No. 17-1432

In The Supreme Court of the United States

COUNTY OF AMADOR, CALIFORNIA,

Petitioner,

v.

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

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

GREGORY G. GILLOTT, ESQ.
County Counsel
COUNTY OF AMADOR, CALIFORNIA

CATHY A. CHRISTIAN, ESQ.
CHRISTOPHER E. SKINNELL, ESQ.
Counsel of Record
NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP
2350 Kerner Blvd., Ste. 250
San Rafael, CA 94901
Phone: (415) 389-6800
cskinnell@nmgovlaw.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

REPLY BRIEF

Two separate acts of Congress preclude the Department of Interior ("Department" or "Interior") from taking land in Amador County into trust for gaming purposes on behalf of the Ione Band of Miwok Indians.

First, the Indian Reorganization Act ("IRA") limits Interior's acquisition of trust lands to lands for "any recognized Indian tribe now under Federal jurisdiction" in 1934. The Ione Band was neither federally recognized nor under federal jurisdiction in 1934. The Ninth Circuit's contrary decision creates a circuit split and grants *carte blanche* for the Department to disregard, in the name of "interpretation," Congress's clear intention that the IRA prevent Interior from acquiring trust lands for groups that were not already formal wards of the federal government in 1934.

This case thus presents an ideal vehicle for the Court to resolve crucial issues regarding Interior's trust acquisition authority – issues that have roiled the lower courts since this Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). Even Interior acknowledges that the "*Carcieri*-analysis" it now undertakes during the fee-to-trust process has the Department "up to [its] eyeballs in litigation on these matters." *Carcieri: Bringing Certainty to Trust Land Acquisitions Before the Senate Comm. on Indian Affairs*, 113th Cong., 1st Sess. 113-214 (2013) (statement of Kevin Washburn, Assistant Secretary – Indian Affairs).

Second, the Indian Gaming Regulatory Act ("IGRA") prohibits gaming on lands taken into trust after October 1988, unless one of several exceptions apply. The Band received permission to game in Amador County under the exception for "lands taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii).[1] However, as the Secretary explicitly determined in formal regulations to implement IGRA, Congress did not intend for "restored" tribes to include those administratively recognized by the Department outside of its formal acknowledgment regulations, like the Ione Band.

Nevertheless, Interior claims authority to disregard Congress's intention, as codified in the Department's regulations, by "grandfathering" pending, non-final applications, including that of the Ione Band. The Ninth Circuit's sanction of this claimed right, on the theory that the agency *could have* adopted a different interpretation of congressional intent, marks a fundamental shift in administrative law, which traditionally holds that agencies are bound by the interpretations embodied in their formally-adopted rules.

---

[1] The main exception, which the Band strategically declined to pursue, is for tribes obtaining a determination from both Interior and California's governor that gaming would be "in the best interest of the Indian tribe and its members" *and* would "not be detrimental" to the surrounding community – a mechanism designed to protect local interests like Amador County's. 25 U.S.C. § 2719(a) and (b)(1)(A).

As such, this case also presents an ideal vehicle for the Court to resolve a circuit split between the Ninth and D.C. Circuits regarding the circumstances in which administrative agencies may "grandfather" non-final agency actions that are contrary to congressional intent. *Compare* this case with *Natural Res. Defense Council, Inc. v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988) ("*NRDC*") (articulating narrow circumstances, not met here, for when agencies can "grandfather" policies that are contrary to congressional intent).

Though the Ione Band (for obvious strategic reasons) seeks to downplay the importance of this petition, the national significance of the questions presented herein is attested by the fact that these issues are being litigated throughout the country, and by the recently filed amicus brief of the California State Association of Counties ("CSAC"), which represents all 58 counties in California.

Review is warranted.

ARGUMENT

I. The Ninth Circuit's and Interior's Definitions of "Under Federal Jurisdiction" Are So Vague and Open-Ended As to Defeat Congress's Clear Intention to Limit the Secretary's Discretion to Accept Land in Trust.

Despite the Ione Band's professed inability to discern any intention underlying Congress's use of the phrase "under Federal jurisdiction" in Section 5, it is

abundantly clear from the legislative history of the Act that Congress incorporated that phrase into the definition of "Indian" to limit the Secretary's authority to take land into trust on tribes' behalf. *See Carcieri*, 555 U.S. at 391. Recognizing that the government already had "supervision" of numerous tribes that it shouldn't, App. 216-27, Congress wished to avoid compounding the problem.[2] It therefore limited the Act's reach to "Indians that are taken care of at the present time," *i.e.*, in 1934. App. 218. Thus, the Act "defines the persons who shall be classed as Indian. In essence, it recognizes the status quo of the present reservation Indians and further includes all other persons of one-fourth Indian blood. . . ."[3]

Congress's clearly-intended limit, however, is toothless unless "federal jurisdiction" is understood to require "a 1934 relationship between the Tribe and Federal Government that could be described as jurisdictional, for example, a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office." *Carcieri*, 555 U.S. at 399 (Breyer, J., concurring).

---

[2] The Ione Band's citation of earlier discussions in the legislative history, preceding the careful focus on this issue on the afternoon of May 17, 1934, and the consequent adoption of the "under Federal jurisdiction" language, demonstrates nothing about Congress's understanding of the purpose of that phrase. *See* Band's Opp. 23.

[3] *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1220 n.10 (D. Haw. 2002) (quoting statement by IRA's House sponsor, Representative Howard, during congressional debate). The blood quantum was subsequently increased to one-half.

This comports with the prevailing understanding at the time, reflected in a 1925 Comptroller General's opinion, App. 210-12, and echoed in correspondence about the Ione Indians from Superintendent of Indian Affairs, Sacramento, O.H. Lipps, to then-Commissioner of Indian Affairs Collier in the lead-up to the IRA's enactment, App. 213-15, that Indians are under the jurisdiction of states, and not the federal government, who do not live on federally supervised land or have land held in trust on their behalf, and belong to no tribe with which there is an existing treaty.

Interior and the Ninth Circuit, however, adopted vastly broader concepts of "jurisdiction" – so broad as to be essentially no limitation at all (which appears to be Interior's goal, given its well-documented unhappiness with *Carcieri*). As Interior Deputy Secretary James Cason acknowledged to Congress last year, the Department's criteria are "pretty loose," don't "respond very particularly to [this] Court['s] decision" in *Carcieri*, are not "specific enough to actually distinguish between applications," and have never yet resulted, to his knowledge, in rejection of a land-to-trust application. *See* Petition 25-26. The Ninth Circuit's standard is even more open-ended: a tribe could be deemed "under Federal jurisdiction" if it merely "had *some* sort of significant relationship with the federal government as of 1934." App. 30 (italics in original).

This case perfectly illustrates Deputy Secretary Cason's point about the "looseness" of Interior's test. For all the focus on peripheral details in the Ione Band's opposition, the key facts remain undisputed: In

1934, the Band had no federally supervised land, no treaty with the United States, received no services from the federal government, had no members enrolled with the Indian Office, and had no tribe-specific legislation, executive order, or appropriation. Moreover, on August 15, 1934, Superintendent Lipps wrote to Commissioner Collier, listing the various Indian communities under the "jurisdiction" of the Sacramento Agency, which then included Amador County.[4] The stated purpose of his letter was to respond to the Commissioner's request for information about Indian communities within the Sacramento Agency's jurisdiction, for the purpose of putting into effect the recently-enacted "Wheeler-Howard bill," *i.e.*, the IRA. Two "tribes" in Amador County – the Jackson Rancheria and the Buena Vista Rancheria Indians – were listed; the Ione Band was not, though the presence of Indians at Ione was well-known in 1934.[5] The Band was not invited to conduct an IRA election, while Jackson Rancheria and Buena Vista Rancheria Indians were.

Faced with this dearth of "jurisdictional" facts, Interior bases its conclusion that the Band was "under Federal jurisdiction" in 1934 entirely on the unsuccessful efforts of a local BIA agent in the years between approximately 1915 and 1925 – ultimately abandoned – to obtain land for Ione-area Indians under a land-purchase program designed for landless California

---

[4] Supp. Admin. Rec. 020754-020758.

[5] *See* App. 213-15 (August 15, 1933, letter from Sacramento Superintendent Lipps to Commissioner Collier, discussing the circumstances of the Ione-area Indians).

Indians "without regard to the possible tribal affiliation of the members of the group" – a fact that even Interior acknowledges was "not conclusive as to the Band's recognized tribal status."[6]

That such unsuccessful efforts to purchase land could be deemed to rise to the level of "under Federal jurisdiction" in 1934 demonstrates the emptiness of the phrase as construed by Interior and the Ninth Circuit. If the land acquisition efforts had succeeded – if the government had established a rancheria/reservation for the Ione-area Indians, as it did for the Jackson and Buena Vista Rancherias – that might have amounted to taking the Ione Indians "under Federal jurisdiction." As it is, however, no reservation was ever created, and "Federal jurisdiction" was not established by the unsuccessful attempt. *Cf. Robinson v. Jewell*, 790 F.3d 910, 917 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016) (unratified treaty between an Indian tribe and the United States "carries no legal effect" and is "a legal nullity"). Holding otherwise, the Ninth Circuit's decision renders the IRA's requirement of federal jurisdiction meaningless.

---

[6] *See* App. 83 (quoting the 2006 Indian lands determination that the ROD incorporates, *see* App. 195).

II. The Decision Below, Allowing Land to Be Taken into Trust for a Tribe "Recognized" Decades after the IRA's Enactment, Deepens a Circuit Split and Further Undermines Congress's Intent to Limit the Secretary's Authority.

The Ninth Circuit's holding that post-1934 recognition of an Indian tribe satisfies the standard of Section 5 of the IRA also undermines the limitations that Congress intended, and certiorari is warranted to resolve a circuit split on this issue.

To conclude that recognition can come at any time makes little sense, given that Congress otherwise uniformly placed temporal limitations on each definition of "Indian," *see Carcieri*, 555 U.S. at 391; *United States v. John*, 437 U.S. 634, 651 (1978); 25 U.S.C. § 5129. It also makes little sense because Congress required the Secretary to conduct special elections under the IRA within a year of the Act's passage. 25 U.S.C. § 5125; *see also City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 161 n.6 (D.D.C. 1980) (making this same observation).

Prior to the decision in *Carcieri* – and the attendant incentive for Interior to find a way around that decision – every court to address Section 19 concluded that a tribe must be "recognized" as of 1934. *See John*, 437 U.S. at 650 ("The 1934 Act defined 'Indians' . . . as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction.'" (brackets by Court)); *United States v. State Tax*

Commission of Mississippi, 505 F.2d 633, 642 (5th Cir. 1974); *Maynor v. Morton*, 510 F.2d 1254 (D.C. Cir. 1975) (plaintiff not an "Indian" under the first or second definition, because "neither Maynor nor his relatives had any tribal designation, organization, or reservation at that time," *i.e.*, 1934); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1281 (9th Cir. 2004) ("There were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934, nor were there any reservations in Hawaii."), *cert. denied*, 545 U.S. 1114 (2005); *Sault Ste. Marie*, 532 F. Supp. at 161 n.6 ("the IRA was intended to benefit only those Indians federally recognized at the time of passage."). Only since the *Carcieri* decision has the tune changed.

The Ninth Circuit dismissed this Court's discussion in *John* as dicta, even while relying on it elsewhere in the same opinion, *see* App. 30, and then simply ignored the remainder of the foregoing cases, though they were discussed by the County at length below.

In *State Tax Commission of Mississippi*, the Fifth Circuit squarely held that "[t]he language of Section 19 positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words 'any recognized Indian tribe now under Federal jurisdiction' and the additional language to like effect." 505 F.2d at 642. That court then concluded that the Mississippi Choctaw did not come within any of the IRA's definitions of "Indian," and that "[t]his omission was not, and could not have been, cured by a Proclamation of the Department of the Interior, grounded on the Act of

1934, which in 1944 purported to recognize the tribal organization of the Mississippi Band of Choctaw Indians and which attempted to declare that the lands purchased for their use and held for them in trust is an Indian Reservation." *Id*. at 642-43.

This directly conflicts with the Ninth Circuit's ruling below that post-IRA recognition suffices. That circuit split should be resolved by this Court.

III. The Ninth Circuit's Approach to the "Grandfathering" Issue Also Creates a Circuit Split and Flouts Basic Administrative Law Principles.

In 2008, four years before the Record of Decision in this case issued, Interior adopted formal rules following notice and comment, "the purpose of [which] was to 'explain to the public how the Department interprets' IGRA's various exceptions and exemptions, including the restored lands exception." *Rancheria v. Jewell*, 776 F.3d 706, 710 (9th Cir. 2015) (quoting 73 Fed. Reg. 29,354, 29,363 (May 20, 2008)). In those rules, Interior expressly determined that Congress did not intend for "restored" tribes to include those that were administratively restored outside of the Part 83 acknowledgement regulations, as the Ione Band indisputably was. 73 Fed. Reg. at 29,363.[7]

---

[7] The Band latches onto references in the *Federal Register* that Congress meant to reject "pre-1979 *ad hoc* determinations," concluding that Interior's statements were not meant to apply to the Band because it was purportedly re-recognized by Ada Deer

Nevertheless, the Department claims the authority to treat the Ione Band as a "restored tribe," contrary to Interior's own interpretation of IGRA. It does so on the theory that tribes with a preliminary, non-final opinion on the "restored tribe" issue, which predated the regulations' adoption, "may have relied" on that non-binding assessment. 73 Fed. Reg. at 29,372.[8] That bare conclusion, however, is insufficient to justify the Department's disregard for congressional intent under well-established case law. *See NRDC*, 838 F.2d at 1244; *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 518 (9th Cir. 2013) (en banc).[9]

The Ninth Circuit took a different tack. The court acknowledged that "the restored tribe exception, as

---

in a *post*-1979 *ad hoc* determination. But, as Congress would have known, the entire purpose of the Part 83 regulations was to end *ad hoc* recognition determinations after 1979. Indeed, Interior obtained a judgment against the Band in 1991 that, after their adoption, the acknowledgment regulations were the exclusive avenue for administrative recognition. *See Ione Band of Miwok Indians v. Sacramento Area Director*, 22 IBIA 194 (1992) (summarizing prior litigation). Moreover, the Band's argument conflicts with the actual language of the 2008 rule. If the Secretary believed Congress intended to allow post-1979 *ad hoc* administrative determination to constitute "restoration," it would be inexplicable that Section 292.10 does not contain such an exception.

[8] Apparently, this was so even if the preliminary opinion concluded that the tribe was not "restored." App. 110-11.

[9] The Band's discussion of *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830 (9th Cir. 1997); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988); and *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006), is a red herring. Those cases address a different body of retroactivity law altogether. *See Bowen*, 488 U.S. at 219-20 (Scalia, J., concurring) (discussing the distinction).

interpreted by Interior, does *not* apply to tribes – such as the Ione Band – that were administratively restored outside the Part 83 process either before or after that process was put into place in 1978." App. 35-36 (emphasis in original). But, expressing the view that Congress's intention was unclear (as the Ione Band argues in its opposition), the court held that because "Interior reasonably *could have* determined that a tribe could be 'restored' to Federal recognition outside the Part 83 process, at least in certain circumstances," App. 39 (emphasis added), the agency is free to apply that construction to the Ione Band, despite the agency's express adoption of the opposite interpretation in its regulations. App. 40.

This approach represents a rejection of well-established rules governing administrative agencies. It flouts black-letter law that an agency is bound by the interpretations it adopts in formal rules. *Service v. Dulles*, 354 U.S. 363, 372 (1957). It also defies well-established law that while an agency may change a regulation embodying its interpretation of a statute (*i.e.*, its understanding of Congress's intent in enacting the statute), it may not enforce inconsistent interpretations of the same statutory term simultaneously. *See Clark v. Suarez Martinez*, 543 U.S. 371 (2005) (same statutory term cannot be reasonably interpreted to mean different things depending on circumstances); *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) (arbitrary for agency to simultaneously interpret a statute one way in investigations and another in administrative reviews).

If such sweeping changes to administrative law are to be made, and decades of precedent effectively overruled, that new course should be charted by this Court, and not the lower courts.

IV. The Questions Presented Warrant This Court's Consideration.

Like *Carcieri*, this case presents "jurisdictional issues of enormous import" that warrant this Court's review. Pet. at 2, *Carcieri*, *supra* (No. 07-526). The scope of Interior's land-acquisition authority under the IRA is of great importance to tribes and to state and local governments alike. *See* Br. of *Amici Curiae* CSAC 12-14. The issue has assumed added urgency due to Interior's abandonment of its former policy of waiting for the completion of litigation before taking land into trust. 78 Fed. Reg. 67,928 (Nov. 13, 2013).

Equally important are the implications of the Ninth Circuit's ruling for administrative law generally. The decision below adopts a novel approach to agency interpretation that warrants this Court's careful review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

GREGORY G. GILLOTT, ESQ.
County Counsel
COUNTY OF AMADOR, CALIFORNIA

CATHY A. CHRISTIAN, ESQ.
CHRISTOPHER E. SKINNELL, ESQ.
Counsel of Record
NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP
2350 Kerner Blvd., Ste. 250
San Rafael, CA 94901
Phone: (415) 389-6800
cskinnell@nmgovlaw.com

Counsel for Petitioner

May 24, 2018