No. 20-753

In The
Supreme Court of the United States

CONFEDERATED TRIBES AND
BANDS OF THE YAKAMA NATION,

Petitioner,

v.

YAKIMA COUNTY AND CITY OF TOPPENISH,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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States do not control federal jurisdiction in Indian Country—Congress does. The Ninth Circuit's decision threatens this fundamental principle of federal Indian law. In 25 U.S.C. § 1323, Congress empowered the Secretary of the Interior ("Secretary") to reassume Pub. L. 83-280 ("Public Law 280") jurisdiction in Indian Country. The Ninth Circuit's decision rewrites this statute by substituting the states as the arbiters of the retrocession process instead of the Secretary. It requires the United States to bend to state interpretations of federal Indian Country jurisdiction, even where a state unilaterally changes such jurisdiction without the tribal consent required by 25 U.S.C. § 1326.

Congress did not envision that the United States would be subservient to the states when it created the retrocession framework; a framework built to address states' historic misuse of Public Law 280. The decision below erroneously empowers states to control the scope of the United States' reassumption of Public Law 280 jurisdiction across Indian Country. Respondents' opposition brief ignores precedent requiring that federal law, not state law, controls the *validity* of a retrocession, even where a state's retrocession process violated its own constitution or statutes. In this case, the Supreme Court should extend that holding to establish that federal law and federal agency judgment at the time of retrocession governs the *scope* of any retrocession once a state offers it. A case of such national importance should be reviewed by this Court.

Respondents' principal argument opposing review is that the Ninth Circuit's interpretation of the State's intent in retroceding Public Law 280 jurisdiction is largely a case-specific inquiry. But the premise that state intent controls a federal reassumption of Public Law 280 jurisdiction is a paradigm shift that will reverberate throughout federal Indian law and undermine settled Indian Country jurisprudence. Those effects are already on display here. In this case, the Ninth Circuit relied on a state's intent to ignore deference owed to the Department of the Interior ("DOI") in conflict with the precedent of this Court. Such a monumental change is not authorized by Congress, and is not supported by the law or evidence of this case. This Court should grant certiorari, reverse the decision below, and affirm federal authority to define federal jurisdiction within federal Indian Country.

A. Respondents And The Ninth Circuit Undermine A Critical Element Of Federal Indian Law By Ignoring Relevant Cases, Statutes, And Evidence.

The Ninth Circuit relies on state intent to define the scope of a federal reassumption of Public Law 280 jurisdiction, but does not reconcile its decision with the statutes, federal precedent, or the clear evidence of contrary federal intent. Respondents' opposition brief assumes this state-determinative position, but remains silent on the law and evidence to the contrary. Such avoidance merely highlights the erroneous grounds

underlying the decision below, and supports this Court's review of this important federal question.

The cases that speak to the federal reassumption of Public Law 280 jurisdiction are defined by an inquiry into the federal government's actions and intent at the moment the retrocession is accepted. *See United States v. Lawrence*, 595 F.2d 1149, 1151-52 (9th Cir. 1979); *Oliphant v. Schlie*, 544 F.2d 1007, 1012 (9th Cir. 1976), *rev'd on other grounds sub nom. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Brown*, 334 F. Supp. 536, 541-42 (D. Neb. 1971); *Omaha Tribe of Neb. v. Walthill*, 334 F. Supp. 823, 831 (D. Neb. 1971).[1] Tribes must be able to rely on the finality afforded by the United States' understanding of the scope of Public Law 280 jurisdiction at the moment it is reassumed under 25 U.S.C. § 1323. Pet. 14-17. Anything else reduces tribes to a "political ping-pong ball between the state and federal governments . . . " bouncing between unresolved, complex jurisdictional questions without the certainty required by 25 U.S.C. § 1323. *Brown*, 334 F. Supp. at 542. And it renders the United States impotent in defining federal Indian Country jurisdiction under 25 U.S.C. § 1323. Indeed, Respondents assert as much in their briefing when they characterize Interior's role in retrocession as a mere rubber stamp and pass-through vehicle

[1] Respondents' assertion that the Yakama Nation seeks to overturn *Oliphant*, 435 U.S. 191 (1978) and *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) here is false. Br. in Opp. 15. Although this Court should revisit *Oliphant* at its earliest opportunity. Pet. 25.

between a state's retrocession proclamation and publication in the Federal Register.[2] Br. in Opp. 11.

This cannot be. This Court has long held that the Constitution vests Congress with all powers "required for the regulation of our intercourse with Indians." *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). Congress has not empowered the states to divest the Secretary of her control over the scope of a federal reassumption of Public Law 280 jurisdiction in Indian Country. 25 U.S.C. § 1323(a) (limiting the state's role in retrocession to making the offer of retrocession). The Ninth Circuit's decision cannot be reconciled with 25 U.S.C. § 1323, the relevant precedent, or the fundamental federal-tribal relationship enshrined in the Constitution.

The decision below also fails to meaningfully address evidence of the United States' clear change in its understanding of the scope of this retrocession. Respondents' brief goes further and outright denies that any such change in understanding occurred without addressing the evidence in the record to the contrary. Br. in Opp. 12. The fact remains that the United States reassumed Public Law 280 jurisdiction over all crimes involving Indians within the Yakama Reservation, and then years later changed that understanding by implementing the State of Washington's post-retrocession request to reassume jurisdiction over crimes between

[2] Respondents state "the role of the Department of Interior was simply to accept the retrocession and post notice of the retrocession in the Federal Registrar [sic] once it was accepted." Br. in Opp. 11.

Indians and non-Indians. Pet. 6-10. The United States implemented this change—reopening the concluded retrocession process to new agency interpretations years after the process's conclusion—without any prior consultation with the Yakama Nation and without the Yakama Nation's prior consent required by 25 U.S.C. § 1326. Pet. 20-21.

The record establishes that in 2015, the United States reassumed criminal jurisdiction over all crimes involving Indians within the Yakama Reservation. Pet. App. 71, 73-77, 93, 99-100. Governor Inslee issued his retrocession proclamation, and then 10 days later sent a letter seeking to change it. Pet. App. 50-58. Assistant Secretary Washburn rejected that request, responding that "unnecessary interpretation might simply cause confusion . . ." and "the Proclamation is plain on its face and unambiguous." Pet. App. 56-57, 71. Governor Inslee understood this as rejecting his request, because when the Yakama Nation and federal agencies implemented retrocession six months later, Governor Inslee made another request for a re-interpretation. Pet. App. 95-98. The Deputy Assistant Secretary of Indian Affairs rejected Governor Inslee's request, Pet. App. 99-101, and six months later DOI issued a memorandum approved by the Department of Justice ("DOJ") confirming that the State no longer retained criminal jurisdiction over Indians within the Yakama Reservation. Pet. App. 73-77.

A new administration turned this understanding on its head. Years later, the new Assistant Secretary of Indian Affairs purported to revoke all of the

aforementioned guidance on the eve of a dispositive motion hearing in this case. Pet. App. 102-03. This was based on a new opinion by the federal Office of Legal Counsel that deferred to the state's interpretation of retrocession made years prior. *See* The Scope of State Criminal Jurisdiction over Offenses Occurring on the Yakama Indian Reservation, Slip Op. O.L.C. (July 27, 2018). This represents an unlawful reversal in federal policy. Federal agencies supplanted congressional authority over Indian affairs at the prompting of a state, reversing an agency decision committed to finality by statute. Such critical jurisdictional decisions cannot be so easily thrown into doubt. Deviation from the structure of the federalist balance should be reviewed and reversed by this Court.

B. Respondents Ignore The Conflict Between The Ninth Circuit's Decision And This Court's Precedent On Deference Owed To Agency Interpretations.

Respondents failed to address the Ninth Circuit's departure from this Court's precedent on agency deference. DOI reassumed from the state criminal jurisdiction over crimes involving Indians within the Yakama Reservation and repeatedly expressed its intent to do so at the time of retrocession and in the following months. The Ninth Circuit's failure to defer to that agency interpretation stands in conflict with this Court's precedent and warrants review.

This Court has maintained that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984); *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (agency rules and interpretation "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"). Deference cannot, however, be unrestrained. Deference to agency decisions and reinterpretations must be abandoned when those decisions prove inconsistent or do "not reflect the agency's fair and considered judgment. . . ." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)). This is especially true where a new agency reinterpretation "appear[s to be] nothing more than a 'convenient litigating position,' or [an attempt to] defend past agency action against attack." *Christopher*, 567 U.S. at 155 (first quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988); then quoting *Auer*, 519 U.S. at 462); *see also Bowen*, 488 U.S. at 213 ("[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

The Ninth Circuit's decision conflicts with this Court's deference framework as it improperly ignored DOI's original acceptance and guidance. DOI accepted the State's retroceded jurisdiction according to the plain terms of Proclamation 14-01. Pet. App. 71. DOI letters, memoranda, and a jurisdictional matrix

memorialized the scope and understanding of that federal acceptance. Pet. App. 71, 73-77, 93, 99-100. The Yakama Nation, DOI, and DOJ then implemented retrocession consistent with DOI's original decision and understanding upon federal acceptance.

The Ninth Circuit ignored these facts and instead considered the subsequent federal administration's reinterpretations as persuasive. By resting its decision on reinterpretations that do "not reflect the agenc[ies'] fair and considered judgment," *Christopher*, 567 U.S. at 155, the Ninth Circuit contradicted this Court's direction to rein in an agency's reinterpretation or action that directly "conflicts with a prior interpretation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2430 (2019) (quoting *Christopher*, 567 U.S. at 155). Moreover, the Ninth Circuit failed to follow this Court's guidance against reinterpretations that reverse firm and understood policy. The subsequent Assistant Secretary of Indian Affairs' letter ("Sweeney Letter") withdrew the former DOI guidance on retrocession days before a dispositive motion hearing in this case. Rather than recognize that the Sweeney Letter represented "precisely the kind of 'unfair surprise' against which [this Court's] cases have long warned," *Christopher*, 567 U.S. at 156 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007)); *see Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (deferring to an agency's improper reinterpretations "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government."), the Ninth Circuit adopted it and deferred to it. Indeed,

the Ninth Circuit's decision allows the Sweeney Letter, which clearly purports to carry the force of law, to avoid the time-consuming processes of notice and comment. *Kisor*, 139 S. Ct. at 2420-21; *see also Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087-92 (9th Cir. 2003) (invalidating an agency interpretation that was issued without the requisite procedures). The Ninth Circuit's decision stands directly at odds with this Court's precedent on agency deference, making it ripe for this Court's review.

C. Respondents Disregard The United States' Vital Interest In Tribal Self-Determination And Public Safety In Indian Country.

Respondents' brief ignores the United States' significant interest in tribal self-determination, while simultaneously empowering state authority in Indian Country. Congress announced its federal Indian policy of self-determination nearly a century ago in the Indian Reorganization Act, 25 U.S.C. § 5101 *et seq.*, which Congress returned to again in 1975 with the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 *et seq*. This Court has acknowledged "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). But Respondents seek, and have thus far accomplished through the Ninth Circuit, a path of paternalism through state control that reeks of the termination-era policies the United States abandoned long ago. *See, e.g.*, *Cohen's Handbook of Federal Indian Law* § 1.06 (2015 ed.).

Respondents argue in favor of the policy behind Public Law 280 jurisdiction, Br. in Opp. 13, while ignoring the overwhelming evidence that Public Law 280 has been catastrophic for Indian Country. Pet. 25-27. Respondents point to the State's statutory duties to enforce state law, but ignore the State's continued refusal to enforce state law against even non-Indians within the Yakama Reservation. Editorial, *Agreement for Washington State Patrol to return to Yakama Reservation is long overdue*, SEATTLE TIMES, Feb. 20, 2020. Respondents characterize the Yakama Nation's objections to state authority—a foreign jurisdiction that did not exist as of the signing of the Treaty of 1855—within the Yakama Reservation as "utter nonsense." Br. in Opp. 15. But Respondents fail to address the states' well-documented failures to enforce criminal laws against non-Indian scofflaws within reservations. Pet. 26-27.

The State of Washington has had since 1963 to demonstrate its commitment to protecting the Yakama Members living within the Yakama Reservation. It has failed. The United States reassumed that jurisdiction from the State under 25 U.S.C. § 1323, returning the United States to its obligations under the Treaty of 1855 to protect Yakama Members from non-Indians within the Yakama Reservation. Treaty with the Yakamas, U.S.-Yakama Nation, June 9, 1855, 12 Stat. 951. Neither the state nor the United States have the authority to change that federal action years after the fact. *See* 25 U.S.C. § 1326.

Respondents remain silent on the absurdity of the jurisdictional scheme they seek to impose on Yakama Indian Country. They advocate for concurrent state jurisdiction over crimes by Indians within the Yakama Reservation, but only for crimes against non-Indians, and only on fee lands, and only for certain types of crimes. Imagine an emergency call to dispatch where the dispatcher has to ask "Are you Indian?" and "Are you on trust land?" while determining whether the nature of the crime triggers tribal, state, or federal jurisdiction. Consider the confusion that one "I don't know" response would cause. Often, multiple law enforcement agencies will respond to an on-reservation call from dispatch, and disputes or questions or hesitations arise over who has jurisdiction even between the most well-intentioned and collaborative law enforcement officers. The confusion that will result from Respondents' arguments, as adopted by the Ninth Circuit, stands in conflict with the United States' understanding when it reassumed Public Law 280 jurisdiction. It will continue to compound the problems that misguided state and federal criminal enforcement policies have caused on the Yakama Reservation.

By granting review, this Court can choose a different path. It can uphold Congress's intent in passing 25 U.S.C. §§ 1323 and 1326. It can affirm the certainty afforded by the United States' understanding of its own actions at the moment it reassumes Public Law 280 jurisdiction. When dispatch receives an emergency call, the only question would be "Are you or anyone involved in the incident an Indian?" If the answer is yes, a tribal

police officer with federal law enforcement authority through a special law enforcement commission from the United States would arrive to enforce tribal law or federal law. If no Indians are involved, the call would be routed to local non-Indian law enforcement.

The way to improve public safety on the Yakama Reservation, and across all of Public Law 280-impacted Indian Country, is to provide jurisdictional certainty and support for tribal self-determination. The Ninth Circuit's decision undermines that certainty required by federal law, ignores federal control over the retrocession process, installs states as the arbiters of federal jurisdiction in Indian Country, and undermines self-determination. This case raises critical issues of federal Indian law that should be reviewed by this Court.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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