No. 19-937

In the Supreme Court of the United States

THE CHEROKEE NATION, PETITIONER

v.

DAVID BERNHARDT, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Secretary of the Interior did not exceed his statutory authority by taking a particular parcel of land into trust for the United Keetowah Band of Cherokee Indians in Oklahoma.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Okla.):

The Cherokee Nation v. *Jewell*, No. 14-cv-428 (May 31, 2017)

United States Court of Appeals (10th Cir.):

The Cherokee Nation v. *Bernhardt*, No. 17-7042 (Sept. 5, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 936 F.3d 1142. The order of the district court (Pet. App. 36a-58a) is not published in the Federal Supplement but is available at 2017 WL 2352011. A prior order of the district court is not published in the Federal Supplement but is available at 2014 WL 122910489.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2019. A petition for rehearing was denied on November 8, 2019 (Pet. App. 59a-60a). The petition for a writ of certiorari was filed on January 23, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Bureau of Indian Affairs (BIA) of the U.S. Department of the Interior approved an application to take into trust a 76-acre parcel of land near Tahlequah, Oklahoma that is owned in fee by the United Keetoowah Band of Cherokee Indians in Oklahoma (UKB), a federally recognized Indian tribe. Pet. App. 2a-3a, 7a. Following the approval, petitioner Cherokee Nation, another federally recognized Indian tribe, sued BIA in the U.S. District Court for the Eastern District of Oklahoma. *Id.* at 3a. The district court enjoined BIA from taking the parcel into trust and ordered an administrative remand. *Id.* at 58a. The court of appeals reversed. *Id.* at 1a-35a.

1. This case concerns two Indian tribes whose members descend from the historical Cherokee Nation. See Pet. App. 2a; U.S. C.A. Br. 1. As such, the history of the Cherokee Nation and its lands is relevant here.

a. The Cherokees initially occupied lands east of the Mississippi River. In 1835, a contingent of Cherokees acceded to removal to the west, in what became known as the Indian Territory in present-day eastern Oklahoma. Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478; see *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 626 (1970). The Treaty of New Echota guaranteed to the Cherokee Nation patents to two tracts of land: one guaranteed to them under prior treaties, and an "additional tract of land." Art. 2, 7 Stat. 479-480.

In 1866, as part of restoring relations with Indian tribes that had allied with the Confederacy, the United States entered into another Treaty with the Cherokee Indians (1866 Treaty), July 19, 1866, 14 Stat. 799; see *Cohen's Handbook of Federal Indian Law* §§ 1.03[8], 4.07[1][a], at 68, 289 (Nell Jessup Newton et al. eds.,

2012) (*Cohen's Handbook*). The 1866 Treaty addressed, *inter alia*, intra-tribal conflict between factions of the Cherokee Nation that had supported the Union and those that had supported the Confederacy, as well as cession of Cherokee land for the resettlement of other tribes then residing in Kansas. *Report of the Commissioner of Indian Affairs for the Year 1866*, at 8, 11-12 (1866); see *Red Bird* v. *United States*, 203 U.S. 76, 87 (1906).

As relevant here, Article 26 of the 1866 Treaty "guarantee[d] to the people of the Cherokee nation the quiet and peaceable possession of their country and protection against domestic feuds and insurrections and against hostilities of other tribes." 14 Stat. 806. If "hostilities among the Indian tribes" were to arise, the United States "agree[d]" that the "commencing" party "shall, so far as practicable, make reparation for the damages done." *Ibid.* Article 31 "reaffirmed and declared to be in full force" "[a]ll provisions of treaties" between the parties that were then "in force, and not inconsistent with the provisions of" the 1866 Treaty. *Ibid.* Like the others of the "Five Tribes" in the Indian Territory, the Cherokee Nation largely governed itself, and Congress established no separate territorial government in the Indian Territory. See *Jefferson* v. *Fink*, 247 U.S. 288, 290-291 (1918); *Atlantic & Pac. R.R.* v. *Mingus*, 165 U.S. 413, 435-436 (1897).

b. By the late nineteenth century, "the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually." *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 253-254 (1992); see generally *Cohen's Handbook* § 1.04, at 71-79.

Although the Cherokee Nation's lands—like those of the others of the Five Tribes—were excluded from the Indian General Allotment Act, ch. 119, 24 Stat. 388, Congress subsequently provided for allotment of the Cherokee Nation's lands as well. See generally *Cohen's Handbook* § 4.07[1][a], at 290-291.

In 1893, to pave the way for Oklahoma statehood, Congress established the Dawes Commission and authorized it to "enter into negotiations" with the Five Tribes "for the purpose of the extinguishment of the national or tribal title to [their] lands," "either by cession of the same * * * to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, * * * or by such other method as may be agreed upon." Act of Mar. 3, 1893 (1893 Act), ch. 209, § 16, 27 Stat. 645. In 1898, Congress enacted the Curtis Act, which provided for the allotment of the Cherokee lands in eastern Oklahoma (along with the land of the others of the Five Tribes). Ch. 517, §§ 11-12, 30 Stat. 497-498. Cherokee lands were allotted to individual tribal members pursuant to subsequent statutes. See, *e.g.*, Act of Mar. 1, 1901, ch. 675, § 4, 31 Stat. 849; Act of July 1, 1902, ch. 1375, § 11, 32 Stat. 717.[1]

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[1] In *McGirt* v. *Oklahoma*, No. 18-9526 (oral argument rescheduled for May 11, 2020), this Court is considering whether, in preparation for Oklahoma statehood, Congress broke up the Creek Nation's former territory, and whether the State of Oklahoma has criminal jurisdiction over crimes by or against Indians committed on fee lands within that area. Those questions, in turn, implicate whether all of the Creek Nation's former territory constitutes a present-day "reservation" with jurisdictional significance, and thus "'Indian country,'" under 18 U.S.C. 1151(a). As the United States has explained, the allotment of the Creek Nation's lands—including through the 1893 Act and the Curtis Act—was part of the process

c. Beginning in the mid-1920s, federal Indian policy shifted away from allotment and toward greater tribal self-determination. See *Cohen's Handbook* § 1.05, at 79-84. As part of that shift, Congress in 1934 enacted the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (25 U.S.C. 5101 *et seq.*). The IRA authorizes the Secretary of the Interior (Secretary) to acquire land into trust "for the purpose of providing land for Indians." 25 U.S.C. 5108. The statute defines "'Indian,'" "as used in this Act," to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. 5129. In *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), this Court held that the phrase "'now under Federal jurisdiction'" "refers to a tribe that was under federal jurisdiction at the time of the statute's enactment," *i.e.*, in 1934. *Id.* at 382 (quoting 25 U.S.C. 5129). Thus, under the IRA, "the Secretary's authority" is "limit[ed]" to "taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Ibid.*

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through which Congress dismantled the Creek Nation's former domain and transferred governance from the Nation and the United States to the new State of Oklahoma. See U.S. Amicus Br. at 4-31, *McGirt*, *supra* (No. 18-9526). Although the United States has taken the view that the same analysis likely applies to the others of the Five Tribes, including the Cherokee Nation, see *ibid.*, this case does not present the question whether Oklahoma has criminal jurisdiction over crimes by or against Indians in the former Cherokee territory, or whether petitioner maintains a present-day "reservation." Accord Pet. 8 n.2 (noting that the Department of the Interior's trust land regulations apply to *former* reservations in Oklahoma). There is thus no basis to hold the petition for a writ of certiorari pending the Court's decision in *McGirt*.

Congress specifically excluded from specified provisions of the IRA certain tribes "located in the State of Oklahoma," including the "Cherokee." 25 U.S.C. 5118; see generally U.S. Amicus Br. at 22-23, *McGirt* v. *Oklahoma*, No. 18-9526 (Mar. 20, 2020). Two years after the IRA's enactment, Congress enacted the Oklahoma Indian Welfare Act (OIWA), ch. 831, 49 Stat. 1967 (25 U.S.C. 5201 *et seq.*). Section 3 of the OIWA extends to "[a]ny recognized tribe or band of Indians residing in Oklahoma * * * the right to organize for its common welfare and to adopt a constitution and bylaws." 25 U.S.C. 5203. Section 3 also authorizes the Secretary to "issue to any such organized group a charter of incorporation" that "convey[s] * * * the right * * * to enjoy any * * * rights or privileges secured to an organized Indian tribe under the [IRA]," which includes the privilege of the Secretary taking land into trust. *Ibid.*; see 25 U.S.C. 5108. The OIWA does not define "Indian" or cross-reference the IRA's definition of that term. See Pet. App. 19a-20a.

d. In 1980, the Secretary promulgated regulations establishing procedures for acquiring land in trust for Indian tribes. 25 C.F.R. Pt. 151. Under the regulations, the "consent[]" of the "tribe having jurisdiction" over a "reservation" is required for the United States to acquire land on that reservation in trust for another tribe. 25 C.F.R. 151.8. The regulations define "Indian reservation" to mean, "in the State of Oklahoma * * * that area of land constituting the *former* reservation of the tribe as defined by the Secretary." 25 C.F.R. 151.2(f) (emphasis added and omitted).

More recently, Congress has enacted legislation specific to acquisitions of land in trust within the bounda-

ries of the historical Cherokee Nation's former territory in Oklahoma. A proviso in a 1992 Appropriations Act for the Department of the Interior provided that until "legislation is enacted to the contrary," no funds may be "used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without the *consent* of the Cherokee Nation." Department of the Interior and Related Agencies Appropriations Act, 1992 (1992 Appropriations Act), Pub. L. No. 102-154, 105 Stat. 1004 (emphasis added). In the 1999 Appropriations Act, Congress expressly "amended" that proviso to state that "no funds shall be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without *consultation* with the Cherokee Nation." Department of the Interior and Related Agencies Appropriations Act, 1999 (1999 Appropriations Act), Pub. L. No. 105-277, 112 Stat. 2681-246 (emphasis added).

2. a. UKB traces to the Keetowah Society, a group of Cherokees in the former Indian Territory. See U.S. C.A. Br. 10. In 1946, Congress recognized UKB as a "band of Indians residing in Oklahoma within the meaning of section 3" of the OIWA. Act of Aug. 10, 1946 (1946 Act), ch. 947, 60 Stat. 976. Four years later, pursuant to the 1946 recognition statute and Section 3 of the OIWA, the Assistant Secretary of the Interior approved a corporate charter for UKB. C.A. App. 84-90.

In 2000, UKB purchased a 76-acre parcel of land located within the historical Cherokee Nation's former territory, where it planned to develop a tribal and cultural center. Pet. App. 2a. In 2004, UKB submitted an application to BIA for the United States to acquire the parcel in trust. *Id.* at 3a. After seven years of review,

which included consultation with petitioner, BIA approved the application pursuant to its authority under the OIWA. *Id.* at 3a, 7a-8a. As relevant here, BIA determined that because UKB requested that the Secretary take land into trust under the OIWA, not the IRA, this Court's decision in *Carcieri* was not implicated, and that the 1999 Appropriations Act required consultation with—rather than the consent of—petitioner before the Secretary could take the parcel into trust for UKB. See *id.* at 6a-7a, 11a; U.S. C.A. Br. 29 n.3.

b. Petitioner sued BIA and BIA officials challenging the approval, and UKB intervened as a defendant. Pet. App. 3a. In 2017, the district court permanently enjoined BIA from acquiring the parcel. *Id.* at 36a-58a. The court determined that BIA had erred in failing to consider whether the Secretary could take land into trust for UKB notwithstanding this Court's decision in *Carcieri*, *supra*. Pet. App. 49a-53a. The court further found that BIA had not obtained petitioner's consent for the acquisition. The court held that consent was required by the Secretary's regulations, which, in its view, "Congress did not override * * * with the passage of the 1999 Appropriations Act." *Id.* at 54a-55a. In addition, the court determined that consent was required under the 1866 Treaty: whether the trust application was considered a "'domestic feud or insurrection'" or the "'hostility of another tribe,'" the court reasoned, "the 1866 Treaty guaranteed [petitioner] protection against it." *Id.* at 56a; see *id.* at 55a-56a.

3. The court of appeals reversed. Pet. App. 1a-35a.

a. As relevant here, the court of appeals first held that "the BIA properly concluded that statutory authority exists for the Secretary to take the Subject Parcel into trust for the UKB Corporation," and that "it was

not necessary for the BIA to consider whether the UKB Corporation met the IRA's definition of 'Indian.'" Pet. App. 19a-20a. The court explained that "the IRA's definition does not apply" to trust acquisitions made pursuant to Section 3 of the OIWA, which, "[b]y its terms," "extends to properly incorporated Oklahoma Indian groups 'the right . . . to enjoy any other rights or privileges secured to an organized Indian tribe under the [IRA].'" *Id.* at 19a (quoting 25 U.S.C. 5203) (brackets in original). Section 3 applies to any "recognized tribe or band of Indians residing in Oklahoma," *id.* at 20a (quoting 25 U.S.C. 5203), and does not cross-reference the IRA's definition of "Indian." Thus, the court determined, Congress in the OIWA chose "to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the definitions of 'Indian' set forth in [the IRA]." *Id.* at 19a (quoting *Carcieri*, 555 U.S. at 392).

b. The court of appeals also held that neither BIA regulations nor the 1866 Treaty required BIA to obtain petitioner's consent to acquire the UKB parcel in trust. Pet. App. 20a-28a.

i. As noted above, BIA regulations generally provide that "[a]n individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition." 25 C.F.R. 151.8. The regulations further define "'reservation'" to include "former reservation[s]" "in the State of Oklahoma." 25 C.F.R. 151.2(f). And the 1992 Appropriations Act stated that "until such time as legislation is enacted to the contrary, * * * [no] funds [shall] be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma

without the consent of the Cherokee Nation." 105 Stat. 1004.

The court of appeals explained that the 1999 Appropriations Act "overr[ode]" the statutory and regulatory "consent" requirements "with respect to lands within the original Cherokee territory in Oklahoma." Pet. App. 22a. In particular, the 1999 Appropriations Act "provides explicitly that it amends the 1992 Appropriations Act," *ibid.*, to state that "until such time as legislation is enacted to the contrary, no funds shall be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without *consultation* with the Cherokee Nation," *id.* at 21a (quoting 112 Stat. 2681-246).

The court of appeals further explained that although the 1999 Appropriations Act "does not specifically state that it overrides" BIA's trust regulation, "when a statute and a regulation are in conflict, the statute 'renders the regulation which is in conflict with it void and unenforceable.'" Pet. App. 22a (quoting *Enfield* v. *Kleppe*, 566 F.2d 1139, 1142 (10th Cir. 1977)). The court rejected the assertion that its reading of the 1999 Appropriations Act "amounts to a 'repeal by implication'" of the regulation: The former simply "carves out an exception to" the latter, and there is no "'irreconcilable conflict'" between the two. *Id.* at 23a (citation omitted).

ii. The court of appeals further held that Article 26 of the 1866 Treaty—which "guarantee[d] to the people of the Cherokee Nation * * * protection against domestic feuds and insurrections and against hostilities of other tribes," 14 Stat. 806—did not grant petitioner "the power to veto the UKB's land-into-trust application." Pet. App. 28a. The court first "note[d] that [petitioner] seem[ed] to reject the district court's finding

that the UKB's application 'could be considered "a domestic feud or insurrection,"'" and the court agreed "that the 'domestic feud or insurrection' clause does not apply." *Id.* at 26a (citation omitted). The court then explained that petitioner's reliance on the "hostilities of other tribes" clause was misplaced. *Id.* at 27a-28a. Based on the contemporaneous, ordinary meaning of "'hostilities,'" the 1866 Treaty "contemplated warlike hostilities, not mere civil disagreements." *Id.* at 27a. Further, reading "'hostilities'" in context, that term—like "'feuds'" and "'insurrections,'" but unlike "'peaceable possession'"—"suggest[s] violent conflict" and "warlike aggression," which were not present here. *Ibid.*; see *id.* at 28a.

4. The court of appeals denied petitioner's petition for rehearing en banc, with no judge requesting a vote. Pet. App. 59a-60a.

ARGUMENT

Petitioner contends (Pet. 11-29) that the court of appeals' interpretation of the OIWA conflicts with *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), and that Article 26 of the 1866 Treaty and a BIA regulation required petitioner's consent before BIA could acquire UKB's parcel of land into trust. The court correctly rejected those arguments. Its decision turns on the unique circumstances of UKB and the present-day Cherokee Nation under the OIWA, and it does not conflict with any decision of this Court or of another court of appeals. Contrary to petitioner's assertion (Pet. i), this case does not "raise[] the same issue" as *Maine Community Health Options* v. *United States*, No. 18-1023 (Apr. 27, 2020). The petition for a writ of certiorari should be denied.

1. Petitioner first contends that the court of appeals' determination that the IRA's definition of "Indian" is

inapplicable to trust acquisitions under Section 3 of the OIWA "'conflicts with'" this Court's decision in *Carcieri*. Pet. 11 (citation omitted); see Pet. 11-16. That is incorrect.

a. Petitioner does not suggest (Pet. 11-16) that Congress expressly incorporated the IRA's definition of "Indian" into the OIWA. Instead, petitioner relies (Pet. 12-13) on Section 3 of the OIWA, which states that the Secretary may "issue" to "[a]ny recognized tribe or band of Indians residing in Oklahoma" a "charter of incorporation," which may "convey * * * the right to enjoy any other rights or privileges secured to an organized Indian tribe under [the IRA]." 25 U.S.C. 5203. As the court of appeals correctly explained, however, Section 3's application to "*[a]ny* recognized tribe or band of Indians residing in Oklahoma," *ibid.* (emphasis added), makes clear that the OIWA "expand[s] the Secretary's authority to particular Indian tribes not necessarily encompassed within the definitions of 'Indian' set forth in [the IRA]." Pet. App. 19a (quoting *Carcieri*, 555 U.S. at 392).

That expansion is consistent with this Court's decision in *Carcieri*. Indeed, the Court there recognized Congress's ability to so expand the Secretary's authority, 555 U.S. at 392, and it cited several examples of statutes in which Congress likewise broadened the Secretary's land acquisition authority to tribes not necessarily encompassed within the IRA's definition of "Indian." See *id.* at 392 n.6. Thus, petitioner's concern (Pet. 12, 15) that the court of appeals' interpretation of the OIWA extends to recognized Oklahoma tribes rights or privileges unavailable to "similarly-situated tribes in other States" ignores that Congress *already*

has expressly extended the IRA's rights or privileges to other such tribes.

Petitioner contends (Pet. 14-15) that *Carcieri* "expressly held" that "when the rights and privileges of the IRA are incorporated by reference into another statute," that incorporation "also carr[ies] over" the IRA's definition of "'Indian.'" *Ibid.* (citation omitted). But *Carcieri* contains no such holding. Petitioner relies (Pet. 15) on *Carcieri*'s discussion of a provision in the Indian Land Consolidation Act (ILCA), 25 U.S.C. 2201 *et seq.* See 555 U.S. at 394. The ILCA provision states that the IRA's land acquisition authority "shall apply to all tribes notwithstanding" an IRA provision that had previously made acceptance of the IRA's benefits optional. See 25 U.S.C. 2202. Accordingly, as *Carcieri* reasoned, ILCA "by its terms simply ensures that tribes may benefit from [the IRA's land acquisition provision] even if they opted out of the IRA." 555 U.S. at 394. The OIWA, by contrast, does not guarantee any benefits to eligible tribes that chose to "opt[] out" of the IRA, *ibid.*; rather, the OIWA extends the IRA's "rights or privileges" to a distinct group of entities: "incorporated group[s]" formed pursuant to the Act and Interior regulations by "[*a*]*ny* recognized tribe or band of Indians residing in Oklahoma," 25 U.S.C. 5203 (emphasis added).

b. Petitioner's reliance (Pet. 12-13) on the OIWA's purpose and legislative history is similarly misplaced.

Petitioner asserts (Pet. 12-13) that Section 3 of the OIWA merely "fill[s] a hole left by" the IRA by "extend[ing] the IRA's tribal government and corporate charter provisions to Oklahoma tribes." Yet the OIWA did not simply rescind language in the IRA that had

made specific statutory provisions inapplicable to certain "[]named Indian tribes" in Oklahoma. 25 U.S.C. 5118. Rather, Section 3 granted the Secretary broad authority to issue to "[*a*]*ny* recognized tribe * * * in Oklahoma" a charter of incorporation that bestows "*any* * * * rights or privileges" secured under the IRA, including the privilege of having land taken into trust. 25 U.S.C. 5203 (emphases added). In recognizing UKB "within the meaning of section 3 of [the OIWA]," 1946 Act, 60 Stat. 976, Congress would have understood that UKB, once incorporated, could enjoy those same rights and privileges.

Nothing in the legislative history of the OIWA contradicts that plain language. Petitioner relies on a statement in a House Report that Section 3 of the OIWA "permit[s] the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the [IRA]." Pet. 13 (quoting H.R. Rep. No. 2408, 74th Cong., 2d Sess. 3 (1936)). But while the IRA and the OIWA address the "same" "rights and privileges," *ibid.* (citation omitted), they do so for two different groups: in the case of the IRA, recognized Indian tribes "under Federal jurisdiction" in 1934, 25 U.S.C. 479 (1934), and in the case of the OIWA, "[*a*]*ny* recognized tribe or band of Indians residing in Oklahoma," 25 U.S.C. 5203 (emphasis added). Nothing requires reading the OIWA's Oklahoma-specific language to incorporate the IRA's more general limitation on the definition of "Indian" for purposes of that Act.[2]

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[2] Petitioner's reliance (Pet. 13) on 25 C.F.R. 151.2(b), is similarly misplaced. That provision defines "Tribe" for purposes of BIA's land acquisition regulations to include, *inter alia*, corporations chartered under both the IRA and the OIWA. *Ibid.* (emphasis omitted).

2. The court of appeals also correctly held that petitioner's consent was not required before the Secretary could take the UKB parcel into trust.

a. The court of appeals held that Article 26 of the 1866 Treaty—in which "[t]he United States guarantee[d] to the people of the Cherokee nation * * * protection * * * against hostilities of other tribes," 14 Stat. 806—did not give petitioner the "power to veto" BIA's acquisition of the UKB parcel. Pet. App. 28a. That interpretation appropriately distinguished the UKB's trust application from the sorts of "violent conflict[s]" contemplated by the 1866 Treaty. *Id.* at 27a. As the court explained, at the time of the Treaty's signing, the ordinary meaning of "[h]ostility" was "the practice of an open enemy; opposition in war; war; warfare." *Ibid.* (quoting *A Dictionary of the English Language* 697 (1860)); see also *ibid.* ("hostility" defined as "[a] state of open war" or "[a]n act of open war") (quoting 1 *A Law Dictionary and Glossary* 31 (2d ed. 1867) (capitalization omitted)); *Report of the Commissioner of Indian Affairs for the Year 1865*, at 340 (1865) (letter from "Southern Cherokees" delegation to United States treaty commissioners recounting earlier "hostility" between Cherokee factions resulting in "bloodshed" and "murders") (emphasis omitted); *Webster's International Dictionary of the English Language* 708 (1907) (defining "hostility," "especially in the plural," as "acts of warfare; attacks of an enemy") (capitalization and emphasis omitted). The court further explained that "[t]he context of the 'hostilities' clause confirms" the point: Article 26 "[p]lac[es] 'hostilities' in a group with

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But those statutes authorize different sets of entities to charter corporations.

other words suggesting violent conflict—'feuds' and 'insurrections'—and contrast[s] those events to 'peaceable possession'" of the Cherokee Nation's former territory. Pet. App. 27a. In that context, "the Treaty would have been understood to protect [the Cherokee] Nation from warlike aggression"—not from a successful land-into-trust application. *Id.* at 27a-28a. In addition, *both* petitioner *and* UKB trace their lineage to the historical Cherokee Nation that entered into the 1866 Treaty, and both accordingly point to the Treaty as a source of their authority. UKB C.A. Br. 27-28; UKB C.A. Reply Br. 9-10. Thus, an acquisition into trust on behalf of UKB does not violate a guarantee in the Treaty to protect "the Cherokee nation" from hostilities of "*other* tribes." Art. 26, 14 Stat. 806 (emphasis added).

Petitioner does not meaningfully engage (Pet. 16-21) with the court of appeals' textual analysis of Article 26 of the 1866 Treaty. Instead, petitioner relies (Pet. 17) on provisions in the Treaty of New Echota with the historical Cherokee Nation—including that the Nation's land would not, without its consent, "be included within the territorial limits or jurisdiction of any State or Territory," and that the Cherokee Nation's "national councils" would be permitted "to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people," provided such laws were not "inconsistent with the constitution of the United States" and applicable federal statutes. Art. 5, 7 Stat. 481. According to petitioner (Pet. 17-18), those provisions granted it a "right to self-government and sovereignty within its reservation boundaries"—a right that was preserved by Article 31 of the 1866 Treaty, which "reaffirmed" the provisions of

prior treaties that remained in force and that were "not inconsistent" with the 1866 Treaty, 14 Stat. 806.

Petitioner's assertion (Pet. 18) of a "treaty right to sovereignty" over land in the former Cherokee territory is not properly before the Court. In the court of appeals, petitioner relied on Article 26 of the 1866 Treaty, not the Treaty of New Echota, to support its treaty-based contention that it may veto the Secretary's approval of UKB's land-into-trust application. See Pet. C.A. Br. 35-44. The court likewise addressed only Article 26. See Pet. App. 25a-28a. Because petitioner's sovereignty-based treaty argument was neither pressed nor passed upon below, this Court should not address it. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Even if it were properly presented, petitioner's argument ignores the past 120 years of federal Indian policy and the transformation of the former Indian Territory in eastern Oklahoma. The historical Cherokee Nation's "tract of country," as described in the Treaty of New Echota, referred to property that was then held communally by the tribe. Art. 2, 7 Stat. 479-480. But most of that land was transferred to individual tribal members in the early twentieth century when Congress, based on "agree[ment]" with the historical Cherokee Nation for the "allotment of [its] lands," enacted statutes to distribute tribal property to individual members in preparation for Oklahoma statehood. *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 627 (1970); see *Heckman* v. *United States*, 224 U.S. 413, 426-436 (1912); see generally *Cohen's Handbook* § 4.07[1][a], at 288-291; U.S. Amicus Br. at 8-20, *McGirt*, *supra* (No. 18-9526). Thus, this case does not involve the (historical) Cherokee Nation's sovereignty over any treaty lands it once

held. Instead, it involves a parcel of land that UKB owns in fee. Cf. Pet. 27 (acknowledging that petitioner "retains several thousand acres in trust" within the boundaries of the original Cherokee territory). And because this case does not concern the historical Cherokee Nation's lands as they were formerly encompassed by a treaty, it also does not present the question whether the OIWA abrogated petitioner's treaty rights, as petitioner contends. See Pet. 20-21 & n.5. Cf. Pet. 21.[3]

b. The court of appeals also correctly held that BIA regulations did not require petitioner's consent for the Secretary to take the UKB parcel into trust. Pet. App. 20a-24a. BIA regulations generally require the "consent[]" of the "tribe having jurisdiction" over a "former reservation" in Oklahoma before the United States may acquire land on that former reservation in trust for another tribe. 25 C.F.R. 151.2(f), 151.8. Regardless of whether that regulation otherwise would apply to UKB's land-into-trust application,[4] Congress has since expressly addressed the issue by statute. In the 1992

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[3] Petitioner briefly cites (Pet. 17) Article 15 of the 1866 Treaty, which provided certain methods for the United States to settle "other tribes" "within the Cherokee country." 14 Stat. 803-804. But the court of appeals did not address that provision. See Pet. App. 1a-35a. And petitioner's negative inference lacks merit: The Secretary's action in taking the UKB parcel into trust does not constitute the United States settling another tribe on Cherokee treaty lands; like petitioner, the UKB also descends from the historical Cherokee Nation, and the historical Cherokee Nation's treaty lands were largely allotted to tribal members in preparation for Oklahoma statehood.

[4] In the court of appeals, the government assumed, for purposes of argument, that the former Cherokee "reservation" was not also the UKB's own former reservation, even though both UKB and petitioner descend from the historical Cherokee Nation. U.S. C.A. Br. 29 n.3.

Appropriations Act, Congress required petitioner's "consent" before the Secretary could expend funds to "take land into trust within the boundaries of the original Cherokee territory in Oklahoma." 1992 Appropriations Act, 105 Stat. 1004. But in the 1999 Appropriations Act, Congress expressly "amended" that proviso to state that "no funds shall be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without consultation" with petitioner. 112 Stat. 2681-246. The court of appeals correctly determined that the 1999 Appropriations Act, by amending the 1992 Appropriations Act that required consent, "overrides" the BIA regulation (to the extent it would otherwise apply) by "carv[ing] out" a "narrow" statutory exception within the original Cherokee territory to Section 151.8's generally applicable consent requirement. Pet. App. 22a-24a & n.17.

Petitioner's contrary argument (Pet. 21-26) relies on the premise that the court of appeals should have "assess[ed] whether [the] appropriations rider implicitly but silently repeal[ed]" the BIA regulation. Pet. 22. But by specifically addressing consent or consultation requirements with respect to the original Cherokee territory, Congress in 1992 and 1999 provided for the matter to be resolved by statute—rather than regulation.

Petitioner's argument in any event misapprehends the critical distinction between statutory commands and agency regulations. Petitioner's discussion of implied repeals would be relevant if this case required the Court to interpret "two *acts* upon the same subject." *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936) (emphasis added); see *Branch* v. *Smith*, 538 U.S. 254, 273 (2003) (An "implied repeal will only be found where

provisions in two statutes are in 'irreconcilable conflict.'") (opinion of Scalia, J.) (quoting *Posadas*, 296 U.S. at 503); *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 381 (1996) (describing the presumption against implied repeal as requiring conflict between "the two federal statutes at issue"); *Black's Law Dictionary* 1436 (11th ed. 2019) (defining "presumption against implied repeal" as the "doctrine that repeal of a statute by implication is disfavored"). But petitioner asserts (Pet. 21-26) only a purported conflict between a statute and an agency's regulation. In that scenario, the court of appeals correctly observed that "the statute 'renders the regulation which is in conflict with it void and unenforceable.'" Pet. App. 22a (quoting *Enfield* v. *Kleppe*, 566 F.2d 1139, 1142 (10th Cir. 1977)). Because petitioner cites (Pet. 26) only cases involving an alleged conflict between two statutes, petitioner provides no basis for questioning the court of appeals' analysis of the interaction between the statute and regulation at issue here.

Petitioner is likewise incorrect in asserting (Pet. 22-23) that the issue in this case is "closely analogous" to the issue in *Maine Community Health Options* v. *United States*, *supra*, *Moda Health Plan, Inc.* v. *United States*, No. 18-1028, and *Land of Lincoln Mutual Health Ins. Co.* v. *United States*, No. 18-1038 (Apr. 27, 2020) (cases consolidated). In those cases, the Court considered the interaction between congressionally enacted statutes: a particular provision of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. 18001 *et seq.*, obligating the government to pay money, on the one hand, and limitations in subsequent appropriations acts, on the other. See *Maine Cmty. Health Options*, slip op. 16-23. This case, by contrast, concerns

the interaction between an appropriations provision that expressly amended a prior appropriations provision to achieve a substantive result (*i.e.*, to alter BIA's obligation from obtaining consent to providing for consultation), and a regulation. The Court's decision in *Maine Community Health Options* and the consolidated cases is not implicated here.

Even if petitioner were correct that the rule against implied repeal applies in this context, its argument (Pet. 25) that the 1999 Appropriations Act and the BIA regulation are "easily reconcil[able]"—and thus the regulation applies here—lacks merit. In petitioner's view, the 1999 Appropriations Act requires consultation with petitioner before BIA may "spend appropriated funds to process an application to take land" into trust within the boundaries of the former Cherokee territory, whereas the regulation requires petitioner's consent to "*actually* take land into trust." Pet. 25-26 (emphasis added). As the court of appeals explained, however, "[t]he operative action is taking land into trust," and there is "no practical difference between 'acquir[ing] land in trust' (section 151.8's language) and 'us[ing funds] to take land into trust' (the Act's language)." Pet. App. 24a (brackets in original). That statement is consistent with the Conference Report for the 1999 Appropriations Act, which explained that the rider's purpose was to ensure that BIA does not "establish[] trust holdings" for UKB (or another specifically identified tribe) "within the Cherokee's original boundaries without Cherokee consultation." H.R. Conf. Rep. No. 825, 105th Cong., 2d Sess. 1209 (1998). The court of appeals thus did not err in holding that the 1999 Appropriations Act superseded the regulation's consent requirement, and its analysis of

the interaction between the statute and regulation does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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