No. 08-655

In the Supreme Court of the United States

HARRAH'S OPERATING COMPANY, INC.,
a Delaware corporation,

Petitioner,

v.

NGV GAMING, LTD.,
a Florida partnership,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1 U.S.C. § 1, a portion of the "Dictionary Act", states in pertinent part:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise –
>
> * * *
>
> words used in the present tense include the future as well as the present;

In recent months, this aspect of the Dictionary Act has featured prominently in two opinions wherein the United States Ninth and Second Circuit Courts of Appeals have considered virtually identical statutory definitions of the phrase "Indian lands," yet reached opposite conclusions. Each statute defines "Indian lands" to include lands the title to which "is held by the United States in trust for an Indian tribe". *Compare* 25 U.S.C. § 81(a) *with* 25 U.S.C. § 2703(4). Each statute serves the important purpose of providing federal agency review of contracts with Indian tribes so as to ensure that Indian tribes are protected from organized crime elements and other unscrupulous actors.

In a 2-1 decision, the Ninth Circuit concluded that Section 81's definition of "Indian lands" means only land currently held in trust and not land that contracting parties intend to place in trust in the future. In so doing, the Ninth Circuit found that Section 81 is unambiguous, and, therefore, 1 U.S.C. § 1's command that words used in the present tense include the future tense did not apply. Thus, the

Ninth Circuit declined to construe Section 81's definitional language of land that "is held by the United States in trust for an Indian tribe" to include land that "will be held in trust." According to the panel dissent, the majority's "existing trust lands only" interpretation of Section 81 creates a mechanism for creating contracts that encumber Indian lands while evading the statutory review requirements.

Less than four months later, the Second Circuit expressly relied upon 1 U.S.C. § 1's present tense includes future tense rule to construe Section 2703(4)'s definition of "Indian lands" to include land that "will be held in trust." In so doing, the Second Circuit expressly disagreed with the Ninth Circuit's contrary construction of the phrase "Indian lands," opining that the Ninth Circuit's narrow interpretation of "Indian lands" would thwart Congress's intent to have pertinent federal agencies oversee contracts for the purpose of promoting the best interests of Indian tribes.

The questions presented are:

1. Does the Dictionary Act's rule that words used in the present tense also include the future tense, unless the context indicates otherwise, only apply if the statutory text at issue is ambiguous?

2. Does the term "Indian lands" as used in 25 U.S.C. §§ 81 and 2701-2721 include both land that "is held by the United States in trust for an Indian tribe" and land that "will be held in trust by the United States for an Indian tribe"?

LIST OF PARTIES

The parties to this proceeding are those listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner Harrah's Operating Company, Inc. is a wholly owned subsidiary of Harrah's Entertainment, Inc., a privately held corporation. No publicly held company owns 10% or more of the stock of either Harrah's Operating Company, Inc. or Harrah's Entertainment, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Harrah's Operating Company, Inc. 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 opinion of the court of appeals (App.1-51) is reported at 531 F.3d 767. The decision of the district court (App.52-60) is reported at No. C 04-3955-SC, C 05-1605-SC, 2005 WL 5503031.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2008, with Judge N. Randy Smith filing a dissenting opinion. App.1-51. On July 7, 2008, the Ninth Circuit granted Petitioner an extension of time to file a petition for rehearing and rehearing *en banc*, and Petitioner filed its petition for rehearing and rehearing *en banc* on July 17, 2008. App.61-62. On August 13, 2008, the petition for rehearing was denied. App.63-64. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

1 U.S.C. § 1 provides in pertinent part:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise –
>
> * * *
>
> words used in the present tense include the future as well as the present;

25 U.S.C. § 81 provides in pertinent part:

> (a) Definitions
>
> In this section:
>
> (1) The term "Indian lands" means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.
>
> * * *
>
> (b) Approval
>
> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

25 U.S.C. § 2703 provides in pertinent part:

For purposes of this chapter--

* * *

(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission.

(3) The term "Commission" means the National Indian Gaming Commission established pursuant to section 2704 of this title.

(4) The term "Indian lands" means--

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

* * *

(10) The term "Secretary" means the Secretary of the Interior.

25 U.S.C. § 2711 provides in pertinent part:

(a) Class II gaming activity; information on operators

(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the

> operation and management of a class II gaming activity that the Indian tribe may engage in under section 2710(b)(1) of this title ....
>
> * * *
>
> (h) Authority
>
> The authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the Commission.

STATEMENT

1. Statutory Overview.

This petition concerns issues of statutory construction involving portions of three Congressional Acts. The first is the Dictionary Act, 1 U.S.C. §§ 1-8, a Congressional enactment that supplies "rules of construction for all legislation." *Ngiraingas v. Sanchez*, 495 U.S. 182, 190 (1990) (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 719 (1978) (Rehnquist, J., dissenting). Originally enacted in 1871, the current version of the Dictionary Act was revised and recodified in 1947. The pertinent Dictionary Act provision in this case is the rule governing the use of verb tense in statutes, and provides as follows:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise --
>
> * * *

> words used in the present tense include the future as well as the present . . .

1 U.S.C. § 1.

The second Congressional enactment implicated by this petition is 25 U.S.C. § 81. Originally enacted in 1871, Section 81 was substantially revised in 1999 with the revisions taking effect in 2000. Congress originally enacted Section 81 "to protect the Indians from improvident and unconscionable contracts...." *In re Sanborn*, 148 U.S. 222, 227 (1893). Accordingly, the original Section 81 incorporated a series of protective measures, specifically requiring the Secretary of the Interior to approve any of a large variety of contracts between a non-Indian and an Indian tribe including any contracts "relative to [Indian tribal] lands."

The revised Section 81, however, significantly pared back the number and type of contracts requiring Secretarial approval. As of 2000, Section 81 now provides, in pertinent part, as follows:

> (b) Approval
>
> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

25 U.S.C. § 81(b).

Under revised Section 81, the term "Indian lands" is defined as follows:

> The term "Indian lands" means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

25 U.S.C. § 81(a).

The legislative history behind the 2000 amendments explains that, "by making this change, Section 81 will no longer apply to a broad range of commercial transactions." S. Rep. No. 106-501 at 9. Rather, the revised Section 81 "will only apply to those transactions where the contract between the tribe and a third party could allow that party to exercise exclusive or nearly exclusive proprietary control over the Indian lands." *Id.* But Congress rejected an Executive Branch proposal to eliminate Section 81 altogether. *Id.* Instead, Congress elected to retain the requirement of Secretarial approval "to address a limited number of transactions that could place tribal lands beyond the tribe's ability to control the lands in its role as proprietor." *Id.*

The third congressional act implicated by this petition is the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721 (2006), which provides a detailed regulatory framework for Indian gaming. Among other purposes, Congress enacted IGRA to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments," while simultaneously "shield[ing tribes] from organized crime and other corrupting influences [and] ensur[ing] that ... Indian tribe[s] [are] the primary beneficiar[ies] of ... gaming operation[s]."

25 U.S.C. § 2702. To conduct gaming, an Indian tribe must satisfy numerous prerequisites. These include the requirement that the gaming take place "on Indian lands ...." 25 U.S.C. § 2710(b)(1)(A). As pertinent, IGRA defines "Indian lands" as follows:

> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4)(B).

2. The Proceedings Below.

On July 3, 2002, the Guidiville Band of Pomo Indians ("the Tribe") entered into a series of contracts with F.E.G.V. Corporation to develop and construct a proposed gaming facility on land the Tribe hoped would be restored as trust land in Northern California. App.4, 54. Respondent is the assignee of these contracts. *Id.* The agreements consisted of a Development Agreement and Personal Property Lease ("Lease") and a Cash Management Agreement ("CMA"). *Id.* Respondent was obligated under these agreements to assist the Tribe in identifying and purchasing land in order to establish the trust land base on which the gaming facility would eventually be built. App.54. There is no dispute that these agreements purported to encumber the Tribe's trust lands for a period of seven or more years. For example, the Lease states

that the Tribe could not without Respondent's consent:

> Sell, dispose of, lease, assign, sublet, transfer, mortgage or encumber (whether voluntarily or by operation of law) all or any part of its right, title, or interest in or to the Trust Lands, the Facility, or the Equipment.

App.5.

In addition, the agreements granted Respondent and its agents a right of entry, providing them with "complete and unrestricted access to the Indian trust lands for purposes of developing, installing and constructing the Structure." App.45. Notwithstanding these encumbrances, Respondent maintained in the proceedings below that Section 81 Secretarial approval was not required for the Lease and CMA because the Indian trust lands on which the gaming facility was to be developed had not been acquired at the time these agreements were executed. App.56.

On August 2, 2004, the Tribe sent Respondent a letter rescinding the CMA and Lease. App.6. Also in August 2004, the Tribe entered into an agreement with Petitioner and Upstream Point Molate, LLC ("Upstream") to develop and manage the Tribe's proposed gaming facility. App.7-8. Ultimately, however, the Tribe, Petitioner and Upstream terminated this agreement. App.9.

Respondent filed suit against Petitioner and Upstream in the United States District Court for the Northern District of California alleging a claim

under California law for tortious interference with contract. App.8 The Tribe commenced a separate declaratory action in the same court seeking a declaratory judgment that the Tribe's agreements with Respondent were invalid. *Id.* The cases were then consolidated. *Id.*

On October 19, 2005, the district court granted summary judgment in the Tribe's favor on the claim for declaratory relief. App.8-9. The district court held that Section 81 applied to contracts involving Indian lands not yet acquired and not yet transferred into trust; and, because the Secretary of the Interior had not approved the Tribe's contract with Respondent as required under Section 81, the Lease and CMA were invalid. *Id.* The district court also granted Petitioner and Upstream's motion for summary judgment, dismissing Respondent's tortious interference claim because no valid contract existed between Respondent and the Tribe, which is a necessary element for the tort alleged. *Id.* Respondent appealed to the Ninth Circuit. *Id.* While the appeal was pending, Respondent entered into a settlement with Upstream and Upstream was dismissed from the action. *Id.*

On June 26, 2008, in a 2-1 decision, the Ninth Circuit vacated the declaratory judgment for the Tribe holding that the Tribe's declaratory action did not present a justiciable case or controversy. App.10-12. In addition, the panel majority reversed the grant of summary judgment for Petitioner. App.33. The majority concluded that the Lease and CMA did not require Section 81 Secretarial approval because such approval is only required for contracts that encumber existing Indian lands. App.32-33.

Since the lands on which the gaming development was to be located had not been acquired as of the date of the CMA and Lease's execution, the majority concluded that the requirement of Section 81 Secretarial approval was not triggered by these agreements. App.33.

In reaching this result, the panel majority refused to apply the Dictionary Act's rule that words used in the present tense include the future tense as well as the present. 1 U.S.C. § 1. Specifically, the panel majority refused to apply this rule to construe the definition of "Indian lands" found in Section 81(a) -- "lands the title to which is held by the United States in trust" (emphasis added) -- to include both land that "is held by the United States in trust for an Indian tribe" and land that "will be held in trust by the United States in trust for an Indian tribe". App.15-24. The panel majority refused to apply the Dictionary Act because it concluded that the definition of "Indian lands" was not ambiguous. App.16-17. In addition, the majority concluded that the definition's context indicated that it only applied to existing Indian lands and not Indian lands to be acquired after the contract's execution. App.17-22.

The dissent disagreed with both of these conclusions, opining that the Dictionary Act's rule that words used in the present tense include the future as well as the present presumptively applies to all Congressional Acts regardless of whether or not the statutory language is ambiguous. App.37-38. Further, the dissent found nothing in the context of the definition of "Indian lands" to defeat this

presumption that words used in the present tense include the future tense. App.38-40.

3. The Second Circuit Opinion Conflicts with That of the Ninth Circuit.

In *Catskill Development, LLC v. Park Place Entertainment Corp.*, --- F.3d ----, 2008 WL 4630309 (2nd Cir., Oct. 21, 2008), a unanimous Second Circuit panel expressly disagreed with the Ninth Circuit's application of the Dictionary Act. App.82-83. The Second Circuit addressed a similar claim brought by an unsuccessful Indian gaming developer who sued a competitor for alleged tortious interference with contracts between the developer and the Mohawk Indian Tribe. App.65-66. The competitor argued, and the district court agreed, that the developer's contracts were invalid because they were management contracts that did not receive the National Indian Gaming Commission's ("NIGC") approval as required by 25 U.S.C. § 2711. App.79-80.

On appeal, the developer argued that NIGC approval of the contracts at issue was not required because at the time the contracts were executed, the Mohawk Indian Tribe did not possess the trust lands on which the gaming development was to be constructed. App.80-81. The developer further argued that NIGC approval is only required for management contracts that relate to existing Indian lands -- not Indian lands intended to be acquired after the contracts are executed. *Id.* The Second Circuit unanimously rejected this contention. First, it stated that the NIGC's authority to review management agreements arguably did not hinge on

whether the contracts relate to Indian lands. App.81-82. But the Court alternatively held that the definition of "Indian lands" in IGRA includes Indian lands to be acquired post-contract execution. App.82-83. As the court explained, "[t]he Dictionary Act, 1 U.S.C. § 1, instructs that '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise ... words used in the present tense include the future as well as the present.'" App.82. Accordingly, "when construing the definition of 'Indian lands' in 25 U.S.C. § 2703(4), the Dictionary Act instructs us to read the words 'which is held in trust' to also include land that will be held in trust." *Id.* As support for this conclusion, the Second Circuit cited to the Ninth Circuit's dissent. *Id.* The court observed that there was "no dispute here that the purpose of all of the contracts at issue was to build and operate a casino on what was intended to become Indian land." App.83.

While observing that Section 81 and Section 2711 differ in that the former involves review of contracts that encumber Indian lands while the latter involves review of management contracts, the Second Circuit nonetheless stated, "[t]o the extent these differences are not material to the Ninth Circuit's majority opinion, we nevertheless agree with Judge Smith's dissenting view that transactions involving land that 'will be' held in trust trigger the agency's review authority, especially where specific land to be taken into trust is identified in the operative agreements." App.82-83. The narrow "existing trust lands only" construction advocated by the developer and adopted by the Ninth Circuit would, in the Second Circuit's view, "thwart Congress's intent to have the NIGC

oversee contracts for the purpose of promoting the best interests of Indian tribes." App.83.

REASONS FOR GRANTING THE WRIT

1. The Decisions of the Ninth and Second Circuits Are Irreconcilable, and Create a Circuit Split on Important Questions of Statutory Interpretation.

The decisions of the Ninth and Second Circuits are directly in conflict with one another and cannot be reconciled. Each case involved contracts that implicated Indian trust lands. Each case involved a requirement for federal agency approval for such contracts -- Section 81 Secretarial approval in this case and Section 2711 NIGC approval in *Catskill Development*. Each involved a nearly identical definition of "Indian lands." But the two Circuits parted company on the role of the Dictionary Act in construing the definition of Indian lands.

This Court should reconcile these conflicting decisions. Not only do the two Circuits differ on the appropriate application of the Dictionary Act to the definition of "Indian lands," the Ninth and Second Circuit also disagree about the fundamental nature of the federal government's relationship with Indian tribes. According to the Ninth Circuit, "Congress now considers self-determination -- not paternalism -- to be in the Indians' best interest." App.27. By contrast, the Second Circuit stated that the "narrow interpretation" of "Indian lands" adopted by the Ninth Circuit "would thwart Congress's intent" to have a government agency "oversee contracts for the

purpose of promoting the best interest of Indian tribes." App.83.

These conflicting decisions have potentially broad and sweeping consequence. The Ninth Circuit panel majority's opinion essentially reads out of existence the Dictionary Act's present-tense-equals-the-future-tense rule. By operation of the majority's decision, this rule applies, if at all, only if the statutory text at issue is ambiguous -- a gloss this Court has never attached to the Dictionary Act. Rather, this Court has described the Dictionary Act's rules as "mandatory", *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 689 n.5 (1978), as "presumptive rules", *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 782 (2000), and as "default rules". *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 490 (2005). Statutory ambiguity, or the lack thereof, has not factored into this Court's Dictionary Act jurisprudence.

A practical consequence of this Circuit split is the contractual uncertainty it creates: *i.e.*, the same contracts encumbering after-acquired Indian trust lands that the Ninth Circuit sanctioned in this case would not, under *Catskill Development*, be valid and enforceable in any of the states comprising the Second Circuit. Without authoritative resolution by the Supreme Court, Indian tribes, and parties with whom they wish to contract, will neither be able to determine what existing contracts are valid without agency approval, nor enter into potential contracts with confidence that the contracts will be enforced by the courts.

Moreover, the Circuit split creates uncertainty for the pertinent federal agencies as well. In the Ninth Circuit, a contract that attempts to encumber for seven years or more Indian lands not yet acquired would not require Section 81 review. Conversely, that same contract **would** require Section 81 review in the Second Circuit. Because of the Circuit split, the Secretary of the Interior is receiving contradictory guidance from the lower federal courts on an issue where clear guidance is necessary.

Finally, and perhaps most ominously, by operation of the panel majority's decision, Section 81 Secretarial approval -- intended "to protect the Indians from improvident and unconscionable contracts...", *In re Sanborn*, 148 U.S. at 227 -- does not apply in the Ninth Circuit to contracts that purport to encumber future-acquired Indian lands. Further, the majority's reasoning logically extends to IGRA's virtually identical definition of "Indian lands" that the Second Circuit construed in *Catskill Development*. In this respect, Section 2711 expressly incorporates the review mechanism of Section 81 and transfers the approval power to the NIGC. *See* 25 U.S.C. § 2711(h) ("The authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the Commission."). Thus, since the panel majority's interpretation rejects Section 81 review of contracts that relate to future-acquired lands, the majority's interpretation also necessarily defeats NIGC review of management contracts that relate to future-acquired lands. This is an incongruous interpretation of a statute enacted with the specific purposes of

"promot[ing] tribal economic development, self-sufficiency, and strong tribal governments," while simultaneously "shield[ing tribes] from organized crime and other corrupting influences [and] ensur[ing] that ... Indian tribe[s] [are] the primary beneficiar[ies] of ... gaming operation[s]." 25 U.S.C. § 2702.

In sum, the Ninth Circuit panel majority's decision extends an open invitation to unscrupulous developers to evade federal agency review and take advantage of Indian tribes by consciously entering into contracts that encumber or impinge Indian lands that have not been acquired as of the date of contract execution, but which of necessity need to be acquired to fulfill the contractual purposes. But within the Second Circuit, the protections afforded Indian tribes by both Section 81 Secretarial review and Section 2711 NIGC review continue to extend to agreements affecting both existing Indian lands and those Indian lands that are yet to be acquired upon the parties' execution of the agreements.

An irreconcilable circuit split that involves such important issues of statutory interpretation, cries out for this Court's certiorari review. Moreover, the Ninth Circuit opinion's "significant impact on the relationship between Indian tribes and the Government" is a sufficient reason even apart from the circuit split to grant the petition for certiorari. *See Dept. of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001). By refusing to apply the Dictionary Act to 25 U.S.C. § 81, the Ninth Circuit contravened Congress's intent that the Executive Branch oversee contracts implicating Indian lands and rejected this Court's and

Congress's instruction regarding the application of the Dictionary Act.

For these reasons alone, the certiorari petition should be granted.

2. The Ninth Circuit's Decision Is Incorrect.

This Court has never considered the Dictionary Act's rule that statutory usages in the present tense also include the future tense. But the Court has, on numerous occasions, considered other Dictionary Act provisions, and has specifically rejected a construction of the Dictionary Act's rules as being merely "allowable" but not "mandatory". *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 689 n.5 (1978). Rather, this Court has characterized the Dictionary Act's provisions as "presumptions", *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 782 (2000), and as sources of "default" definitions "unless the context indicates otherwise." *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 490 (2005). The Court has frequently relied upon the Dictionary Act's rules of construction when interpreting federal statutes.[1]

The Ninth Circuit panel majority's analysis of the Dictionary Act's present-tense-equals-the-future-tense rule is plainly erroneous. As noted, the panel

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[1] *See, e.g., Stewart v. Dutra Construction Co.*, 543 U.S. 481, 490 (2005); *Cook County, Illinois v. U.S. ex rel. Chandler*, 538 U.S. 119, 127 (2003);*Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 782 (2000); *Ngiraingas v. Sanchez*, 495 U.S. 182, 190-91 (1990); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 774, 799 (1984); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 689 & n.53 (1978).

majority concluded that the Dictionary Act only applies (if it applies at all) when a statute is ambiguous, essentially applying a judicially created canon approach to the Dictionary Act. App.16-17. The application of a canon of statutory construction, however, differs markedly from the application of a statutory rule. Judicially created canons of statutory construction are not mandatory rules. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Instead, they are guides that are not necessarily conclusive. *Id.* The Dictionary Act's rules, by contrast, are mandatory default rules that are to govern statutory construction unless the context indicates otherwise. *Stewart*, 543 U.S. at 490; *Monell*, 436 U.S. at 689 n.5. By its express terms, therefore, the Dictionary Act presumptively applies "[i]n determining the meaning of **any** Act of Congress, unless the context indicates otherwise ...." 1 U.S.C. § 1 (emphasis added). The Ninth Circuit panel majority's unsupported creation; namely that the Dictionary Act only applies to ambiguous statutes, is directly contrary to the Dictionary Act's express terms, and is, therefore, erroneous.

The majority also argued that Congress could have drafted Section 81 to include the future tense if it so intended. But Congress's purpose in enacting the Dictionary Act was to eliminate this necessity. In 1948, Congress inserted into the Dictionary Act the language "words used in the present tense include the future as well as the present." Act of June 25, 1948, 62 Stat. 859. Thereafter, effective 2000, Congress amended Section 81 to include the present definition of "Indian lands." The dissent cogently observed that "[b]ecause we presume that

Congress is knowledgeable about existing law when it passes new legislation, we must presume that Congress was aware of the Dictionary Act when it enacted § 81." App.40. Thus, there is no reason for Congress to draft a statute with language in both present and future tense; indeed, such drafting "would be illogical given that the Dictionary Act already addresses the future tense in 'any Act of Congress.'" *Id.*

The majority also attempted to rely on the Dictionary Act's proviso "unless the context indicates otherwise" to conclude that Section 81's context precludes the use of the future tense. For Dictionary Act purposes, context is "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Rowland v. California Men's Colony*, 506 U.S. 194, 199 (1993). As the dissent observed, "the words of § 81 do not provide a different context. There is no finding in the majority opinion or arguments in the briefs of the parties suggesting that the words of the statute surrounding 'which is held' provide a different context." App.38.

Instead, and without citing to any supporting Supreme Court precedent, the majority suggested that other statutes -- specifically 25 U.S.C. §§ 465, 2710, and 2719 -- provide the "context" to reject reading Section 81 to include the future tense, as mandated by the Dictionary Act. App.19-22. In so doing the majority went much farther afield then the concept of "contextual indicators" allows. While context can include "other related acts", *Rowland*, 506 U.S. at 199, this should not be a license to roam through the Title wherein the statute at issue lies

for purported contextual indicators. Notably, in *Rowland*, this Court looked for contextual indicators to interpret the word "person" as used in 28 U.S.C. §§ 1915(a) and 1915(d) solely by reference to other language found or absent in Section 1915. *Id.* at 201-04. No decision of this Court has endorsed the free-ranging search for contextual indicators that the panel majority employed.

Moreover, the statutes upon which the panel majority relied provide no contextual indicators that the term "Indian lands" only refers to then-existing Indian lands. As the dissent noted, these other statutes, "provide additional protections to the Indian tribes and their lands, but provide no support for the proposition that the Dictionary Act should not apply to § 81." App.38. The dissent further observed that "[n]one of the language in sections 465, 2710, or 2719 even addresses contracts encumbering Indian lands, much less provides a context suggesting that § 81 can include only the present tense." App.39.

The panel majority also incorrectly implied that the statutory language in the Dictionary Act should be rejected as archaic. But as noted above, the present-tense-equals-the-future-tense rule was not added until 1948, which hardly renders this provision "hoary." "Acts of Congress ... are not presumed invalid until declared so by the Supreme Court. Simply because the Supreme Court has not yet addressed this issue does not affect the application of the Dictionary Act to the facts of this case." App.40.

Finally, the majority contended that its interpretation of Section 81 as applying only to existing trust lands comports with a "more modern attitude toward Indian tribes." App.26. In so doing, the majority ignores Section 81's text and recent legislative history. As noted in the Statement *supra* at 7, when Congress revised Section 81 effective in 2000, it included new language specifically setting forth a requirement that contracts encumbering Indian lands for a period of seven years or more have Secretarial approval. This fact belies the majority's conclusion that its reading of Section 81 is supported by a "more modern attitude toward Indian tribes". App.26. Congress specifically retained the Secretarial approval requirement for "a limited number of transactions that could place tribal lands beyond the tribe's ability to control the lands in its role as proprietor." S. Rep. No. 106-501 at 9. Hence, Congress expressly retained Section 81's Secretarial approval for contracts that would encumber Indian trust lands for seven years or more -- a measure of the "paternalism" so decried by the panel majority -- and the Lease and CMA are precisely of this type of contract.

The dissent noted the mischief inherent in the majority's construction of Section 81. As the dissent observed, "[l]imiting § 81's definition of Indian lands to only the present tense -- land which 'is held in trust' -- undermines the protection § 81 is intended to provide to the Indian tribes." App.36. Parties can use the majority's reading of Section 81 to "easily circumvent the statute." *Id.* The dissent noted further that under the majority's construction of Section 81:

> The parties, fully intending that their contract will encumber Indian lands for more than seven years, can simply execute their contract before the lands are conveyed into trust. Because such a contract would not pertain to land presently held in trust by the United States for an Indian tribe, the contract would not require the approval of the Secretary of the Interior.

App.36.

This would be true, the dissent continued, with contracts such as the Lease and CMA, where "the parties always intended that the land would be held in trust by the United States for the Indian tribe and even if the contract contained an explicit provision requiring that the land be held in trust by the United States for the Indian tribe." *Id.* The Second Circuit voiced similar concerns when rejecting the present tense only construction of Indian lands in *Catskill Development*:

> The Catskill Group's narrow interpretation -- which would give the NIGC review authority over only contracts relating to already existing Indian land -- would thwart Congress's intent to have the NIGC oversee contracts for the purpose of promoting the best interests of Indian tribes. *See* 25 U.S.C. §§ 2701, 2702.

App.82-83.

The panel majority's construction of Section 81 will enable, and even embolden, unscrupulous developers to take advantage of the very Indian tribes Section 81 was enacted to protect, by simply manipulating the timing of their predatory agreements to skirt around the federal review which inevitably would invalidate those agreements.

For these additional reasons, the certiorari petition should be granted.

CONCLUSION

The decisions of the Ninth and Second Circuits are irreconcilably in conflict with one another. Their competing constructions of "Indian lands" cannot be harmonized. Nor can their contrasting approaches to applying the presumptive rules of the Dictionary Act be reconciled in a principled manner. Lastly, the Ninth Circuit panel majority's constructions of 1 U.S.C. § 1 and 25 U.S.C. § 81 are simply incorrect and contrary to the broad and protective purposes behind these enactments. Petitioner respectfully submits that the petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

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