No. 08-554

In The Supreme Court of the United States

MICHIGAN GAMBLING OPPOSITION ("MICHGO"),

Petitioner,

v.

DIRK KEMPTHORNE, in his official capacity as Secretary of the United States Department of the Interior, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONERS

The United States does not deny the importance of the constitutional question this case presents, nor could it. That is because the future allocation of jurisdiction between states and tribes over a potentially unlimited amount of state lands hangs in the balance, with the outcome turning on the continued viability of the nondelegation doctrine. "The importance of [whether Section 5 violates the nondelegation doctrine] is beyond cavil." Petition for Writ of Certiorari, *United States v. Roberts*, No. 99-991174, at 28 (Jan. 12, 2000).

In *Whitman v. American Trucking Associates, Inc.*, 531 U.S. 457 (2001), this Court instructed that where Congress confers a power that has broad scope – such as the power to take state land and give it to a co-sovereign – the statute must provide "substantial guidance" to the agency. As the Eighth and Eleventh Circuits have held and as Judge Brown reiterated below, Section 5 of the IRA provides absolutely no guidance. Yet this Court's directive in *Whitman* has been ignored by the D.C. Circuit majority and the other Circuits that have upheld Section 5 over nondelegation challenges. Indeed, the one thing the government does not say in its opposition brief is that there is ample guidance in Section 5's text, such that a court reviewing a land-in-trust decision can say whether that decision is in accord with Congressional will. The time is ripe for this Court to address the important issue of Section 5's constitutionality, as no less than 24 states have requested.

Neither the United States nor the Tribe disputes the importance of the *Carcieri* question, either.

Instead, the government simply questions the date when the Tribe's federal recognition ceased. At a minimum, then, this Court should hold the petition until the Court issues its decision in *Carcieri*, and, if *Carcieri* is reversed, GVR the present case for further consideration in light of *Carcieri*. Alternatively, because the administrative record and statutory language are clear, the Court should enter judgment in MichGO's favor.

I. This Court should grant the petition to decide an important constitutional issue of immense significance to state sovereignty, separation of power principles, and the delicate balance between state and Indian jurisdiction.

The United States attempts to identify reasons why this case does not merit review. That exercise is unavailing.

a. The government points to this Court's denial of certiorari in other cases raising the question of Section 5's constitutionality, including *Carcieri v. Kempthorne*, No. 07-526. Opp. at 5. But the comments of several Justices at the *Carcieri* oral argument demonstrate the important issues of state sovereignty and unlimited executive discretion that permeate the constitutional question presented and require this Court's intervention. *See, e.g.*, 11/3/08 Tr. at 36 ("[W]e are talking about an extraordinary assertion of power. The Secretary gets to take land and give it a whole different jurisdictional status apart from State

law . . . ") (Roberts, C.J.); *id.* at 38 ("[Is there not] some principle of Federalism which makes us be very cautious before we take land out of the jurisdiction of the State[?]") (Kennedy, J.); *id.* at 29 ("Very strange statute, just leaving it up to [the Secretary] to do whatever he wants.") (Scalia, J.). *But see* Tribe Opp. at 11 & n.6 (arguing that the Secretary's unbridled authority to take land from states and give it to a co-sovereign is "limited" and "pales in comparison to general appropriations"). Indeed, it is the circuit courts' persistent refusal to take a Section 5 nondelegation challenge seriously that warrants this Court's immediate intervention.

b. The government does not dispute that the Eighth Circuit's decision in *South Dakota v. United States Department of the Interior*, 69 F.3d 878 (8th Cir. 1995) ("*South Dakota I*"), is directly at odds with the decision below. Opp. at 6. Instead, the government simply points out – as the petition made clear – that this Court vacated that decision. *See* 519 U.S. 919 (1996). But it remains true that the Eighth Circuit's reasoning in *South Dakota I* has never been contradicted;[1] is in direct conflict with the several circuits that have upheld Section 5's constitutionality; and caused Justices Scalia, Thomas, and O'Connor to dissent from the remand order and urge this Court to resolve the constitutional question. 519 U.S. at 920-23

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[1] "Even if a decision is vacated, . . . the force of its reasoning remains, and the opinion of the Court may influence resolution of future disputes." *Finburg v. Sullivan*, 658 F.2d 93, 100 n.14 (3d Cir. 1980).

(Scalia, J., dissenting). Moreover, the Eighth Circuit's view of the statute is consistent with the Eleventh Circuit's, which has similarly concluded that Section 5 "does not delineate the circumstances under which exercise of [the Secretary's] discretion is appropriate." *Florida Dep't of Bus. Regulation v. United States Dep't of Interior*, 768 F.2d 1248, 1256 (11th Cir. 1985). Further percolation in the lower courts will not be beneficial until this Court reaffirms the nondelegation doctrine's continuing vitality.

c. The passage of 70 years since Section 5's enactment is no reason to deny review. *Contra* Opp. at 6-7. The Quiet Title Act, 28 U.S.C. § 2409a, likely bars litigants from challenging land-in-trust decisions that have already become final. And the possibility that the government is unconstitutionally taking land from states and giving it to co-sovereigns is the very reason review is warranted now. *Carcieri v. Kempthorne*, No. 07-526, 11/3/08 Tr. at 36 ("[W]e are talking about an extraordinary assertion of power. The Secretary gets to take land and give it a whole different jurisdictional status apart from State law . . . ") (Roberts, C.J.).

d. In their attempt to divine an intelligible principle from Section 5, the government points to everything but the text of the statute (including court decisions that discuss the supposed purposes of IRA without reference to the text). For example, it is not helpful for the government to point to the Secretary's own regulations as providing the necessary limit on his unbridled discretion under Section 5. Opp. at 8 n.4.

This Court has already held that an agency cannot cure a standardless delegation of power by promulgating limiting regulations. *Whitman*, 531 U.S. at 473. Indeed, the government's reliance on regulations as the limit that renders Section 5 constitutional is strong evidence that the statutory text has no such limit.

e. Likewise, purported limiting principles in Section 5's purpose and factual background are of no relevance in the absence of some limiting principle in the statutory text. App. 31a (Brown, J., dissenting) (discussing this Court's decisions in the *Intermountain Rate Cases* [*United States v. Atchison, Topeka, & Santa Fe Ry.*], 234 U.S. 476, 486-88 (1914), and *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)); *Whitman*, 531 U.S. at 472 (Congress must articulate an intelligible principle "by legislative *act*"); *contra* Opp. at 9. Equally important, the government's conjecture as to the statutory purpose – "to promote Indian self-government and economic self-sufficiency," Opp. at 9-11, is not at all apparent from these vague sources, as was made clear at the *Carcieri* oral argument, in Judge Brown's dissent below, and in the Eighth Circuit's decision in *South Dakota I*. *See* 11/3/08 Tr. at 39 (Roberts, C.J.) (suggesting that Section 5 is a "backward-looking" statute intended to compensate Tribes unintentionally harmed by the government's allotment policy); *accord* App. 28a (Brown, J., dissenting) (suggesting that Section 5's purpose may have been, among other things, to consolidate checkerboarded reservations); *South*

Dakota I, 69 F.3d at 883 (suggesting that Section 5's purpose was to provide homestead or agrarian land for landless Indians).[2]

f. Most important, then, is what the government does *not* say – namely, that there is ample guidance in Section 5's text, such that a court reviewing a land-in-trust decision can say whether that decision is in accord with Congressional will. Quite the opposite, Section 5 expressly vests the Secretary with unbridled "discretion" to take lands, limited only by the identity of the recipient: "for Indians." The government's submission does not so much identify guidance for the exercise of discretion as stand for the proposition that the nondelegation doctrine is no impediment to the exercise of such unbridled discretion. It is that conclusion – rejected by the Eighth Circuit in *South Dakota I*, Judge Brown in her

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[2] In claiming to fall within the scope of the tribes Congress sought to benefit when enacting Section 5, the Tribe disparages its own letter to DOI, a letter assuring the government that the Tribe was seeking federal acknowledgment provided that "there would never be casinos in our Tribe." *See* Tribe Opp. at 4 n.2. That letter was wholly consistent with the Tribe's constitution, also submitted to DOI, which stated that the Tribe is "the only Indian Tribe in the State of Michigan which has decided not to sacrifice the future of its membership to gaming interests and the changes to traditions in the community that gaming could bring." D.C. Cir. J.A. at 1863. That the Tribe could make such statements during the federal acknowledgment process, then immediately succeed in procuring the Secretary's approval to take land in trust for a casino, only serves to highlight the lack of principles limiting the Secretary's exercise of his discretion under Section 5.

dissent below, and at least 24 states – that this Court should review.

II. At a minimum, this Court should hold the petition until the Court issues its opinion in *Carcieri* and, if *Carcieri* is reversed, GVR the present case for further consideration in light of *Carcieri*.

Respondents also make several arguments to avoid the application of this Court's anticipated ruling in *Carcieri v. Kempthorne*, No. 07-526, and any change in the law resulting from that decision. Those arguments are equally unavailing.

a. The Tribe – but not the government – argues in a footnote that MichGO lacks standing to raise the *Carcieri* issue because MichGO's members are not within the "zone of interests" the IRA protects. Tribe Opp. at 13 n.8. But the prudential standing test is not demanding; it requires plaintiffs to demonstrate only that their interests are "arguably within the zone of interests" protected by the statute forming the basis of their claims. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). To satisfy prudential standing, the plaintiff need not show that, "in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff." *Nat'l Credit Union*, 522 U.S. at 492. "The essential inquiry is whether Congress 'intended

for a particular class of plaintiffs to be relied upon to *challenge* agency disregard of the law.'" *Clarke*, 479 U.S. at 399 (citation omitted, emphasis added).

MichGO easily satisfies prudential standing. MichGO's members are the individuals and businesses that will be most affected by the casino's impacts. D.C. Cir. J.A. at 21, 465, 1202, 1207-08. Thus, MichGO's members represent the very class of plaintiffs that Congress would have intended and expected to challenge the Secretary's "disregard of the law." *Clarke*, 479 U.S. at 399. Indeed, IRA regulations *require* the Secretary to consider the impact that a land-in-trust action will have on the surrounding community and to provide an opportunity for community members to communicate their concerns to the Secretary. 25 C.F.R. §§ 151.10-12. MichGO's members will be uniquely impacted by the government's erroneous land-in-trust decision (which is why the Tribe does not contest MichGO's constitutional standing) and are within IRA's zone of interests.

b. Anticipating that this Court may reverse the First Circuit's decision in *Carcieri*, the Tribe also argues that it was federally recognized and under federal jurisdiction in 1934. Tribe Opp. at 15. Earlier in the litigation, however, the Tribe acknowledged that it *lost* its federal recognition long before IRA's enactment. *See* Pet. 7, citing D.C. Cir. J.A. at 1772; *see also* Appeal Br. of Def.-Appellee Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians at 42 (the Tribe

"was not federally recognized and had no reservation when IGRA was enacted [in 1988]").

The Tribe's admissions in the lower courts are consistent with the administrative record. BIA determined that the Tribe's federal acknowledgement ceased in 1870 when the Tribe decided to discontinue its compliance with the Treaty of 1855.[3] 62 Fed. Reg. 38,113 (1997) (1870 "has been used as the date of the latest Federal acknowledgement for purposes of this finding to enable the petitioner to proceed under the provisions of section 83.8."). While BIA made this finding under the regulations governing federal acknowledgement, Tribe Opp. at 16, there is no basis for suggesting that BIA's determination was incorrect or even controversial. The Tribe never questioned this conclusion, nor would it: the federal government's finding was legally required for the Tribe to obtain federal acknowledgement in 1999, which in turn was a necessary prerequisite for having land taken in trust under IRA.

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[3] The National Congress of American Indians, which represents the Gun Lake Band, stated in an *amicus* brief submitted to the First Circuit *en banc* in *Carcieri*, that it is "false" to assume that a treaty between a tribe and the United States in the 1800s, such as the 1855 Treaty of Detroit, demonstrates that a tribe was recognized in 1934. Supp. *En Banc* Br. for *Amici Curiae* Nat'l Congress of Am. Indians, at 13 n.6 (Dec. 26, 2006).

Despite all this, the Tribe now seeks to disavow BIA's finding – and the Tribe's previous endorsement of it – arguing that according to BIA, the Tribe's federally recognized status has never been "lawfully terminated." Tribe Opp. at 4, 15, citing 62 Fed. Reg. 38,113-38,114. But all BIA stated was that it found no evidence that the Tribe was ever terminated by *legislation*, 62 Fed. Reg. 38,114, a determination necessary for BIA to federally acknowledge the Tribe under 25 C.F.R. § 83.3(e). The proper question is whether there was an effective termination by any other means, including administrative action. *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Attorney for the W. Dist. of Mich.*, 369 F.3d 960, 968 (6th Cir. 2004) (asking whether "the executive branch of the government illegally acted as if the [tribe's] recognition had been terminated, as evidenced by its refusal to carry out any trust obligations for over one hundred years").

Here, both Respondents have admitted that the Tribe's federal recognition was terminated no later than 1870. In fact, the Tribe has stated that it sought recognition in 1934 in response to IRA's enactment, but that "before the Tribe could take firm action the [BIA] . . . decided to *withhold recognition* for lower peninsula of Michigan Indian Tribes in the IRA process." D.C. Cir. J.A. at 1844. Accordingly, if this Court holds in *Carcieri* that the acquisition statute requires that a tribe be under federal jurisdiction and

federally recognized in 1934, the Tribe is ineligible for a land-in-trust acquisition.[4]

c. Finally, both Respondents argue that MichGO waived the *Carcieri* issue by failing to raise it until after this Court granted certiorari in *Carcieri*. Opp. at 12; Tribe Opp. at 14-15. Respondents say that MichGO should have been aware of the potential claim because *Carcieri* had been in litigation for five years when MichGO filed its Complaint. But as Respondents themselves note, *see* Opp. at 12; Tribe Opp. at 15, both the district court and the First Circuit in the *Carcieri* litigation *rejected* the statutory argument, consistent with the other Circuits that had addressed the question. *Carcieri v. Kempthorne*, No. 07-526, United States Opp. at 5 (Nov. 21, 2007) ("The court of appeals' decision is consistent with this Court's precedents and does not conflict with the decisions of any other circuit."). Because MichGO had no reason to anticipate a change in the established law, it should be allowed to raise the issue of the Tribe's ineligibility for a land-in-trust acquisition if this Court reverses in *Carcieri*.[5]

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[4] Significantly, the government in its opposition brief never endorses the Tribe's position. The government suggests that, if this Court reverses *Carcieri*, a remand would be necessary. Opp. at 13-14.

[5] The Tribe contends that the legal precedent permitting appellate consideration of arguments following an intervening change of law applies only to constitutional claims, Tribe Opp. at 15, but that is incorrect. In *Hormel v. Helvering*, 312 U.S. 552 (1941), for example, this Court permitted appellate

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Indeed, failing to apply *Carcieri* here would defeat the ends of justice, as it would result in the government taking land in trust for a tribe that was not recognized or under federal jurisdiction in 1934. Even if the government is correct that a remand is necessary to determine the Tribe's status as of 1934 (which MichGO disputes), there is no legal basis for refusing to apply the new rule simply because it would require a remand. It would be incongruous and contrary to the public interest to apply *Carcieri*, as the Tribe proposes, to all pending land-in-trust decisions *except* this one. *See Standard Indus., Inc.*, 397 U.S. at 587-88 (setting forth three-part test for considering new arguments on appeal, including whether an important public interest is served); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (change in law applies to all cases still open on direct review). It would therefore be wholly appropriate for this Court to hold MichGO's petition pending a decision in *Carcieri*, and, if *Carcieri* is reversed, GVR the

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consideration of a purely statutory argument raised for the first time on appeal, following an intervening decision of this Court that changed the statute's interpretation. The Court held that any other decision "would defeat rather than promote the ends of justice." *Id.* at 560 (remanding for consideration of additional evidence); *see also Standard Indus., Inc. v. Tigrett Indus., Inc.*, 397 U.S. 586, 587 (1970) (Black, J., dissenting) ("the Court has permitted consideration on appeal of statutory arguments not presented below").

present case for further consideration in light of *Carcieri*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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