No. 08-554

IN THE

Supreme Court of the United States

MICHIGAN GAMBLING OPPOSITION,
Petitioner,

v.

DIRK KEMPTHORNE, SECRETARY OF INTERIOR, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS

CONLY J. SCHULTE
SHILEE T. MULLIN
FREDERICKS PEEBLES & MORGAN LLP
3610 North 163rd Plaza
Omaha, NE 68116
(402) 333-4761

SETH P. WAXMAN
Counsel of Record
ETHAN G. SHENKMAN
DEMIAN S. AHN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

QUESTIONS PRESENTED

1. Whether Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, is an unconstitutional delegation of legislative power to the Secretary of the Interior.

2. Whether the Court should hold this case pending the resolution of *Carcieri* v. *Kempthorne*, No. 07-526, for possible remand to the court of appeals on a question that has never been properly presented in this case and was not considered by either court below.

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 525 F.3d 23. The opinion of the district court (Pet. App. 36) is reported at 477 F. Supp. 2d 1.

JURISDICTION

The court of appeals denied petitioner's petition for rehearing en banc on July 25, 2008. The petition for a writ of certiorari was filed on October 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Section 5 of the Indian Reorganization Act of 1934 authorizes the Secretary of the Interior to acquire into trust, for the benefit of Indians and Indian Tribes, "any interest in lands, water rights, or surface rights to lands, within or without existing reservations, . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. The Secretary exercises this authority pursuant to regulations published at 25 C.F.R. pt. 151.

In May 2005, the Secretary agreed to take a parcel of land into trust for respondent the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians. The land would give the Tribe a federally-recognized land base near its traditional home and allow it to pursue economic development through the construction and operation of a gaming facility, in accordance with the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* Pet. App. 38. The Secretary's decision followed a lengthy administrative process that began in August 2001. *Id.* at 40. The Tribe's request was (and is) actively supported by the local government with jurisdiction over the land at issue, and no state or other government has ever objected to the proposed trust acquisition.[1] But private interests opposed to the Tribe's planned gaming facility announced their intent to delay the acquisition through litigation—and so far they have

[1] Moreover, while the case was pending before the court of appeals, the Governor of the State of Michigan executed a compact with the Tribe under IGRA, 25 U.S.C. § 2710(d)(1)(C), which would allow the Tribe to conduct Class III (*i.e.*, casino-style) gaming on the land at issue. The Michigan State House of Representatives has ratified the compact, which is now pending ratification in the Michigan State Senate.

succeeded, despite the failure of their legal arguments at every stage. Now they ask this Court to consider one question on which there is no circuit split and which the Court has repeatedly (and very recently) declined to review, and another question that has never been properly presented in this case. There is no ground for further review. It is time for this litigation to end.

1. Congress enacted the Indian Reorganization Act of 1934 to ensure that "Indian tribes would be able to assume a greater degree of self-government, both politically and economically," *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974), than had been possible under previous federal removal and allotment policy, which had decimated tribal landholdings. *See, e.g.*, *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). The legislation was intended "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism," *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151-152 (1973) (quotations omitted), in large part by "conserv[ing] and develop[ing] Indian lands and resources." Pub. L. No. 73-383, 48 Stat. 984, 984 (1934). Section 5 of the IRA authorizes the Secretary to pursue those goals by "acquir[ing], through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . . for the purpose of providing lands for Indians." 25 U.S.C. § 465.

2. The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians is a federally-recognized Indian Tribe whose aboriginal territory is located in the present-day State of Michigan. The Tribe's government-to-government relationship with the United States was formally recognized no later than 1821, when Chief Match-E-Be-Nash-She-Wish signed a treaty that

granted the Tribe a federal reservation near present-day Kalamazoo, Michigan. *See* 62 Fed. Reg. 38,113 (July 16, 1997) (Notice of Proposed Finding). While the Tribe was a party to other treaties with the United States in the nineteenth century, it lost its last reservation land under an 1833 treaty that the Tribe did not sign. *See* Treaty of September 26, 1833, 7 Stat. 431. Nevertheless, the Tribe maintained its distinct identity throughout U.S. history, and its status as a recognized Tribe was never lawfully terminated. 62 Fed. Reg. 38,113-38,114.

The Secretary formally acknowledged the Tribe's federally-recognized status in 1999. *See* 63 Fed. Reg. 56,936 (Oct. 23, 1999) (Notice of Final Determination).[2] The Secretary expressly found that the Tribe comprised a distinct Indian community; that the Tribe had continuously existed as a discrete American Indian entity from the date of its last annuity payments in 1870 through the present; that the Tribe had a substantially continuous historical identification of political leadership; and that the Tribe had never been the subject of any legislation terminating its relationship with the

[2] Petitioner incorrectly suggests that the Tribe conditioned its petition for federal acknowledgement on the representation that "there would never be casinos in our Tribe." Pet. 8 (quotations omitted). That allegation is unsupported as well as irrelevant. The document on which petitioner relies was "unratified [and] undated" (Court of Appeals Joint Appendix (CAJA) 1897), and there were no "minutes . . . or other documentation . . . to support" or substantiate it. CAJA 1863. The Secretary's acknowledgment of the Tribe makes no reference to any such representation (63 Fed. Reg. 56,936), and nothing in the applicable regulations would permit consideration of such a representation in connection with the acknowledgement process. *See* 25 C.F.R. pt. 83.

United States. *See* 63 Fed. Reg. 56,936, *affirming proposed findings at* 62 Fed. Reg. 38,113.

Acknowledgement alone did not provide the Tribe with a reservation or other federally-protected trust lands on which it could exercise territorial sovereignty and pursue economic self-sufficiency.[3] Thus, in 2001, pursuant to Section 5 of the IRA, the Tribe asked the Secretary to accept into trust a 146-acre parcel of disused industrial land so that the Tribe could redevelop the land into a gaming facility that would provide a federally-recognized land base, as well as much-needed economic and other benefits for Tribe's members and the local community. The Tribe's proposal garnered widespread support. In fact, no state or local government with jurisdiction over the land has ever objected; the local government with jurisdiction actively supported (and supports) the proposal; the Governor of Michigan and the state House of Representatives have approved a compact that would allow the Tribe to con-

[3] The Match-E-Be-Nash-She-Wish Band of Potawatomi Indians is now the only federally-recognized Indian Tribe in Michigan that does not have reservation or federally-protected trust lands. All eleven of the other federally-recognized Indian Tribes in Michigan currently operate (or are in the process of constructing) casinos pursuant to tribal-state gaming compacts. *See* http://www.michigan.gov/mgcb/0,1607,7-120-1380_1414_2182---,00.html (last visited Dec. 5, 2008). The tribes operating casinos under those compacts annually pay tens of millions of dollars in revenues to the State and to local governments. *See* http://www.michigan.gov/mgcb/0,1607,7-120-1380_1414_2182-11370--,00.html (last visited Dec. 5, 2008).

duct full casino gaming on the land at issue; and the compact is pending ratification in the Michigan Senate.[4]

3. The Secretary approved the Tribe's request on May 13, 2005, after a lengthy administrative process. *See* 70 Fed. Reg. 25,596 (May 13, 2005) (Notice Of Final Agency Determination). On June 13, 2005, petitioner filed this action in the U.S. District Court for the District of Columbia. The complaint asserted that the Secretary's decision to accept land into trust violated the National Environmental Policy Act (42 U.S.C. §§ 4321 *et seq.*) and the Indian Gaming Regulatory Act (25 U.S.C. § 2719), and that the statute authorizing the Secretary's action (Section 5 of the IRA) was an unconstitutional delegation of legislative power. Petitioner's complaint was not supported by any state or local government. In fact, the local government that has jurisdiction over the land at issue filed an amicus brief *supporting* the Tribe. Joint Amicus Curiae Brief of Wayland Township, et al., *Michigan Gambling Opposition* v. *Norton*, No. 05-CV-01181 (D.D.C. Jan. 19, 2006). After more than twenty months of litigation delay, the district court rejected all of petitioner's claims and dismissed the complaint on February 23, 2007. Pet. App. 83-84.

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[4] The compact includes, pursuant to IGRA, provisions regarding "the application of the criminal and civil laws and regulations of the Indian tribe or the State" on the land at issue. 25 U.S.C. § 2710(d)(3)(C)(i). The Tribe has also concluded agreements with state and local governments concerning law enforcement, emergency services, and taxes. *See* CAJA 119, 121; http://www.michigan.gov/taxes/0,1607,7-238-43513_43517---,00.html (last visited Dec. 5, 2008).

4. Petitioner appealed, raising only its NEPA and nondelegation claims. Four months after oral argument, more than six months after briefing was completed, and shortly after this Court denied review on the Section 5 nondelegation question in *Carcieri* v. *Kempthorne*, 128 S. Ct. 1443 (2008), petitioner asked the court of appeals to "supplement the issues" in this case with the question on which the Court granted review in *Carcieri*: How to construe the definition of "Indian tribe" in Section 19 of the IRA, which refers to members of "any recognized Indian tribe now under Federal jurisdiction." *See id.* (argued Nov. 3, 2008). The court of appeals rejected petitioner's request and declined to consider the untimely-raised *Carcieri* issue. Order, *Michigan Gambling Opposition* v. *Kempthorne*, No. 07-5092 (D.C. Cir. Mar. 19, 2008).

On April 29, 2008, the court of appeals affirmed the dismissal of petitioner's complaint. Pet. App. 3. In rejecting petitioner's nondelegation claim, the court observed that Section 5 is "no broader than other statutes, which the Supreme Court has upheld" against such challenges. *Id.* at 14. It reasoned that the IRA supplies an "intelligible principle" to guide the Secretary's discretion because, in acquiring land "for the purpose of providing land for Indians," the Secretary must "exercise his powers in order to further economic development and self-governance" among Indian Tribes. *Id.* at 15. Accordingly, Section 5 "is not an unconstitutional delegation of legislative authority." *Id.* at 3, 20. Judge Brown dissented from the court's decision.

Petitioner sought en banc rehearing on its nondelegation claim, and on its belated *Carcieri* claim. The full court rejected that petition on July 25, 2008 (Pet. App. 85-86), after requesting a response from the United

States and the Tribe on the nondelegation question, but not on the *Carcieri* issue. Order, *Michigan Gambling Opposition* v. *Kempthorne*, No. 07-5092 (D.C. Cir. May 20, 2008).[5]

REASONS FOR DENYING THE PETITION

1. Petitioner seeks review of its claim that Section 5 of the IRA violates the nondelegation doctrine. That question is properly presented, but it does not warrant review.

a. This Court has considered petitions for certiorari on this same issue three times over the past three years. It has denied review every time, most recently in *Carcieri* v. *Kempthorne*, 128 S. Ct. 1443 (2008) (granting certiorari but limiting review to exclude nondelegation challenge to Section 5). *See also South Dakota* v. *Department of Interior*, 549 U.S. 813 (2006) (denying certiorari); *Utah* v. *Shivwits Band of Paiute Indians*, 549 U.S. 809 (2006) (same). There is no reason

[5] The district court had stayed its judgment in favor of the Secretary and the Tribe pending resolution of proceedings in the court of appeals. *See* Order, *Michigan Gambling Opposition* v. *Norton*, No. 1:05-CV-01181 (D.D.C. Mar. 5, 2007). After the court of appeals affirmed and rehearing was denied, petitioner moved to stay that court's mandate pending the filing and disposition of a petition for certiorari. Over the opposition of the Tribe and the United States, the court of appeals granted a stay, without explanation, on August 15, 2008. *See* Order, *Michigan Gambling Opposition* v. *Kempthorne*, Case No. 07-5092 (D.C. Cir. Aug. 15, 2008)). The Chief Justice denied the Tribe's application (unopposed by the United States) to vacate the stay. Order, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Michigan Gambling Opposition*, No. 08-A184 (Sept. 3, 2008). The Secretary is thus effectively precluded from acquiring the land in trust until the present petition is denied.

for a different result here—especially in light of the fact that the State of Michigan has never objected to the proposed trust acquisition in this case, and the local government with jurisdiction over the land has actively supported the Secretary's decision. *See* Joint Amicus Curiae Brief of Wayland Township, et al., *Michigan Gambling Opposition* v. *Norton*, Case No. 05-CV-01181 (D.D.C. Jan. 19, 2006).

b. There is no circuit conflict on the nondelegation question. To the contrary, every court of appeals—and every district court—that has resolved a nondelegation challenge to Section 5 has upheld the statute. *See Carcieri* v. *Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (en banc), *cert. denied on this question*, 128 S. Ct. 1443 (2008); *Shivwits Band of Paiute Indians* v. *Utah*, 428 F.3d 966, 972-974 (10th Cir. 2005), *reaffirming United States* v. *Roberts*, 185 F.3d 1125, 1136-1137 (10th Cir. 1999); *South Dakota* v. *Department of Interior*, 423 F.3d 790 (8th Cir. 2005) ("*South Dakota II*"); *Sauk County* v. *Department of Interior*, No. 07-CV-543, 2008 WL 2225680, at *4 (W.D. Wis. May 29, 2008); *City of Lincoln City* v. *Department of Interior*, 229 F. Supp. 2d 1109, 1128 (D. Or. 2002).

Petitioner suggests a conflict based on one decision that was vacated twelve years ago, and one case that involved irrelevant questions under the Administrative Procedure Act (APA). First, petitioner relies on *South Dakota* v. *Department of Interior*, 69 F.3d 878 (8th Cir. 1995) ("*South Dakota I*"). That decision was vacated by this Court, 519 U.S. 919 (1996), has no precedential value, and has since been rejected by the Eighth Circuit itself. *See South Dakota II*, 423 F.3d 790. Second, petitioner quotes out-of-context dicta from *Florida Department of Business Regulation* v. *Department of Interior*, 768 F.2d 1248, 1256 (11th Cir. 1985). But the is-

sue in that case was whether decisions under Section 5 of the IRA and related regulations at 25 C.F.R. pt. 151 were "committed to agency discretion by law" under the APA, 5 U.S.C. § 701(a)(2), not whether Section 5 itself violated the nondelegation doctrine. *Florida Department of Business Regulation*, 768 F.2d at 1255-1257.

c. In any event, the decision below is correct. The only "question [in a nondelegation challenge] is whether the statute has delegated legislative power," *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001), and this Court has made clear that only the most sweeping delegations will fail that test. *See, e.g., id.* at 474-475 ("[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.") (quotations omitted). So long as Congress establishes an "intelligible principle" to guide the implementing agency in administering the statute, even a broad delegation of regulatory power will be sustained. *Touby* v. *United States*, 500 U.S. 160, 165 (1991).

Section 5 of the IRA provides such an intelligible principle. The statute expressly limits land acquisitions to those that serve the "purpose of providing land for Indians," specifies the means by which land may be acquired (i.e., consensually), and subjects acquisitions by purchase to a limited authorization and the further oversight of the appropriations process. 25 U.S.C. § 465. The purposive limitation by itself is sufficient to satisfy the constitutional requirement because, as the court of appeals held, it requires the Secretary "to exercise his powers in order to further economic development and self-governance among the Tribes." Pet. App. 15; *see also Carcieri*, 497 F.3d at 41-43; *Shivwits*,

428 F.3d at 972-974; *South Dakota II*, 423 F.3d at 797-798. That guide for the exercise of the Secretary's authority is at least as clear as an agency's determination of what is "fair" or "equitable" (*American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104 (1946); *Yakus* v. *United States*, 321 U.S. 414, 420, 423-426 (1944)) or "in the public interest" (*National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943); *New York Cent. Sec. Corp.* v. *United States*, 287 U.S. 12, 24-25 (1932)).

Moreover, Section 5 of the IRA does not authorize the Secretary to make any law; to promulgate any rule restricting private conduct; to compel any act; or to impose any tax—and its limited authorization for purposes of land acquisition pales in comparison to general appropriations this Court has upheld without particular scrutiny under the nondelegation doctrine. *See, e.g.*, *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322 (1937) ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. . . . The constitutionality of this delegation of authority has never been seriously questioned.").[6]

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[6] As the Tribe argued below (Tribe Appeal Br. 47-49), it is not clear why the "intelligible standards" requirement should even apply to a statute such as Section 5, which does not delegate any lawmaking or rulemaking power at all. The Court has rarely discussed the nondelegation doctrine outside the rulemaking context, and when it has it has dispatched the issue quickly. *See, e.g.*, *Cincinnati Soap*, 301 U.S. at 322; *Clinton* v. *City of New York*, 524 U.S. 417, 466-467 (1998) (Scalia, J., dissenting) ("From a very early date Congress also made permissive individual appropriations, leaving the decision whether to spend the money to the President's unfettered discretion. . . . The constitutionality of such appropriations has never seriously been questioned).

d. The dissenting opinion below provides no basis for granting certiorari. Pet. App. 20-31. The dissent asserts that the limiting purpose of Section 5 cannot be "derived from the text of the [statute]," and that the statute is "tautological" and devoid of meaning. *Id.* at 28.[7] But the dissent reached that conclusion only by abandoning traditional rules of statutory interpretation. Section 5 limits the Secretary's authority to land acquisitions which serve "the purpose of providing lands for Indians." The text of that provision must be interpreted in light of the historical context in which Section 5 was enacted; the surrounding statutory text and the text and structure of the statute as a whole; longstanding precedent construing the purposes behind the IRA; and the rule that statutes should be construed to avoid constitutional questions. *See, e.g.*, *American Power & Light*, 329 U.S. at 104 ("the statutory language may derive content from the purpose of the [statute], its factual background and statutory context.") (quotations omitted); *Mistretta* v. *United States*, 488 U.S. 361, 373 n.7 (1989) (noting cases which narrowly construed statutes to avoid or reject nondelegation challenges). The court of appeals properly interpreted Section 5 in light of these principles, and cor-

[7] Petitioner and the dissent err in asserting that federal courts have "consistently" interpreted Section 5 of the IRA to provide "unfettered discretion" (Pet. 12, 18; Pet. App. 28, 31) that "encompasses any possible acquisition" (*id.*). Every court confronted with a nondelegation challenge to Section 5 has concluded otherwise. *See, e.g.*, *Carcieri*, 497 F.3d at 41-43; *Shivwits*, 428 F.3d at 972-974; *South Dakota II*, 423 F.3d at 797-798; *Roberts*, 185 F.3d at 1136-1137; *Sauk County*, 2008 WL 2225680, at *4; *Lincoln City*, 229 F. Supp. 2d at 1128.

rectly concluded that there is nothing tautological about it. Pet. App. 15.

2. Petitioner also seeks review of a question that it improperly attempted to raise at the eleventh hour below—namely, whether the Tribe and its members are "Indians" and an "Indian tribe" under the definitions set out in Section 19 of the IRA, 25 U.S.C. § 479.[8] The court of appeals twice recognized that petitioner waived that claim by failing to raise it until after this Court granted review of a similar question in *Carcieri*—well after the appeal in this case was briefed and argued. First, the court of appeals denied petitioner's motion to supplement the issues on appeal after oral argument. Order, *Michigan Gambling Opposition* v. *Kempthorne*, Case No. 07-5092 (D.C. Cir. Mar. 19, 2008). Second, the court rejected petitioner's request for rehearing en banc without requesting a response on this issue. *See* Order, *Michigan Gambling Opposition* v. *Kempthorne*, No. 07-5092 (D.C. Cir. May 20, 2008) (requesting response on the nondelegation question, but not on the *Carcieri* issue).

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[8] The courts, in any event, lack jurisdiction to consider petitioner's statutory claim, as petitioner's alleged injuries fall outside of, and indeed are directly inconsistent with, the "zone of interests" protected by the IRA. *Clark* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987) ("if the [party's] interests are marginally related to or inconsistent with the purposes implicit in the statute," it will not have prudential standing to bring a claim under the Administrative Procedures Act). *See, e.g.*, *City of Sault Ste. Marie* v. *Andrus*, 458 F. Supp. 465, 468 (D.D.C. 1978) (no standing under Section 5 of the IRA for private non-Indian taxpayers); *Western Shoshone Bus. Council* v. *Babbitt*, 1 F.3d 1052, 1054 (10th Cir. 1993) (no standing for private law firm to challenge Secretary's decision not to review a contract under 25 U.S.C. § 81).

There is no reason for this Court to depart from its ordinary practice and consider an issue that was neither timely raised in nor addressed by the courts below. *See*, *e.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument that was "inadequately preserved in the prior proceedings"); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *accord Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10 (1982).[9]

Petitioner seeks to avoid that result by invoking cases that involved exceptional circumstances (not present here), where this Court excused parties for failing to timely raise arguments that had previously been "futile" because they were contrary to established precedent. *See*, *e.g.*, *Standard Indus., Inc.* v. *Tigrett Indus., Inc.*, 397 U.S. 586, 587 (1970) (allowing previously "futile" argument to be raised after contrary precedent had been "specifically overruled"); *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130, 144 (1967) (excusing failure to timely raise issue in light of previous "strong precedent" that civil libel actions were immune from consti-

[9] There is likewise no justification for holding the present petition pending this Court's decision in *Carcieri*. Even if this case were returned to the court of appeals after a decision in *Carcieri*, ordinary waiver principles would preclude petitioners from advancing in that court a claim they first raised after oral argument on appeal. *See Hussain* v. *Nicholson*, 435 F.3d 359, 364 (D.C. Cir. 2006) (declining to hear arguments raised for the first time on appeal); *Worldwide Moving & Storage, Inc.* v. *District of Columbia*, 445 F.3d 422, 427 n.7 (D.C. Cir. 2006) (declining to hear arguments raised for the first time after oral argument).

tutional scrutiny). Those cases are inapposite. Petitioner's argument in this case is based on statutory language that has not changed during the course of these proceedings, and there was no established precedent in this Court or the court of appeals that would have made the argument legally futile in the district court or the court of appeals.[10]

In any event, even if the Court accepts petitioner's statutory argument in *Carcieri*, the Tribe in this case was a "recognized Indian tribe . . . under Federal jurisdiction" (25 U.S.C. § 479) when the IRA was enacted in 1934. The administrative record demonstrates that the Tribe was recognized by the United States no later than 1821, when it signed a treaty granting it a federal reservation near Kalamazoo (*see* 62 Fed. Reg. 38,113), and that the Tribe's federally-recognized status has never been lawfully terminated (*id.* at 38,114; *see also* 63 Fed. Reg. 56,936, *affirming proposed findings*).

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[10] Indeed, by the time petitioner filed its complaint in this case, the plaintiffs in *Carcieri* had been arguing the IRA Section 19 issue for several years, producing at least two published decisions of which petitioner presumably (*see* Pet. 29) was aware. *See Carcieri* v. *Norton*, 290 F. Supp. 2d 167, 172, 178-181 (D.R.I. 2003), *aff'd*, 398 F.3d 22, 29-32 (1st Cir. 2005), *superseded on rehearing*, 423 F.3d 45, 53-56 (1st Cir. 2005); *superseded on rehearing en banc Carcieri* v. *Kempthorne*, 497 F.3d 15, 41-43 (2007). Moreover, the *Carcieri* plaintiffs relied heavily on *dictum* that they claimed supported their position from this Court's decision two decades ago in *United States* v. *John*, 437 U.S. 634, 649 (1978) (dicta referring to "1934"); *see also United States* v. *Tax Comm'n*, 505 F.2d 633 (5th Cir. 1974) ("tribal status is to be determined as of June, 1934"). Petitioner may have decided for strategic reasons not to raise the issue in this case, but the Section 19 argument was no more unavailable here than it was in *Carcieri* itself.

Petitioner's argument depends on a distortion of the record, along with statements taken out of context from briefing that did not address issues under Section 19 of the IRA. For example, petitioner asserts that the "BIA determined conclusively that the Tribe's federal acknowledgement ceased in 1870." Pet. 7. That is wrong. As the BIA expressly explained, it chose 1870 as the last date of "unambiguous Federal acknowledgment" (CAJA 1791) solely for purposes of defining the temporal scope of its analysis under 25 C.F.R. 83.8 (certain recognition criteria to be analyzed from date of last unambiguous federal acknowledgment to the present), and "[t]he use of the 1870 date . . . in these reports is *not to be regarded as a determination by BIA that unambiguous Federal acknowledgement of the [Tribe's] antecedent group ceased at that date*." CAJA 1791 (emphasis added).[11]

Petitioner's belated attempt to use a petition for discretionary review in this Court to interject a new issue into a case that has already been fully litigated, at great cost to the Tribe and the United States, lacks both justification and merit and should be rejected.

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[11] The statement petitioner highlights (Pet. 7) from the Tribe's appellate brief was not directed to whether, as of 1934, it was a "recognized Indian tribe … under federal jurisdiction," 25 U.S.C. § 479, precisely because petitioner had never raised any question concerning the Tribe's IRA status during the briefing on appeal. The Tribe's statement reflects the diminished federal benefits the Tribe received from the BIA after its last annuity payments in 1870. *See* 62 Fed. Reg. 38,113; CAJA 1772 (noting cessation of annuity payments in 1870). As noted above (*see* pp. 4-5, 15-16), however, the Tribe's status was never lawfully terminated—in fact, the BIA expressly confirmed that the Tribe's legal status and relationship to the United States, dating back at least to 1821, were never terminated by Congress. 62 Fed. Reg. 38,114.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CONLY J. SCHULTE
SHILEE T. MULLIN
FREDERICKS PEEBLES & MORGAN LLP
3610 North 163rd Plaza
Omaha, NE 68116
(402) 333-4761

SETH P. WAXMAN
Counsel of Record
ETHAN G. SHENKMAN
DEMIAN S. AHN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

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