17-8

No. _____

Supreme Court U.S.
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In The

Supreme Court of the United States

TOWN OF VERNON, NEW YORK,

Petitioner,

v.

UNITED STATES OF AMERICA, Individually and as Trustee of the Goods, Credits and Chattels of the Federally Recognized Indian Nations and Tribes Situated in the State of New York, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a tribe that opted out of the Indian Reorganization Act can have its status under the Act revived under the Indian Land Consolidation Act, 25 U.S.C. § 2202, even though the United States did not hold land in trust for that tribe at the time the tribe sought a land-in-trust acquisition.

2. Whether the land-in-trust provision of the Indian Reorganization Act, 25 U.S.C. § 5108, exceeds Congress' authority under the Indian Commerce Clause, Art. I, § 8, cl. 3.

3. Whether § 5108's standardless delegation of authority to acquire land "for Indians" is an unconstitutional delegation of legislative power.

4. Whether the federal government's control over state land must he categorically exclusive for the Enclave Clause, Art. I, § 8, cl. 17, to prohibit the removal of that land from state jurisdiction.

PARTIES TO THE PROCEEDING

Petitioner is the Town of Vernon, New York. Respondents are the United States of America, Individually and as Trustee of the Goods, Credits and Chattels of the Federally Recognized Indian Nations and Tribes Situated in the State of New York, Sally M.R. Jewell, in her Official Capacity as Secretary of the United States Department of the Interior, Michael L. Connor, in his Official Capacity as Deputy Secretary of the United States Department of the Interior and exercising his delegated authority as Assistant Secretary of the Interior for Indian Affairs, Elizabeth J. Klein, in her Official Capacity as the Associate Deputy Secretary of the United States Department of the Interior and exercising her delegated authority as Assistant Secretary of the Interior for Indian Affairs, and the United States Department of the Interior.

Town of Verona, Abraham Acee, and Arthur Stife, all Plaintiffs before the district court and the Second Circuit, are not parties to this Petition.

RULE 29.6 STATEMENT

The Town of Vernon, New York, represents that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 841 F.3d 556 and reproduced at App. A-1 to 44. The opinions of the district court are not reported but are available at 2015 WL 1400291 (N.D.N.Y. March 26, 2015), reproduced at App. B-1 to 24 and 2009 WL 3165556 (N.D.N.Y. Sept. 29, 2009), reproduced at App. C-1 to 29. The opinion in the consolidated case, *Upstate Citizens for Equality, Inc., et al. v. United States, et al.*, is not reported but is available at 2015 WL 1399366 (N.D.N.Y. March 26, 2015), reproduced at App. D-1 to 31.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 2016. The Town of Vernon's petition for panel rehearing or, in the alternative, for rehearing *en banc* was denied on January 27, 2017. This Court granted an extension to file the Petition on April 17, 2017 and a second extension on May 15, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 1 of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, § 8, Clause 3 of the Constitution gives Congress the authority "[t]o regulate Commerce . . . with the Indian Tribes."

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 5108 (formerly § 465), provides, in pertinent part:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

The provisions of 25 U.S.C. § 5108 are reproduced in full at App. E-1.

Article I, § 8, Clause 17 of the United States Constitution provides:

> Congress shall have the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of

the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings."

25 U.S.C. § 2201(1) provides as follows:

"Indian tribe" or "tribe" means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds land in trusts.

25 U.S.C. § 2202 provides as follows:

The provisions of section 5108 of this title shall apply to all tribes notwithstanding the provisions of section 5125 of this title: *Provided*, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s).

INTRODUCTION

This litigation arises from the federal government's decision to remove 13,000 acres of land from the sovereign taxing and regulatory jurisdiction of the State of New York and its local governments, and to place that land under the sovereign jurisdiction of the United States, in trust for the Oneida Indian Nation ("OIN"). The Second Circuit's approval of this massive

land grab raises four questions of federalism and congressional authority that warrant this Court's immediate review.[1]

The first question involves the interplay between the Indian Reorganization Act ("IRA") and the Indian Land Consolidation Act ("ILCA"), 25 U.S.C. § 2202. The IRA does not apply to a tribe that votes to reject the IRA's application. 25 U.S.C. § 5125. But the ILCA later applied § 5 to dissenting "tribes," 25 U.S.C. § 2202, defined as any "Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States *holds lands in trust*." 25 U.S.C. § 2201(1) (emphasis added). Here, it is undisputed that the OIN (1) affirmatively voted to reject the IRA, and (2) had no lands held in trust by the federal government before the disputed transaction at issue. The Second Circuit's approval of the Oneida land-in-trust application rewrites this plain, statutory language.

The second two questions presented emanate from § 5 of the IRA, which authorizes the Secretary of the Interior to extinguish state sovereignty over land and to take it in trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. There are two fundamental problems with § 5. First, the land-in-trust power exceeds the federal government's limited power "[t]o regulate commerce . . . with the Indian tribes" under the

[1] There is a separate petition pending in this case that presents additional questions. *Upstate Citizens for Equality, Inc., et al.* v. *United States, et al.*, No. 16-1320. The United States requested additional time to respond, and the brief in opposition in that case is now due July 3, 2017.

Indian Commerce Clause, Art. I, § 8, cl. 3. Although some have characterized that federal power as "plenary," the text of the Clause does not say that. And it is inconceivable that the constitutional ratifiers envisioned the federal government using the Indian Commerce Clause to remove from state and local jurisdiction massive tracts of land – both on and off historic reservations – that wealthy tribes have purchased using casino revenues.

Second, § 5 delegates this extraordinary land-in-trust power with no parameters whatsoever, simply directing that land be taken "for Indians" in the "discretion" of the Secretary. 25 U.S.C. § 5108. Although the notion that Congress cannot delegate its legislative power to the executive branch has fallen out of favor in recent years, circuit courts and Justices of this Court alike have questioned whether § 5 is a bridge too far. *E.g.*, *South Dakota* v. *United States DOI*, 69 F.3d 878 (8th Cir. 1995), *vacated and remanded*, 519 U.S. 919 (1996) ("*South Dakota I*"); *Florida* v. *United States Dep't of Interior*, 768 F.2d 1248, 1256 (11th Cir. 1985); *Michigan Gambling Opposition* ("*MICHGO*") v. *Kempthorne*, 525 F.3d 23, 37 (D.C. Cir. 2008) (Brown, J., dissenting); *South Dakota I*, 519 U.S. at 920-23 (Scalia, J., dissenting from remand) (Justices Scalia, Thomas, and O'Connor urged the Court to resolve § 5's constitutionality). Over the last several years, 24 states have raised the same concern.[2] A review of § 5's constitutionality –

[2] *See Shivwits Band of Paiute Indians* v. *Utah*, No. 05-1160 (Utah; *amici curiae* brief of Rhode Island, Alabama, Arkansas, Colorado, Idaho, Iowa, Kansas, Louisiana, Michigan, Missouri,

which this Court once deemed necessary in *South Dakota I* but never completed due to the United States' post-acceptance maneuvering which resulted in the case being remanded with no decision – is long overdue.

The fourth question involves a circuit split regarding the Enclave Clause, Art. I, § 8, cl. 17, which limits the federal government's authority to remove lands from a state's sovereign jurisdiction. The First Circuit has held that a land-in-trust acquisition is not within the Enclave Clause's scope. *Carcieri* v. *Kempthorne*, 497 F.3d 15 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 379 (2009). The Second Circuit here held the Enclave Clause *is* applicable to such a transaction but declined to apply the Clause because the placement of land in trust for a tribe does not eliminate absolutely *all* state and local regulatory authority, relying on *Nevada* v. *Hicks*, 533 U.S. 353 (2001). This Court should reject the Second Circuit's expansion of the federal government's power to confiscate state lands.

These questions are not merely academic. Just since 2009, the federal government has removed more than half-a-million acres from local jurisdiction via land-in-trust transactions. These transactions feed a tribal casino industry that exceeds $30 *billion* per year, revenue that is then used to purchase more land to

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Nevada, New York, North Dakota, Ohio, South Dakota, and Wyoming); *Carcieri* v. *Salazar*, No. 07-526 (2008) (Rhode Island; *amici curiae* brief of Alabama, Alaska, Arkansas, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Massachusetts, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Utah).

take in trust. Petitioner does not question the policies underlying this cycle of casinos and land acquisitions. But they must be implemented within the limits of federal law. These issues are important and recurring. The Petition should be granted.

STATEMENT OF THE CASE

A. The Land Grab

This case stems from the OIN's attempt to extinguish state taxation and regulatory controls over 13,000 acres of land (an area greater than one-third of the entire District of Columbia), purchased with casino revenues. On April 4, 2005, this Court rejected the tribe's claim of tribal sovereignty over fee land it purchased in open market purchases that had been under state and local jurisdiction for two centuries. *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 214 (2005). Less than one week later, the tribe asked the Secretary of Interior to take that same land in trust under IRA § 5, including the land on which the tribe's Turning Stone Casino is located. The tribe's present attempt to extinguish 200 years of state and local jurisdiction over these lands is no less burdensome to local governments and neighboring land owners than the original attempt this Court rejected in 2005.

B. The Indian Reorganization Act

In 1934, Congress enacted the IRA, significantly changing federal policy toward Indians. Before the

IRA, the federal government had pursued a policy established by the Indian General Allotment Act, Ch. 119, 24 Stat. 388, which sought "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992). The IRA ended the allotment policy by prohibiting further allotments of reservation land. 25 U.S.C. § 5101. In addition, IRA § 5 allowed the Secretary, in his or her "discretion," to acquire new lands "for Indians." 25 U.S.C. § 5108.

C. The Indian Lands Consolidation Act

Section 18 of the IRA contained a provision that allowed tribes to vote against the application of the IRA to their tribe. 25 U.S.C. § 5125 (formerly § 576). Tribes that opted out of the IRA were ineligible to use § 5 to have land placed into trust for their benefit.

Nearly 50 years later, Congress enacted the ILCA. The ILCA allowed the Secretary to use IRA § 5 for the benefit of an opt-out "tribe," 25 U.S.C. § 2202, but it defined "tribe" narrowly to include only an "Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States *holds lands in trust*." 25 U.S.C. § 2201(1) (emphasis added). So if a tribe opted out of the IRA and now wishes the Secretary to use § 5 land-in-trust power, the tribe must first demonstrate that it had land held in trust for its benefit at the time of submitting its fee-to-trust

application. It is undisputed that the OIN (1) affirmatively voted to disavow the IRA's application, and (2) did not hold land in trust at the time it submitted its present fee-to-trust application.

D. Proceedings in the District Court

In 2008, the Town of Vernon and other plaintiffs, in separately filed cases, challenged the Secretary's decision to take more than 13,000 acres of land into trust for the Tribe. The plaintiffs challenged the Secretary's ability to take the land into trust asserting, among other things, that the decision violated the United States Constitution and the Tribe was not eligible to have land placed in trust pursuant to § 5 of tbe IRA, even if it was constitutional. The district court granted the United States' motions for summary judgment in both cases, ruling that the IRA was constitutional and that the tribe was eligible to have its land placed into trust under § 5 so as to avoid state and local jurisdiction. App. B-1 to 24; App. C-1 to 29; and App. D-1 to 31.

E. Second Circuit's Opinion

The Second Circuit consolidated the two lawsuits and affirmed. It held that despite the tribe's previous vote to reject the IRA, the tribe's eligibility for a § 5 land-in-trust transaction was later revived under § 2202 of the ILCA. App. A-1 to 44. Although it is undisputed that the tribe did not have "lands in trust" at the time it submitted its application, the Second Circuit ruled that the "land in trust" requirement was

only applicable to an Indian "community" and that a "tribe" needs to make no showing at all. App. A-41.

The Second Circuit also concluded that "[n]either principles of state sovereignty nor the Constitution's Enclave Clause – which requires state consent for the broadest federal assertions of jurisdiction over land within a state – prevents the federal government from conferring on the Tribe jurisdiction over these trust lands." App. A-4. The Second Circuit believed that the Indian Commerce Clause gave plenary power to the federal government relative to Indian affairs and the IRA is, therefore, constitutional. App. A-1 to 44. With respect to the Enclave Clause, the Second Circuit ruled that state consent to the loss of its regulatory authority is needed only when the federal government takes "exclusive" jurisdiction over land within a state. App. A-29. Because federal control over land placed in trust pursuant to the IRA is not exclusive, said the court, the Enclave Clause is inapplicable to the land-in-trust transaction at issue here. App. A-1 to 44.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant the Petition to Correct the Second Circuit's Rewriting of the Indian Lands Consolidation Act.

The federal government did not force the IRA on any tribe. Instead, the government gave each tribe the opportunity to disavow the IRA's application by vote. 25 U.S.C. § 5125. The OIN did just that in 1936. 841

F.3d 556, 574, App. A-1 to 44. Absent a different governing rule, the tribe is ineligible for an IRA § 5 land-in-trust acquisition.

The federal government relies on the ILCA for that different governing rule. The ILCA allows disclaiming tribes like the Oneida to still take advantage of IRA § 5. 25 U.S.C. § 2202. But the ILCA defined "tribe" very specifically, to include only an "Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States *holds lands in trust*." 25 U.S.C. § 2201(1) (emphasis added). So the ILCA's restorative power is limited to those tribes for which the United States held "land in trust" at the time of the § 5 fee-to-trust application.

It is undisputed that at the time the Oneida tribe submitted its § 5 application, it had no land in trust. 841 F.3d 556, 574, App. A-1 to 44. That should have been dispositive. But the Second Circuit discarded the plain language of § 2201(1) and rewrote it so that the phrase "holds lands in trust" applies only to an Indian "community," not a tribe. App. A-41. To reach that result, the court applied the last-antecedent rule, which states that a qualifying word or phrase refers to the language immediately preceding the qualifier unless common sense shows it was meant to apply differently. App. A-1 to 44; *see Barnhart* v. *Thomas*, 540 U.S. 20, 27-28 (2003) (describing the rule).

But here, common sense points in the opposite direction. The terms "tribe," "band," "group," "pueblo,"

and "community" are essentially synonymous; all are entities eligible for a land-in-trust acquisition. There is no policy or other reason why an Indian "community" would be treated any differently than an Indian "tribe." Accordingly, the last-antecedent rule does not apply.

The situation here is no different than the Secretary's interpretation of 25 U.S.C. § 5130(a) (formerly § 479). In that provision, Congress defined the term "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." As in ILCA, there is no comma after the word "community," and the last-antecedent rule might suggest that the phrase "that the Secretary of the Interior acknowledges to exist as an Indian tribe" applies only to the last word in the series: "community." Instead, the Secretary interprets the acknowledgement requirement to *every* term in the list. *See* List of Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 47 Fed. Reg. 53, 130 (1982). Section 2201(1) should be interpreted exactly the same way. Otherwise, ineligible tribes that voluntarily opted out of the IRA will continue to invoke § 5 as though the IRA still applied to them.

What the Secretary appropriately did in interpreting § 5130(a) was to apply a different canon of statutory construction: the series-qualifier principle. *See, e.g.*, *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920). Under the series-qualifier principle, when "there is a straightforward, parallel construction

that involves *all* nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (Thompson/West 2012).

This Court's precedents identify two signals indicating when the series-qualifier principle applies rather than the last-antecedent rule. First, "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920). Second, the "modifying clause appear[s] . . . at the end of a single, integrated list." *Jama* v. *Immigration and Customs Enf't*, 543 U.S. 335, 344 n.4 (2005). When both signals are present, the series-qualifier rule produces a "natural" reading. *Paroline* v. *United States*, 134 S. Ct. 1710, 1721 (2014).

Section 2201(1) contains both signals. The modifying phrase "for which, or for the members of which, the United States holds lands in trust" applies seamlessly to every word in the series (tribe, band, group, pueblo, or community). And the modifying phrase appears at the end of a single, integrated list; the nouns in the list are all "integrated" in function and content. Moreover, no incongruity results from applying the modifying phrase to every term in the list; conversely, it makes no sense at all to apply the modifying phrase only to an "Indian . . . community."

In addition to grammatical analysis, applying the modifier to the entire list is consistent with Congress' previously expressed desire to limit the applicability of IRA § 5. As the Court has held, only tribes under federal jurisdiction in 1934 are eligible for fee-to-trust acquisitions pursuant to the IRA. *Carcieri*, 555 U.S. at 395. Both the IRA's temporal requirement and the ILCA's existing trust-land requirement are designed to prevent exactly what is occurring here: groups with limited relationships with the federal government, decades after these laws were enacted, purchasing huge tracts of land, both on and off historic reservations, and seeking to place that land outside of all state and local jurisdiction. Both statutes allow the federal government to take land in trust only for tribes with a close and continuous relationship with the United States. Under the ILCA, tribes that opted out of the IRA can demonstrate that close relationship by showing it has at least some land under federal supervision at the time it seeks to place additional land in trust.

As this Court has already determined, "[t]he appropriateness of the relief OIN here seeks must be evaluated in light of the long history of state sovereign control over the territory. From the early 1800's into the 1970's, the United States largely accepted, or was indifferent to, New York's governance of the land in question. . . ." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 214 (2005). Congress had similar concerns when it enacted both the IRA and the ILCA and placed appropriate limits on their application. This Court should grant the Petition and correct the Second Circuit's rewriting of § 2201(1).

II. The Court Should Grant the Petition to Decide Whether § 5 of the Indian Reorganization Act Exceeds Congress' Power Under the Indian Commerce Clause.

When the Secretary takes land in trust for Indians, that action precludes states from asserting fundamental aspects of their sovereignty on what is then deemed Indian Country. *Alaska* v. *Native Village of Venetie*, 522 U.S. 520, 527 n.1 (1988); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324,. 332 (1983). "Land held in trust is generally not subject to (1) state or local taxation, *see* 25 U.S.C. § 5108; (2) local zoning and regulatory requirements, *see* 25 C.F.R. § 1.4(a); or, (3) state criminal and civil jurisdiction, unless the tribe consents to such jurisdiction, *see* 25 U.S.C. §§ 1321(a), 1322(a)." *Connecticut ex rel. Blumenthal* v. *United States DOI*, 228 F.3d 82, 85-86 (2d Cir. 2000). Furthermore, "'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the states.'" *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (quoting *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980)). *Shivwits Band of Paiute Indians* v. *Utah*, 428 F.3d 966, 985 (10th Cir. 2005) ("[S]tates are permitted to enforce regulations when Congress explicitly delegates authority to do so."). *Id.* In other words, IRA § 5 is extraordinarily destructive to states. If they are to retain any jurisdiction, it is at the mercy of the federal government and only when "Congress explicitly delegates" such authority.

The Second Circuit nonetheless upheld § 5 as within Congressional authority under the Indian Commerce Clause. The Second Circuit cited *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989) for the proposition that the Indian Commerce Clause grants Congress plenary authority over all Indian affairs. But the word "plenary" (or any synonym to it) appears nowhere in the Clause's actual text; the Clause states only that Congress has the power "[t]o regulate Commerce . . . with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3.

In addition, it is implausible to say that the power to "regulate Commerce . . . with the Indian Tribes" somehow vests the federal government with plenary authority over Indian affairs. If so, then Congress must also enjoy a plenary power over all foreign nations as well, since Congress can regulate commerce with them, too. Worse, if Congress has plenary power over Indian affairs, then it must also have plenary power over the states, because Congress possesses the power to regulate commerce among them. *Ibid.*

Add to this the fact that there is no historical evidence supporting the view that the original meaning of the Indian Commerce Clause granted Congress a plenary power over Indian tribes. To the contrary, even the Continental Congress' much broader power (to regulate trade and manage all affairs relating to Indians) was never understood as granting a plenary power.

Finally, it is well understood that the Commerce Clause itself is not plenary. *E.g.*, *United States* v. *Morrison*, 529 U.S. 598, 619 (2000) (rejecting "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"); *United States* v. *Lopez*, 514 U.S. 549, 552 (1995) (Commerce Clause did not authorize a federal criminal conviction for violation of the Gun-Free School Zones Act of 1990). It is anomalous to say that while the Commerce Clause does not grant the federal government plenary power over the states, it does grant Congress a general police power over the country's Indian tribes.

"At one time, the implausibility of this assertion [of plenary authority] at least troubled the Court, see, *e.g.*, *United States* v. *Kagama*, 118 U.S. 375, 378-379, 30 L. Ed. 228, 6 S. Ct. 1109 (1886) (considering such a construction of the Indian Commerce Clause to be "very strained")." *United States* v. *Lara*, 541 U.S. 193, 224 (2004) (Thomas, J., concurring). This Court has even concluded that "[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 84 (1977), *citing United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946).

The Court has also placed some limits on the Indian Commerce Clause. For example, the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(C) ("IGRA"), passed by Congress under the Indian Commerce Clause, imposes upon the states a duty to negotiate in good faith with an Indian tribe toward the formation of a

compact, 25 U.S.C. § 2710(d)(3)(A), and authorizes a tribe to bring suit in federal court against a state in order to compel performance of that duty. 25 U.S.C. § 2710(d)(7); *Seminole Tribe* v. *Fla.*, 517 U.S. 44, 47 (1996). Notwithstanding Congress' clear intent to abrogate the states' sovereign immunity in the IGRA, this Court held "the Indian Commerce Clause does not grant Congress that power." *Id. Accord, e.g., Adoptive Couple* v. *Baby Girl*, 133 S. Ct. 2552, 2565-67 (2013) (Thomas, J., concurring) ("neither the text nor the original understanding of the Clause supports Congress' claim to such 'plenary' power"); *United States* v. *Lara*, 541 U.S. 193, 224 (2004) (Thomas, J., concurring) ("I cannot agree that the Indian Commerce Clause 'provide[s] Congress with plenary power to legislate in the field of Indian affairs.'") (quotation omitted).

It is well past time to revisit the question of Congress' power under the Indian Commerce Clause, because the IRA § 5 power is so destructive to federalism. As far back as 1995, when this Court first accepted, but never decided, a petition for review in a case addressing the constitutionality of the IRA, thousands of applications were pending before the Secretary to acquire additional lands pursuant to § 5. *See* 64 Fed. Reg. 17574, 17580 (1999) (in 1996, 6941 applications were filed with the Secretary to place lands in trust). More recently, with the explosion of tribal gaming, the Bureau of Indian Affairs ("BIA") has processed 2,265 trust applications and restored 542,000 acres of land into trust since 2009 alone. Press Release: Obama

Administration Exceeds Ambitious Goal to Restore 500,000 Acres of Tribal Homelands, Oct. 12, 2016. And in 2016, the National Indian Gaming Commission confirmed tribes are now generating nearly $30 billion a year in gaming revenue.[3]

Casino profits are not the only source of tribal revenue enabling tribes to purchase massive amounts of land for the purpose of removing it from state and local jurisdiction. The United States Department of Health and Human Services – FY 2016 Funding states: "The President's Fiscal Year (FY) 2016 budget proposes $20.9 billion, a $1.5 billion (8%) increase over the 2015 enacted level, across a wide range of Federal programs that serve Tribes including education, social services, justice, health, infrastructure, and stewardship of land, water, and other natural resources."[4]

A recent Government Accountability Office ("GAO") report also noted a federal investigation into two separate agreements between groups of tribes and two BIA regional offices, designed to expedite the processing of the applications submitted by the tribes that paid money to their regional BIA office. U.S. Gov't Accountability Office, GAO-06-781, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications* (2006) at p. 20. Extraordinarily, these tribes

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[3] https://www.nigc.gov/commission/gaming-revenue-reports

[4] https://www.ihs.gov/redesign/includes/newihstheeme/display_objects/documents/HHSTribalFY2016Budget.pdf

were actually paying the salaries of the BIA staff "dedicated to processing consortium members' land in trust applications." *Id.*

Petitioner does not suggest that this kind of impropriety occurred here. Rather, the growth of tribal gaming resulting in millions of acres being purchased by tribes to be placed into trust, and the extreme rubberstamping of fee-to-trust applications, beg for closer scrutiny. That scrutiny should begin at the foundation of the process, namely, whether Congress bad authority under the Indian Commerce Clause to enact IRA § 5.

III. The Court Should Grant the Petition and Decide Whether IRA § 5 Is an Unconstitutional Delegation of Power.

The non-delegation doctrine is one of the cornerstones of separation of powers jurisprudence, *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989), existing since the days of Locke. *See* John Locke, *Second Treatise of Government* 87 (R. Cox ed. 1982) ("The legislat[ure] can have no power to transfer their authority of making laws, and place it in other hands."). The doctrine is codified in the Constitution's text, which vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States," U.S. Const. Art. 1, § 1, and the "text permits no delegation of those powers. . . ." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). To avoid an unconstitutional delegation when conferring decision-making authority on an agency,

Congress is required to articulate, "by legislative act," an intelligible principle to direct the person or body authorized to act. *Id.* at 472 (quoting *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928)).

It has been nearly 82 years since this Court last struck down a statute on non-delegation grounds, *see Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp* v. *United States*, 295 U.S. 495 (1935), leaving the doctrine's continuing viability in doubt. But the present case – which involves a statute enacted by the same depression-era Congress that enacted the unconstitutional legislation in *Panama Refining* and *A.L.A. Schechter* – provides the ideal vehicle to affirm the doctrine's continued vitality. As the Eighth Circuit observed in *South Dakota* v. *United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995) ("*South Dakota I*"): "It is hard to imagine a program more at odds with separation of powers principles" than § 5 of the IRA. 69 F.3d at 885.

In *South Dakota I*, 519 U.S. 919, the question presented to, and accepted by this Court, was "[w]hether section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. 5108, which authorizes the Secretary of the Interior to acquire interest in real property 'for the purpose of providing land for Indians,' is an unconstitutional delegation of legislative power." That is the exact question at issue in this case. Unfortunately, because of last minute maneuvering by the federal government, this Court in *South Dakota I* never answered that question.

It is the complete lack of any discernible intelligible principle in § 5's text that distinguishes this statute from others this Court has upheld over nondelegation challenges in the past 82 years. *MICHGO*, 525 F.3d at 34 (Brown, J., dissenting). Section 5 does not contain even the very broad "public interest," "public health," "fair and equitable," or "just and reasonable" standards that have previously represented the outer limits of a constitutional delegation of legislative power. *See, e.g.*, *Whitman*, 531 U.S. at 475-76 (statute required EPA "to set air quality standards at the level that is 'requisite' . . . to protect the public health with an adequate margin of safety"); *Yakus* v. *United States*, 321 U.S. 414, 420 (1944) (statute directed agency to set prices that are "fair and equitable"); *Federal Power Comm'n* v. *Hope Nat. Gas Co.*, 320 U.S. 591, 600-01 (1944) (statute directed agency to set rates that are "just and reasonable"); *National Broad. Co.* v. *United States*, 319 U.S. 190, 225 (1943) (statute directed agency to grant broadcast licenses in the "public interest").

Instead, § 5 simply identified the beneficiaries on whose behalf the government should hold the land: "for Indians." 25 U.S.C. § 5108. "[W]hen Congress authorize[d] the Secretary to acquire land in trust 'for Indians,' it [gave] tbe agency no 'intelligible principle,' no 'boundaries' by which the public use underlying a particular acquisition may be defined and judicially reviewed." *South Dakota I*, 69 F.3d at 883.

The Eighth Circuit in *South Dakota I* was the first appellate court to consider § 5's constitutionality.

Unable to discern an intelligible principle, the court was forced to conclude that § 5 "define[s] no boundaries to the exercise of this [land acquisition] power." 69 F.3d at 882. "Indeed," the court observed, § 5 would "permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." *Id.* "The result is an agency fiefdom." *Id.* at 885. Before the Eighth Circuit's ruling, the Secretary of the Interior had taken the position that IRA land acquisitions were not subject to judicial review. *South Dakota I*, 519 U.S. at 920 (Scalia, J., dissenting). Following the decision, the Department of the Interior promptly changed course and promulgated a new regulation providing for judicial review. The United States then petitioned this Court to vacate and remand the Eighth Circuit's decision, and this Court granted that request. *Id.* at 920-21.

In dissent, Justice Scalia, joined by Justices Thomas and O'Connor, urged the Court to hear the merits of the non-delegation challenge, finding it "inconceivable that this reviewability-at-the-pleasure-of-the-Secretary could affect the constitutionality of the IRA in anyone's view, including that of the Court of Appeals." *Id.* at 922-23. As 16 state *amici* noted in support of the petition for certiorari in *Carcieri*, "No other court has challenged [the Eighth Circuit's conclusion in *South Dakota I*], or found any significant limitation on the trust power in the text of the IRA." Brief of the States of Alabama, *et al.* as Amici Curiae Supporting Petitioners, *Carcieri* v. *Kempthorne*, No. 07-526, at 21 (Nov. 21, 2007).

On remand, a different Eighth Circuit panel upheld § 5's constitutionality. *South Dakota* v. *United States Dep't of Interior*, 423 F.3d 790, 799 (8th Cir. 2005) [*South Dakota II*]. The *South Dakota II* panel invoked the same suspect historical and statutory "context" and legislative history that Judge Brown thoroughly discredited in her dissenting opinion in *MICHGO*. *Id.* at 797-99. And a primary motivator appeared to be the fact that this Court has struck down only two statutory provisions on non-delegation grounds, and not since 1935. *Id.* at 795. In fact, one or more of the threads of this questionable analytical triumvirate – historical/statutory context, legislative history, and the length of time since the last successful non-delegation challenge – can be found in every circuit decision holding § 5 constitutional. *United States* v. *Roberts*, 185 F.3d 1125, 1137 (1999); *Carcieri*, 497 F.3d at 42-43.

In *Florida* v. *United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), the Eleventh Circuit expressly held that § 5 was an unreviewable exercise of discretion because the statute "does not delineate the circumstances under which exercise of this discretion is appropriate. . . ." *Id.* at 1256. Though not specifically resolving a non-delegation challenge, the Eleventh Circuit's decision in *Florida* is wholly consistent with the reasoning of *South Dakota I* and Judge Brown's dissent in *MICHGO*, and conflicts with the decisions of numerous other circuits which have rejected the non-delegation challenge to § 5. *Carcieri* v. *Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007); *South Dakota* v.

United States Dep't of Interior, 423 F.3d 790, 799 (8th Cir. 2005) ("*South Dakota II*"); and *United States* v. *Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999). Certiorari is warranted.

Ironically, as originally proposed, IRA contained standards which very likely would have rendered it constitutional.[5] While the original bill tried to articulate basic policy choices and impose real boundaries, the bill was rejected because legislators could not agree on its purpose. *Compare* House Hearings at 1-14 *with* 48 Stat. 984 (1934).[6] Given Congress thereafter, deliberately eliminated all intelligible standards

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[5] The original draft of the bill provided for Indian lands in Title III. *Readjustment of Indian Affairs: Hearings on H.R. 7902 before the House Committee on Indian Affairs*, 73d Cong., 2d Sess. 8 (1934) (hereinafter "House Hearings"). Section 1 set out a detailed declaration of policy. *Id.* Section 6 required the Secretary to "make economic and physical investigation and classification of the existing Indian lands, of intermingled and adjacent non-Indian lands and of other lands that may be required for landless Indian groups or individuals" and to make "such other investigations as may be needed to secure the most effective utilization of existing Indian resources and the most economic acquisition of additional lands." *Id.* at 8-9. The Secretary was further required to classify areas which were "reasonably capable of consolidation" and to "proclaim the exclusion from such areas of any lands not to be included therein." *Id.* at 8. Section 8 allowed the tribe to acquire the interest of any "non-member in land within its territorial limits" when "necessary for the proper consolidation of Indian lands." *Id.* at 9.

[6] The detailed statement of general policy for the Act as a whole was eliminated. Section 1 was entirely deleted. Section 7, the predecessor to 25 U.S.C. § 5108, was stripped of standards and renumbered Section 5.

from the original bill's text, and enacted a full bill substitute, it can hardly be said that Congress articulated such standards in the 1934 legislative history. While Congress is empowered to enact legislation to address societal problems, it is Congress' responsibility to devise solutions that pass constitutional muster, and to specify those solutions in the statutory text, rather than ceding that authority to the Executive branch.

The need to define boundaries within which the Secretary must act, is also highlighted by the fact that despite the 25 C.F.R. § 151 regulations relating to the criteria the BIA is supposed to consider before accepting land into trust, the BIA almost always accepts the applications without question. For example, from 2001 through 2011, 100% of the proposed fee-to-trust acquisitions submitted to the Pacific Region BIA were granted. Kelsey J. Waples, *Extreme Rubber-Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 PEPP. L. REV. 1 (2013), at 278. Additionally, for all 111 decisions, the BIA did not conclude that a single § 151 factor weighed against acceptance of the land into trust. *Id.* Clearly, the system is broken.

Petitioner acknowledges that it did not directly raise the non-delegation issue to the lower courts. In the companion case, however, which was consolidated with this case for the purpose of appeal, the plaintiffs did specifically argue "that § 5 of the IRA violates the non-delegation doctrine." *Upstate Citizens for Equal., Inc.* v. *Jewell*, 2015 WL 1399366, *2, App. D-6. And the extraordinary ramifications of the federal government's attempt to remove these 13,000 acres from state

and local jurisdiction justify consideration of all arguments. As this Court recognized in *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197 (2005), "[w]e resolve this case on considerations not discretely identified in the parties' briefs. But the question of equitable considerations limiting the relief available to OIN, which we reserved in *Oneida II*, is inextricably linked to, and is thus 'fairly included' within, the questions presented." *Id.* at 214, n.8. Moreover, the Secretary's conclusion that § 5 applies even to wealthy casino tribes no longer in need of federal assistance, in one of the original 13 colonies, for which there never was a federal reservation, and whose "condition [was] entirely peculiar," begs for restraints on tbe Secretary's authority to place land in trust.

The non-delegation argument also goes to the "fundamental principles of the structure of the federal government" and the separation of powers, a subject certainly justifying Supreme Court review regardless of when the issue was first raised. Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1582-83 (2012), *citing Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535-36 (1962). This is especially true when the interpretation of the applicable statutory provisions requires no factual analysis whatsoever. *Id.* at 1563, *citing Kimes* v. *Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996). Instead, the non-delegation argument relates directly to an issue of constitutional magnitude. This too has been determined to be the proper area of

review of an issue not raised to the lower courts. *Id.* at 1564, *citing Real Estate Ass'n for Mass., Inc.* v. *National Real Estate Information Services*, 608 F.3d 110, 125 (1st Cir. 2010).

The non-delegation argument is also not a new claim but rather a new argument as to why § 5 is unconstitutional. As the Court noted in *Kamen* v. *Kemper Fin. Servs.*, 500 U.S. 90 (1991), "the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Id.* at 99. That is especially true where, as in this case, the exact issue was raised and briefed to the district court.

Finally, the non-delegation issue is of public interest and likely to return to this Court given the proliferation of tribal gaming and the wealth it creates for tribes to purchase tremendous quantities of land. *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120 (1988). In short, all of the factors which would counsel toward the Court accepting an issue, regardless of its treatment below, are present here.

IV. The Court Should Grant the Petition and Resolve a Circuit Conflict Regarding the Scope of the Enclave Clause.

The Enclave Clause, Art. I, § 8, cl. 17, allows Congress to exercise authority over certain property, but only with the consent of the affected state. The First Circuit in *Carcieri* v. *Kempthorne*, 497 F.3d 15 (1st Cir.

2007), *rev'd on other grounds*, 555 U.S. 379 (2009), held that the Clause does not apply to a land-in-trust transaction, no matter the extent of a state's loss of its jurisdiction.

Here, the Second Circuit concluded that the Clause *was* generally applicable to the land-in-trust transaction. But it nonetheless upheld the federal government's action because, in the Circuit's view, the Clause only applies when the federal government takes *exclusive* jurisdiction over land within a state. App. A-1 to 44 (*citing Paul* v. *United States*, 371 U.S. 245, 263 (1963)).

Yet only a year earlier, the Second Circuit had concluded that tribal jurisdiction "is a combination of tribal and federal jurisdiction over land, to the *exclusion* of the jurisdiction of the state." *Citizens Against Casino Gambling* v. *Chaudhuri*, 802 F.3d 267, 279-80 (2d Cir. 2015) (emphasis added). That is because the Constitution "vests *exclusive* legislative authority over Indian affairs in the federal government" and that when it comes to dealing with Native Americans, "there is no room for state regulation." *Id.* (emphasis added, *citing* Cohen's *Handbook of Federal Indian Law*, § 6.03(1)(a) (Nell Jessup Newton Ed. 2012). The Second Circuit's conclusion in *Chaudhuri* is consistent with that of other circuits, which have routinely held that the federal government and tribe have "exclusive" jurisdiction over Indian land. *E.g.*, *Oneida Tribe of Indians of Wis.* v. *Village of Hobart*, 732 F.3d 837, 841 (7th Cir. 2013); *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 658, 666 (9th Cir. 1975); *see also*

Oneida Nation v. *Village of Hobart*, Case No. 1:16-cv-01217-wcg, Decision and Order, Doc. 46, p. 15 (state regulatory authority is extinguished in Indian country).

This Court should grant the Petition, resolve the circuit conflict, and hold either that (1) the Enclave Clause applies to a land-in-trust transaction because jurisdiction over the trust lands is exclusively in the federal government and tribe, or (2) the Clause applies notwithstanding any residual jurisdiction exercised by a state.

V. The Issues This Case Presents Are of National Importance.

It is difficult to overstate the jurisprudential importance and practical significance of the federal government's land-in-trust scheme. That is because trust lands are used to build and operate tribal casinos, and tribal-casino revenues are used to purchase even more land that a tribe will then seek to take in trust at the expense of state and local governments.

Casino gambling is "one of the nation's fastest growing industries." Nicholas S. Goldin, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gambling*, 84 CORNELL L. REV. 798, 800 (1999). From 1996 to 2015, annual tribal gambling revenue skyrocketed from $6.3 billion to $30 billion, according to the National Indian

Gaming Commission.[7] And the stratospheric growth shows no sign of slowing, as hundreds of tribes seek federal recognition, nearly all of them receiving significant financial backing from non-Indian investors hoping to reap substantial profits from casino management contracts. Iver Peterson, *Would-Be-Tribes Entice Investors*, N.Y. Times, Mar. 29, 2004, at A1.

As tribal gaming has become more widespread, so have the costs. "[S]tates now facing the biggest budget deficits are also the states with the largest number of tax-exempt Indian casinos and tax-evading tribal businesses." Jan Golab, *The Festering Problem of Indian "Sovereignty": The Supreme Court ducks. Congress sleeps. Indians rule.*, The American Enterprise, Sept. 2004, at 31. Like many state-based governments, entirely located within historic reservations, the Towns of Vernon and Verona, as well as the City of Sherrill face eventual extinction. They have no way to survive the ever-growing tribal purchases of land, with ever growing casino revenue, followed by fee-to-trust applications. Eventually, the loss of the Towns' and City's ability to tax and regulate, will be fatal. *See* App. F Maps of Oneida Reservation, Town of Verona, Town of Vernon, and City of Sherrill.

And the legal issues at stake are significant in their own right. "It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded. . . ." *Mistretta* v. *United States*, 488 U.S. 361,

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[7] *See* https://www.nigc.gov/commission/gaming-revenue-reports.

415 (1989). That is why commentators have continued to urge this Court to revitalize the non-delegation doctrine, to remind Congress that its powers under the Commerce Clause were in fact limited. *E.g.*, Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 356 (1999) ("In the most extreme cases, open-ended grants of authority should be invalidated. . . . A Supreme Court decision to this effect could have some of the salutary effects of the *Lopez* decision in the Commerce Clause area, offering a signal to Congress that it is important to think with some particularity about the standards governing agency behavior."); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 351 (2002); *see also* Petition for Writ of Certiorari, *United States* v. *Roberts*, No. 99-9911174, at 28 (Jan. 12, 2000) ("The importance of [whether § 5 violates the non-delegation doctrine] is beyond cavil.").

The same importance has been ascribed to the validity of § 5. In its petition for certiorari in *South Dakota I*, the United States told this Court that the IRA is "one of the most important congressional enactments affecting Indians," "the cornerstone of modern federal law respecting Indians." Petition for Writ of Certiorari, *South Dakota* v. *U.S. Dept. of the Interior*, No. 95-1956 at 15-16 (June 3, 1996). That statement is undeniably true. Because of IRA, the BIA manages more than 50 million acres of land on behalf of more than 567 recognized Indian tribes. The United States

in *South Dakota I* also rejected as "unpersuasive" the state's argument that § 5's constitutionality lacks "national importance." Reply Br., *South Dakota* v. *U.S. Dep't of the Interior*, No. 95-1956 at 1 (Aug. 30, 1996). Again, that statement is undeniably true. When the Secretary takes land in trust, he strips away the host state's sovereiguty and jurisdiction and places them in the hands of a competing sovereign, insulating the land from state and local taxation, 25 U.S.C. § 5108, ¶ 4, and from state regulation, *see Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d 908, 915 (1st Cir. 1996). In the United States' own words, "This Court has the overarching responsibility for determining conclusively whether Congress has overstepped constitutional limitations." Petition for Writ of Certiorari, *South Dakota* v. *U.S. Dep't of the Interior*, No. 95-1956 at 4 (June 3, 1996).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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