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

PETITIONER'S SUPPLEMENTAL BRIEF [RULE 15.8]

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8, petitioner Amador County respectfully submits this supplemental brief to address the Solicitor General's response, filed on behalf of the Federal Respondents (hereafter "Interior") at this Court's request after petitioner's reply brief was already submitted. Nothing in the response undermines the importance of this Court's review or the suitability of this case for resolving the issues presented.

ARGUMENT

I. Interior's Standardless Test for Determining If a Tribe Was "Under Federal Jurisdiction" in 1934 Is an End-Run around the Limitations Congress Intended to Impose on the Secretary in Enacting the IRA.

Congress's use of the phrase "under Federal jurisdiction" in the IRA's definition of "Indian" was indisputably intended to limit the Secretary's authority to take land into trust on tribes' behalf. *Carcieri v. Salazar*, 555 U.S. 379, 391-92 (2009). However, following this Court's *Carcieri* decision, Interior adopted a novel understanding of that phrase that is so nebulous as to annul Congress's intended limitations. Then-acting (since-confirmed) Interior Associate Deputy Secretary Cason admitted as much to Congress last year. Describing Interior's test as "pretty loose," he testified:

> If you look at the Solicitor's [M-37029] Opinion itself, my concern about the Solicitor's

> Opinion is the criteria is very wide, and that it does not respond very particularly to the Supreme Court['s *Carcieri*] decision. We have concerns about the current advice in the Solicitor's Opinion about being specific enough to actually distinguish between applications.[1]

This case starkly demonstrates the truth of Mr. Cason's admission. Interior concluded that the Ione Band was "under Federal jurisdiction" in 1934, even though the Band had no federally supervised land; was not party to any treaty with the United States; received no services from the federal government; had no members enrolled with the Indian Office; had no tribe-specific legislation, executive order, or appropriation; and was not invited to organize under the IRA following that Act's adoption.

The only fact upon which the ROD bases its conclusion that "Federal jurisdiction" over the Band existed in 1934 was the abandoned effort of the government to obtain land for the Band between about 1915 and 1925. App. 193. But even the ROD acknowledged that "[t]he actions of the Department in furtherance of its efforts to acquire land for the Indians at Ione are not conclusive as to the Tribe's recognized tribal status." App. 175. The 2006 Indian lands opinion, which the ROD adopted, made an identical admission and further acknowledged, "Throughout California in the early part of the Twentieth Century, the Department attempted to purchase land wherever it could for

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[1] *See* Pet. 1 n.1. The Solicitor's Opinion incorporated the Ione ROD's standardless test for "under Federal jurisdiction."

landless California Indians without regard to the possible tribal affiliation of the members of the group." Admin. Rec. 005072. *See also Malone v. Bureau of Indian Affairs*, 38 F.3d 433, 438 (9th Cir. 1994) (describing the unique history of California Indians).

If this amounts to "jurisdiction" in 1934, anything could under Interior's test—indeed, Mr. Cason admitted he knows of no tribe that has ever been found to fail that test. Pet. 1.

But this is not "jurisdiction" in any meaningful sense, nor the sense used in the IRA. Being "under Federal jurisdiction" in 1934 required a tribe to have a ward/trustee relationship with the federal government. This is confirmed by the legislative history of the IRA, App. 216-227, despite Interior's efforts to muddy the waters by quoting fragments of that history completely out of order. And it is confirmed by contemporaneous administrative practice. Interior dismisses the 1925 opinion of the Comptroller General on this point, App. 210-212, as one from "an official with no direct role in Indian affairs." Opp. 26. But BIA officials relied on that opinion in the years preceding passage of the IRA. Indeed, in 1933 the Sacramento-area Superintendent wrote *of the Ione Indians* that:

> They are classified as non-wards under the rulings of the Comptroller General because they are not members of any tribe having treaty relations with the Government, they do not live on an Indian reservation or rancheria, and none of them have allotments

> in their own right held in trust by the Government.

App. 214.

It is one thing to say a tribe was "under Federal jurisdiction" in 1934 if:

- It lived on federal lands.
- It was party to a ratified treaty.[2]
- Its members were "enrolled" with the Indian office. *Id.* at 398; App. 217.
- It had been recognized by Congress—by name—in legislation, including appropriations legislation.[3]

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[2] That describes the Stillaguamish tribe, referred to by Justice Breyer's *Carcieri* concurrence. 555 U.S. at 397; *see also* Memorandum from Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980), *available online at* https://sct.narf.org/documents/carcieri/merits/lodging/memo_from_associate_solicitor_10-01-80.pdf (visited Aug. 17, 2018).

[3] That describes the Catawba tribe. Interior notes that the Catawba were organized under the IRA in 1944, despite the suggestion of their ineligibility in the legislative history. But their eligibility was expressly premised on Congress's recognition of the tribe, *by name*, in 19th Century legislation; indeed, then-Solicitor Harper declared himself "disturbed" by the suggestion that the Catawbas could organize if they were not wards of the federal government in 1934, noting that "if such were the case, the tribe could not now take advantage of the [IRA]." Memorandum from Solicitor to Assistant Secretary, Indian Affairs, Questions of the Catawbas' Identity and Organization as a Tribe and Right to Adopt IRA Constitution (Apr. 11, 1944), reprinted in 2 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs,*

- It conducted an election to organize under the IRA in immediate wake of the Act's passage. *Stand Up for Cal.! v. United States DOI*, 879 F.3d 1177, 1181-82 (9th Cir. 2018); *but see United States v. State Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974) (Mississippi Choctaws' election improper).[4]

But it is undisputed that no such "jurisdictional" facts existed here. There were only unconsummated efforts to acquire land, which were as much a "legal nullity" as an unratified treaty. *See Robinson v. Jewell*, 790 F.3d 910, 917 (9th Cir. 2015). The Ione Band's members were, until 1994 at least, wholly subject to the jurisdiction of the State of California and Amador County, Admin. Rec. 001159-001169—just as the Narragansett were subject to Rhode Island's jurisdiction in *Carcieri*. *Cf. So. Carolina. v. Catawba Indian Tribe*, 476 U.S. 498, 508 (1986) (effect of Congress's termination of federal jurisdiction over tribe was to subject its members "to the full sweep of state laws and state taxation").

1917-1974, 1261-62 (1979), *available online at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015030532322;view=1up;seq=162 (visited Aug. 17, 2018).

[4] Contrary to Interior's claim (Opp. 21-22 n.3), tribes were invited to conduct Section 18 elections, even if they did not live on a reservation, if they were otherwise deemed "under Federal jurisdiction" (because, for example, they were a treaty tribe). *See Shawano County, Wisc. v. Acting Midwest Reg'l Dir.*, 53 IBIA 62, 72-73 (2011) (citing numerous examples).

II. Interior's Denial of the Circuit Split Created by the Ninth Circuit's Acceptance of Post-1934 "Recognition" Is Meritless.

Prior to this Court's *Carcieri* decision in 2009, the courts uniformly treated Section 19 of the IRA as requiring tribes to be recognized in 1934. Pet. 27-28; Pet's Reply 8-10. The post-*Carcieri* decisions of the D.C. Circuit in *Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016), and the Ninth Circuit here create a circuit split warranting resolution by this Court.

To downplay this circuit split, Interior denigrates the significance of the pre-*Carcieri* decisions. That includes this Court's decision in *United States v. John*, 437 U.S. 634 (1978), which Interior dismisses as dicta because the decision ultimately turned on a different prong of the IRA's definition of "Indian." But that very fact makes this Court's treatment of the issue so significant. The Fifth Circuit had found that the Mississippi Choctaws were not eligible for benefits under the IRA because the tribe had not been recognized in 1934. *United States v. John*, 560 F.2d 1202, 1212 (5th Cir. 1977). Though the issue was squarely presented, this Court did not reject the Fifth Circuit's construction of the first definition of "Indian," but implicitly accepted it, adding the brackets to the phrase "any recognized [in 1934] tribe now under Federal jurisdiction." 437 U.S. at 649. Instead, it held that land could be taken into trust for Mississippi Choctaws because they met the "persons of one-half or more Indian blood" criterion. This alternative holding would have been

unnecessary had the Court concluded that post-1934 "recognition" sufficed, because Interior had established a reservation for the tribe in 1944.

Interior likewise dismisses the holding in *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004), that "[t]here were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934," as dicta. Hardly. The district court decision, which was affirmed, conducted a detailed examination of the text and history of the 1934 Act before concluding that Section 479 "was intended to preserve the status quo with respect to whom should be considered an Indian." *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1220 n.10 (D. Haw. 2002).

Interior contends that the holding in *United States v. Tax Comm'n*, 505 F.2d 633—that "[t]he language of Section 19 positively dictates that tribal status is to be determined as of June, 1934"—relates solely to "under Federal jurisdiction" and not recognition. Opp. 20. There is no support for that distinction in the opinion. The Fifth Circuit stated its holding was "indicated by the words '*any recognized Indian tribe* now under Federal jurisdiction' and the additional language to like effect." 505 F.2d at 642 (emphasis added).

Finally, Interior ignores *Maynor v. Morton*, 510 F.2d 1254, 1256 (D.C. Cir. 1975) (holding that plaintiff was 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), and *City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 161 n.6 (D.D.C. 1980) (holding "the IRA was intended to benefit only those Indians federally recognized at the time of passage.").

Interior also makes the grammatical claim that the placement of "now" in the middle of the phrase "any recognized tribe now under Federal jurisdiction" means it only modifies what comes after it—"under Federal jurisdiction." "But the adjectival phrase 'now under federal jurisdiction' . . . modifies the term 'recognized Indian tribe.' One may ask therefore how it is that an Indian tribe could have been a 'recognized . . . tribe . . . under federal jurisdiction' on the prescribed date, unless it first was a 'recognized . . . tribe' on that date." *Rape v. Poarch Band of Creek Indians*, ___ So.3d ___, 2017 Ala. LEXIS 103, *25 (Ala. Sept. 29, 2017) (ordered published July 3, 2018); *see also* App. 226 (statement of Comm'r Collier).

Interior also ignores the fact that even before the phrase "now under Federal jurisdiction" was added to the statute, the IRA's sponsor repeatedly treated the phrase "recognized tribe" as imposing a temporal limitation. Pet. 29-30.

III. Interior Makes No Effort to Defend the Ninth Circuit's Reasoning with Respect to Grandfathering, which Conflicts with Decisions of the D.C. Circuit.

Interior interprets IGRA's "restored tribe" exception as excluding tribes (like the Band) that were

administratively recognized outside the regulatory acknowledgement process; it embodied that interpretation in a formal regulation in 2008. App. 206-207, 235. But, though the ROD in this case was not issued until four years after the regulations' adoption, Interior claims the power to defy congressional intent in this instance, based on the Band's receipt of a non-binding, advisory opinion in 2006 that conflicts with Interior's regulation.

A fundamental question presented by this case is, therefore: when adopting regulations to implement a statutory mandate, under what circumstances may an agency "grandfather in" preliminary agency actions that conflict with Congress's intent as recognized in the regulations? Though Interior claims otherwise, the Ninth Circuit's decision conflicts with decisions of the D.C. Circuit.

Circuit Split. Historically, when determining if such counter-statutory grandfathering is permissible, courts have applied the test articulated by the D.C. Circuit in *Natural Res. Defense Council, Inc. v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988) ("*NRDC*"), and *Sierra Club v. EPA*, 719 F.2d 436 (D.C. Cir. 1983) ("*Sierra Club*"). Under this test, "considerations governing an agency's duty to apply a rule" to pending matters are:

> (1) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (2) the extent to which the party against whom the new rule is applied relied on the formed [sic] rule, (3) the degree of the

> burden which a retroactive order imposes on a party, and (4) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

NRDC, 838 F.2d at 1244.[5]

The Ninth Circuit expressly refused to apply this test, adopting a far more permissive approach. App. 37-41. It held that an agency may decline to enforce congressional intent with respect to non-final agency actions if the agency merely "could have" construed that intent differently. App. 39-40. (Note, the Ninth Circuit did not hold Interior's regulatory interpretation of the "restored tribe" exception was *wrong*, just debatable, App. 38-39.)

As previously discussed, this contravenes longstanding rules of administrative law, which bind agencies to the rules they adopt and the rationales they give, *even if* they could have reached a different result in the first instance. Pet. 34-35; Pet's Reply 12. Given the concerns expressed by members of this Court in recent years about the accretion of power to administrative agencies in the name of "interpretation," and the possible threats to due process, equal protection, and the separation of powers,[6] it is especially important

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[5] Contrary to Interior's implication, Opp. 31, this test is not limited to adjudicatory proceedings. *NRDC* and *Sierra Club* both applied it to regulations, as did *Delancy v. Crabtree*, 131 F.3d 780, 787 (9th Cir. 1997).

[6] *E.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring); *Michigan v. EPA*, 135 S. Ct. 2699, 2712-14 (2015) (Thomas, J., concurring); *Arlington v. FCC*, 569 U.S. 290,

that such constraints as do currently exist not be undermined.

Though Interior seeks to defend the *result* below, it makes no attempt to defend the Ninth Circuit's *reasoning*, except to note the court's passing claim that "even assuming" *NRDC/Sierra Club* applied it would permit grandfathering. Opp. 31-32; App. 40. But that claim is an afterthought; the holding of the opinion is that *NRDC/Sierra Club* do not apply. Furthermore, it was premised on the proposition that the statutory purpose of IGRA would not be frustrated by grandfathering, App. 40, which in turn rested on the Court's indefensible (and undefended) "could have determined" test.

Interior's Alternative Justifications. Declining to defend the Ninth Circuit's reasoning, Interior retreats to the original justification for the grandfathering provision that it gave in 2008—that tribes "*may have* relied" upon pre-2008 opinions, even though they were preliminary and revocable at any time. App. 240 (emphasis added). (Indeed, the Ione Band's opinion was actually revoked in 2009 before being "reinstated" by the ROD, App. 195).

312-28 (2013) (Roberts, C.J., dissenting); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring). *See also* Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150-56 (2016).

But this "reliance" rationale is not a reason for refusing review, for multiple reasons:

- For one thing it is the Ninth Circuit's alternative "could have determined" test that is precedential and creates the circuit split with the D.C. Circuit, warranting this Court's review.
- Second, reliance is only one factor under the *NRDC/Sierra Club* test, quoted above. In the ROD and in this litigation Interior has not addressed the remaining factors, all of which support the application of Interior's regulatory interpretation to the Ione Band. *See* Pet.'s C.A. Op. Br. 41-46.
- Third, *NRDC/Sierra Club* requires a demonstration of *actual* reliance, not just the hypothetical reliance cited by Interior in adopting the grandfathering provision. *Sierra Club*, 719 F.2d at 467.
- Finally, reliance must be reasonable, and reliance on the outcome of non-final agency actions is not. *See WRT Energy Corp. v. FERC*, 107 F.3d 314, 321-22 (5th Cir. 1997).

Interior also defends its grandfathering rule as advancing IGRA's purposes, ensuring that tribes recognized after 1988 are not "disadvantaged" relative to earlier tribes. Opp. 30. But Interior concluded that Congress *did* intend to "disadvantage" informally recognized tribes, at least with respect to the "restored tribe" exception. Also, that exception is not the only avenue for such a tribe to proceed under IGRA; it could obtain the concurrence of California's governor and the

Secretary, as other tribes have. 25 U.S.C. § 2719(a), (b)(1)(A).

IV. This Court's Review Is Necessary to Reconcile Conflicting Appellate Decisions and Decide Important Questions of Federal Law.

The scope of Interior's land-acquisition authority under the IRA is critically important to tribes and to state and local governments and their citizens. *See* Br. of *Amici Curiae* CSAC 12-14. And, as even Interior acknowledges, the "*Carcieri*-analysis" it now undertakes during the fee-to-trust process has the Department "up to [its] eyeballs in litigation on these matters." Pet's Reply 1. Review by this Court is appropriate to resolve these crucial issues, and this case provides an ideal vehicle for doing so.

Also, though Interior seeks to characterize the grandfathering issue as one of "diminishing importance" with respect to the specific regulation in question, Opp. 32, the National Indian Gaming Commission's website lists at least 100 Indian lands opinions; 72 predate the 2008 regulations. NIGC, "Indian Lands Opinions," *online at* https://www.nigc.gov/general-counsel/indian-lands-opinions (visited Aug. 16, 2018). And that list is obviously incomplete; it omits the Ione Band's opinion.

Nor is the grandfathering issue limited to IGRA decisions by Interior; it can arise whenever an agency

adopts new regulations. Thus, the Ninth Circuit's new standard invites mischief in countless contexts.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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