify when, if ever, administrative agencies may "grandfather" pending agency actions that are contrary to congressional intent as recognized by the agency itself, in formal regulations.

IV. The Ninth Circuit's Erroneous Decision Threatens To Have Substantial Negative Impacts On State And Local Governments Nationwide.

The importance of the issues presented by this petition, and the importance of their prompt resolution by this Court, cannot be overstated from the perspective of State and local governments.

A decision by the Secretary of Interior to take land into trust can be highly disruptive to local governments, ejecting those governments from their long-standing taxing, regulatory and environmental authority over territory that they previously regulated. States and counties must make long-term strategic plans for developing and funding infrastructure, including identifying areas for development and areas for preservation and providing for the annexation of newly developing urban areas. And counties must decide how to allocate their limited resources for essential governmental services, such as police, fire, road maintenance, and social services. The ability to remove land from state and local jurisdiction can undermine those long-term planning efforts by introducing development on a scale never anticipated, thereby dramatically increasing the public services for which the County must pay, and concurrently reducing potential tax revenues.

It is even more disruptive when new tribes can suddenly be recognized and then land can be taken into trust on their behalf. It is one thing to deal with trust applications from tribes that were recognized

and genuinely "under Federal jurisdiction" in 1934; they are known quantities with whom counties often have working relationships. But as this case demonstrates, the Secretary's expansive interpretations of the IRA give him virtually unlimited authority to broaden the number of tribes who may have land taken out of local government jurisdiction and the geographic area that he could affect. The economic incentives of IGRA only encourage would-be tribes to seek that result and to reach to those areas with the greatest economic potential.

Since the *Carcieri* decision in 2009, the federal government has taken more than 300,000 acres of land into trust for tribes, and Interior has made clear that if the vitality of *Carcieri* is lessened – the inevitable effect of the D.C. Circuit's decision – the rate of land acquisition will only quicken.[32] From the county perspective, it is imperative that the Court address this issue now.

Moreover, delaying resolution of these critical issues threatens to deprive local governments of a practical remedy for erroneous trust decisions. Following the Eighth Circuit's decision in *South Dakota v. United States DOI*, 69 F.3d 878 (8th Cir. 1995), Interior adopted regulations to delay implementation of a decision to take land into trust for 30 days, to allow for judicial review, after which the Quiet Title Act (QTA) was regarded as making the trust decision conclusive. 61 Fed. Reg. 18082 (Apr. 24, 1996); *Dept. of the Interior*

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[32] *See* Washburn Testimony, *supra*, note 8, at p. 1.

v. South Dakota, 519 U.S. 919, 920 (1996) (Scalia, J., dissenting). Once this Court decided *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012), holding that the QTA does not bar a challenge to an illegal trust acquisition, the Secretary amended the regulations to delete the 30-day waiting period so Interior could begin taking lands into trust immediately upon deciding to do so. 78 Fed. Reg. 67928, 67930 (Nov. 13, 2013). And while *Patchak* creates the theoretical possibility that land could be removed from trust after its acquisition, if the government makes trust acquisitions and permits tribes to build Indian casinos or other major projects[33] on the trust parcels while litigation drags on for years, a State or local government's ability to mitigate the significant negative impacts of project construction is effectively nullified.

In sum, allowing the crucial issues presented by this petition to fester without resolution by this Court puts State and local governments in an untenable position.

[33] *See* Joe Eaton, "Outsiders Target Indian Land for Risky Business" (Center for Public Integrity), Nov. 18, 2008, *online at* https://www.publicintegrity.org/2008/11/18/3632/outsiders-target-indian-land-risky-business (last visited Apr. 9, 2018) ("The Cortina landfill is one among dozens of projects across the country for which developers and Native Americans are using Indian sovereignty to bypass state and local regulations and build projects that other communities shun – projects ranging from landfills, big box stores and a massive power plant to casinos, motorcycle tracks and billboards.").

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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