No. 20-846

In the Supreme Court of the United States

CLUB ONE CASINO, INC., ET AL., PETITIONERS

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Section 5108 of the Indian Reorganization Act (IRA), 25 U.S.C. 5101 *et seq.*, "authorize[s]" the Secretary of the Interior, "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands * * * within or without existing reservations, * * * for the purpose of providing land for Indians." 25 U.S.C. 5108. The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, authorizes the Secretary to determine whether a tribe may conduct certain gaming on off-reservation trust land acquired after October 17, 1988. 25 U.S.C. 2719(b)(1)(A). Class III gaming, at issue here, is lawful under IGRA if (among other conditions) it is conducted on "Indian lands" and authorized by the Indian tribe "having jurisdiction over such lands." 25 U.S.C. 2710(d)(1)(A)(i). The questions presented are:

1. Whether the Secretary of the Interior's acquisition of land in trust for the benefit of a tribe under Section 5108 of the IRA vests jurisdiction in the tribe (as well as the federal government) for purposes of IGRA.

2. Whether, if the IRA vests federal and tribal jurisdiction over land so acquired, Congress had power to enact the IRA under the Indian Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 959 F.3d 1142. The opinion of the district court (Pet. App. 26-60) is reported at 328 F. Supp.3d 1033.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2020. A petition for rehearing was denied on August 3, 2020 (Pet. App. 62-63). The petition for a writ of certiorari was filed on December 18, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns plans for a tribal gaming facility on a parcel of land taken into trust by the Secretary of the Interior (Secretary) for the North Fork Rancheria of Mono Indians (Tribe), a federally recognized Indian

tribe. See Pet. App. 5. It involves both the Indian Reorganization Act (IRA), 25 U.S.C. 5101 *et seq.*, and the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*

1. a. The IRA confers discretion on the Secretary to "acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations," for the "purpose of providing land for Indians." 25 U.S.C. 5108. The Act provides that "[t]itle to any lands or rights acquired pursuant to this Act * * * shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." *Ibid.*; see 25 U.S.C. 5105 ("Title to lands or any interest therein acquired pursuant to this Act for Indian use shall be taken in the name of the United States of America in trust for the tribe or individual Indian for which acquired.").

b. IGRA provides a statutory basis for the "operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). IGRA generally prohibits gaming on lands taken into trust for tribes after October 17, 1988, with certain exceptions. See 25 U.S.C. 2719(a) and (b)(1). As relevant here, gaming is permitted on lands that are acquired in trust after that date and are not contiguous to the tribe's reservation if the Secretary determines that a gaming establishment on such lands "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the

Governor" of the affected state "concurs in the Secretary's determination." 25 U.S.C. 2719(b)(1)(A).

IGRA divides gaming into three classes. See 25 U.S.C. 2710. Class III gaming, at issue here, includes slot machines and house banking games, including card games and casino-style games. See 25 U.S.C. 2703(7)-(8). IGRA provides that Class III gaming is lawful only if it is conducted on "Indian lands" that are located in a state that permits such gaming. 25 U.S.C 2710(d). In relevant part, IGRA defines "Indian lands" as "any lands title to which is * * * held in trust by the United States for the benefit of any Indian tribe * * * and over which an Indian tribe exercises governmental power." 25 U.S.C. 2703(4)(B). Class III gaming is "lawful on Indian lands" only if such gaming is authorized by the "Indian tribe having jurisdiction over such lands." 25 U.S.C. 2710(d)(1)(A)(i).

Class III gaming must be conducted in conformance with a tribal-state compact entered into by the Indian tribe and the state and approved by the Secretary, or, if attempts to reach such a compact are unsuccessful, under "procedures" prescribed by the Secretary under IGRA's remedial process, 25 U.S.C. 2710(d)(7)(B)(vii)(II). The Indian tribe must request that the state "enter into negotiations for the purpose of entering into a tribal-state compact governing the conduct of gaming activities." 25 U.S.C. 2710(d)(3)(A). Upon receiving such a request, the state "shall negotiate with the Indian tribe in good faith to enter into such a compact." *Ibid.*

If negotiations are unsuccessful, the tribe may file suit against the state in federal district court. 25 U.S.C. 2710(d)(7)(A)(i). If the court finds that the state did not negotiate in good faith, the court must order the state and the tribe to conclude a compact within 60 days and,

if they do not, the state and the tribe must each submit their "last best offer for a compact" to a court-appointed mediator. 25 U.S.C. 2710(d)(7)(B)(iv). The mediator must then select the proposed compact that best comports with IGRA, and the state has 60 days to consent to the mediator's choice of compact. 25 U.S.C. 2710(d)(7)(B)(v)-(vi). If the state does not consent within that period, the mediator must notify the Secretary, who "shall prescribe * * * procedures"—known as Secretarial Procedures—"under which class III gaming may be conducted." 25 U.S.C. 2710(d)(7)(B)(vii)(II).

2. a. In 2005, the Tribe applied to the Secretary to have a 305-acre parcel of mostly undeveloped, private fee lands in Madera County, California (the Parcel) taken into trust for the Tribe's benefit under the IRA. Pet. App. 5. In 2013, the United States acquired the Parcel in trust for the Tribe pursuant to the IRA. Pet App. 31; *North Fork Rancheria of Mono Indians* v. *California*, No. 15-cv-419, 2015 WL 11438206, at *2 (E.D. Cal. Nov. 13, 2015).

"Facing high unemployment, inadequate public services, and an uncertain revenue stream," the Tribe sought to "stimulate economic development" by building a casino complex on the Parcel. *Stand Up for California!* v. *United States Dep't of the Interior*, 879 F.3d 1177, 1179-1180 (D.C. Cir. 2018), cert. denied, 139 S. Ct. 786 (2019). The Tribe asked the Secretary to determine whether the Parcel, once in trust, would be eligible for Class III gaming. *Id.* at 1180. In September 2011, the Secretary issued a Record of Decision determining that the Parcel was eligible for gaming under IGRA's exception for gaming on lands acquired in trust after October 17, 1988. Pet. App. 5-6; see 25 U.S.C. 2719(b)(1)(A). In August 2012, the Governor of California concurred.

Pet. App. 6; see *id.* at 31. On the same day, the Governor and Tribe completed and executed a tribal-state compact in accordance with IGRA, 25 U.S.C. 2710(d)(1)(C), to govern Class III gaming on the Parcel. Pet. App. 6, 32. In 2013, the California Legislature ratified the compact, and the Governor signed it into law. *Id.* at 6. The Secretary then published notice in the Federal Register that a compact between the Tribe and the State of California had been approved. 78 Fed. Reg. 62,649 (Oct. 22, 2013).[1]

b. During the 2014 election, a referendum known as Proposition 48 was placed on the state ballot, proposing to void the California Legislature's approval of the tribal-state compact. Pet. App. 6. Proposition 48 passed, nullifying the law that ratified the compact. *Ibid.*

In light of Proposition 48's passage, the State no longer recognized the compact as valid. *North Fork Rancheria of Mono Indians*, 2015 WL 11438206, at *3. In 2015, the Tribe requested that the State enter into negotiations for a new compact for the Parcel. Pet. App. 6. The State refused, and the Tribe filed suit under IGRA, seeking a declaration that the State failed to negotiate in good faith. *Ibid.*; see 25 U.S.C. 2710(d)(7)(A)(i); *North Fork Rancheria of Mono Indians*, 2015 WL 11438206, at *1. The district court agreed and ordered the State and Tribe to conclude a compact within 60 days, but the parties failed to do so. Pet. App. 6-7. As required by IGRA, the court then appointed a mediator, who directed the parties to submit their "last best offers" for a compact. *Id.* at 7. The mediator selected the

[1] The Secretary's initial determination that the Parcel was eligible for gaming under Section 2719(b)(1)(A), and the Secretary's approval of the compact, are separate final agency actions that petitioners do not challenge here.

Tribe's proposal, and submitted it to the State for its consent. *Ibid.* The State did not provide consent within the statutorily required period. *Ibid.*; see 25 U.S.C. 2710(d)(7)(B)(vi).

As required by IGRA, the mediator then submitted the proposed compact to the Secretary. Pet. App. 7; see 25 U.S.C. 2710(d)(7)(B)(vii). In July 2016, the Secretary prescribed Secretarial Procedures to regulate the Tribe's conducting of Class III gaming on the Parcel. Pet. App. 7; see *id.* at 64-271.

3. Petitioners are state-licensed cardrooms located in California. Pet. App. 5. Following the issuance of the Secretarial Procedures, petitioners filed this suit in the U.S. District Court for the Eastern District of California, contending that the issuance of those procedures violated the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, on the theory that the Secretary inadequately considered whether the Tribe had jurisdiction over the Parcel for purposes of IGRA. Pet. App. 26-27.

The district court granted summary judgment in favor of the Secretary. Pet. App. 26-60. The court first rejected petitioners' argument that the Tribe lacked "territorial jurisdiction" over the Parcel, as required by IGRA. *Id.* at 45. The court determined that the United States' action in acquiring the lands in trust for the Tribe under the IRA conferred jurisdiction on the Tribe. *Id.* at 40-52. Petitioners argued in the alternative that tribal jurisdiction obtained by virtue of the IRA violated the Tenth Amendment by providing for the unilateral transfer of the State's territorial jurisdiction. *Id.* at 40-41. The district court declined to address that issue, however, on the ground that the relevant agency action that purportedly violated the Tenth Amendment—the Secretary's acquisition of the Parcel

for the benefit of the Tribe under the IRA—was "not challenged in this action." *Id.* at 41.

4. The court of appeals affirmed. Pet. App. 1-25.

a. Like the district court, the court of appeals first rejected petitioners' argument that the Secretarial Procedures "were issued in violation of IGRA because the Tribe purportedly lacked jurisdiction" over the Parcel. Pet. App. 13. The court explained that "while there [wa]s no Ninth Circuit precedent precisely on point, other circuits have logically concluded that, as a matter of law, the federal government confers tribal jurisdiction over lands it acquires in trust for the benefit of tribes." *Id.* at 14; see *id.* at 14-16 (citing *Upstate Citizens for Equality, Inc.* v. *United States*, 841 F.3d 556 (2d Cir. 2016) (*Upstate Citizens*), cert. denied, 140 S. Ct. 2587 (2017); and *Yankton Sioux Tribe* v. *Podhradsky*, 606 F.3d 994 (8th Cir. 2010), cert. denied, 564 U.S. 1019 (2011)). The court "agree[d]" with those decisions. *Id.* at 14. The court observed that "when Congress enacted [IRA] 'it doubtless intended and understood that the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference as well as free from taxation.'" *Id.* at 15 (quoting *Yankton Sioux*, 606 F.3d at 1011 (brackets in original)); see *id.* at 14.

The court of appeals explained that "[a]s a general matter * * * off-reservation trust land like the * * * Parcel is 'Indian country' with all the jurisdictional consequences that attach to that status." Pet. App. 16. The court stated that "[o]ff-reservation trust land" is Indian country because it is, "by definition, land set aside for Indian use and subject to federal control." *Ibid.* (citing 18 U.S.C. 1151(b)). "Generally speaking," the court continued, "primary jurisdiction over land that is Indian

country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Ibid.* (quoting *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998)). The court accordingly determined that "the federal government confers tribal jurisdiction over lands it acquires in trust for the benefit of tribes as a matter of law." *Ibid.* The court clarified, however, that "federal and Indian authority do not entirely displace state authority over land taken into trust." *Id.* at 15 n.4 (quoting *Upstate Citizens*, 841 F.3d at 572).[2]

The court of appeals rejected petitioners' related contention that state consent or cession was required for the transfer of jurisdiction over the Parcel. Pet. App. 19. Petitioners had relied on the Enclave Clause of the Constitution, Art. I, § 8, Cl. 17, as well as 40 U.S.C. 3112. The court explained that the Enclave Clause applies when "the federal government takes 'exclusive' jurisdiction over land within a state," Pet. 19 n.6 (citing *Paul* v. *United States*, 371 U.S. 245, 263 (1963)), but "[s]tate jurisdiction is . . . only reduced, and not eliminated, when the federal government takes land into trust for a tribe," *id.* at 20 (quoting *Upstate Citizens*, 841 F.3d at 572). "Because federal and Indian authority do not wholly displace state authority over" such lands, "the Enclave Clause poses no barrier to the entrustment that occurred here." *Ibid.* (quoting *Upstate Citizens*, 841 F.3d at 572).

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[2] The court of appeals also rejected petitioners' argument that the Tribe fails to "exercise[] governmental power" over the Parcel as required by 25 U.S.C. 2703(4)(B). Pet. App. 17-19. Petitioners have not challenged that determination in this Court.

The court of appeals likewise rejected petitioners' reliance on 40 U.S.C. 3112. That statute provides certain conditions under which "the head of a department, agency, or independent establishment of the Government * * * may accept or secure, from the State in which land * * * that is under the immediate jurisdiction, custody, or control of the [government official] is situated, consent to, or cession of, any jurisdiction over the land or interest not previously obtained." 40 U.S.C. 3112(b). The court explained that Section 3112 "[b]y its own terms, * * * sets forth requirements for the federal government's *acceptance* of jurisdiction over land." Pet. App. 20 (citing 40 U.S.C. 3112(b)). Here, however, "the federal government is not accepting jurisdiction 'from the State,'" because such jurisdiction "was created by operation of law." *Ibid.*

b. The court of appeals also rejected petitioners' argument that, if the Secretary's acquisition of land in trust for the benefit of the Tribe under the IRA conferred jurisdiction on the Tribe, the IRA exceeds Congress's enumerated powers and violates the Tenth Amendment. Pet. App. 21-23.[3]

The court of appeals explained that the authority to regulate Indian affairs is among the enumerated powers of the federal government, and that "Indian relations became the exclusive province of federal law" upon the "adoption of the Constitution." Pet. App. 22

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[3] Although the district court had determined, in the alternative, that petitioners lacked standing to assert a Tenth Amendment challenge, the court of appeals found standing under this Court's decision in *Bond* v. *United States*, 564 U.S. 211, 220-221 (2011). Pet. App. 21 n.7; see Gov't C.A. Br. 32 n.5 (declining to assert a standing argument).

(citations omitted); see *id.* at 21 (noting the government's "plenary and exclusive" power over Indian affairs) (quoting *United States* v. *Lara*, 541 U.S. 193, 200 (2004)). The court further observed that, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *Id.* at 22 (quoting *New York* v. *United States*, 505 U.S. 144, 156 (1992)). Thus, the court held, because "Congress has plenary authority to regulate Indian affairs, * * * [the] IRA does not offend the Tenth Amendment." *Id.* at 22; see *id.* at 22-23 (citing authority).

The court of appeals denied rehearing and rehearing en banc. Pet. App. 62-63.

ARGUMENT

Petitioners renew their contentions (Pet. 18-38) that the government's taking land into trust for the benefit of a tribe under the IRA does not confer tribal jurisdiction over that land for purposes of IGRA, and that if it does so, the IRA exceeds Congress's powers. The court of appeals correctly rejected those arguments, and the decision below does not conflict with any decision of this Court or of another court of appeals. This Court has repeatedly denied petitions for certiorari raising similar constitutional challenges. See *Upstate Citizens for Equality, Inc.* v. *United States*, 140 S. Ct. 2587 (2017) (No. 16-1320); *Central N.Y. Fair Bus. Ass'n* v. *Zinke*, 137 S. Ct. 2134 (2017) (No. 16-1135); *Citizens Against Casino Gambling in Erie Cnty.* v. *Chaudhuri*, 136 S. Ct. 2387 (2016) (No. 15-780); *Stop the Casino 101 Coal.* v. *Brown*, 575 U.S. 1027 (2015) (No. 14-1236). The same result is warranted here, particularly because the Secretarial Procedures remain under review in separate litigation.

1. The court of appeals correctly determined that once the United States acquired the Parcel in trust for the Tribe, the Tribe acquired jurisdiction over the Parcel for purposes of IGRA.

a. i. The IRA "authorize[s]" the Secretary, "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations," for the "purpose of providing land for Indians." 25 U.S.C. 5108. The Act provides that "[t]itle to any lands" acquired under the IRA "shall be taken in the name of the United States in trust for the Indian tribe." *Ibid.*; see 25 U.S.C. 5105 ("Title to lands or any interest therein acquired pursuant to this Act for Indian use shall be taken in the name of the United States of America in trust for the tribe or individual Indian for which acquired.").

The court of appeals correctly determined that once the federal government took the Parcel into trust for the Tribe, it became "Indian country" under 18 U.S.C. 1151, "with all the jurisdictional consequences that attach to that status." Pet. App. 16; see *id.* at 16 n.5 (noting that although Section 1151 "by its terms relates only to criminal jurisdiction," this Court has "recognized" its general applicability to civil jurisdiction) (quoting *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) (*Venetie*)). As this Court has recognized, trust lands qualify as Indian country because such lands have been "validly set apart for the use of the Indians as such, under the superintendence of the Government." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (citations omitted); see *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 125 (1993); *Cohen's Handbook of*

Federal Indian Law § 3.04[2][c][ii], at 190-193 (Nell Jessup Newton et al. eds. 2012); see also, *e.g.*, *Langley* v. *Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985) ("[W]hether the lands are merely held in trust for the Indians or whether the lands have been officially proclaimed a reservation, the lands are clearly Indian country."). The Secretary's decision to take the Parcel into trust for the Tribe—and thus to make the Parcel Indian country—brings the Parcel within the general rule that "primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." Pet. App. 16a (quoting *Venetie*, 522 U.S. at 527 n.1); see also, *e.g.*, *Yankton Sioux Tribe* v. *Podhradsky*, 606 F.3d 994, 1011 (8th Cir. 2010), cert. denied, 564 U.S. 1019 (2011).

That holding is confirmed by the IRA's history and purposes. The IRA was enacted "against a backdrop of great concern over economic and social challenges facing American Indians, and especially over the consequences of the federal government's allotment policy," *Michigan Gambling Opposition* v. *Kempthorne*, 525 F.3d 23, 32 (D.C. Cir. 2008) (per curiam), cert. denied, 555 U.S. 1137 (2009), which had "proved disastrous for the Indians," *Hodel* v. *Irving*, 481 U.S. 704, 707 (1987). Congress passed the IRA "not only to stem the loss of Indian land holdings brought on by allotment but also to give tribes the opportunity to re-establish their governments and land holdings." *Oneida Nation* v. *Village of Hobart*, 968 F.3d 664, 671 (7th Cir. 2020). The IRA "fundamentally restructured the relationship between Indian tribes and the federal government" and "embod[ied] 'principles of tribal self-determination and self-governance.'" *Connecticut ex rel. Blumenthal* v. *United States Dep't of the Interior*, 228 F.3d 82, 85

(2d Cir. 2000), cert. denied, 532 U.S. 1007 (2001) (quoting *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation,* 502 U.S. 251, 255 (1992)). The IRA was thus intended to "promot[e] * * * a significant increase in tribal autonomy and authority and the extension to the tribes of 'an opportunity to take over the control of their own resources.'" *Blackfeet Tribe of Indians* v. *State of Montana*, 729 F.2d 1192, 1197 (9th Cir. 1984), aff'd, 471 U.S. 759 (1985) (quoting 78 Cong. Rec. 11,124 (1934)).

As the court of appeals explained, "when Congress enacted [the IRA] 'it doubtless intended and understood that the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference as well as free from taxation.'" Pet. App. 14 (quoting *Yankton Sioux*, 606 F.3d at 1011). Indeed, Congress expressly provided that "any lands" taken into trust under the statute "shall be exempt from State and local taxation." 25 U.S.C 5108.

ii. Petitioners do not suggest (Br. 18-32) that the decision below conflicts with any decision of this Court or of another court of appeals. To the contrary, this Court has specifically identified Section 5108 as "provid[ing] the proper avenue" for the federal government to assume control over tribal land. *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 221 (2005). And the court of appeals in this case relied on the Second Circuit's determination that "the federal government may, 'by acquiring land for a tribe, divest a state of important aspects of its jurisdiction, even if a state previously exercised wholesale jurisdiction over the land.'" Pet. App. 15 (quoting *Upstate Citizens for Equality, Inc.* v. *United States,* 841 F.3d 556, 561 (2d Cir. 2016), cert. de-

nied, 140 S. Ct. 2587 (2017)). The court of appeals likewise relied (*ibid.*) on the Eighth Circuit's decision in *Yankton Sioux Tribe*, which rejected the argument that "taking land into trust for the benefit of an Indian tribe is insufficient to convert such land into Indian country." 606 F.3d at 1011; see Pet. App. 15. As those decisions recognize, once the Secretary takes land into trust for a tribe, it is subject to federal and tribal jurisdiction, though "federal and Indian authority do not entirely displace state authority." Pet. App. 15 n.4 (citing *Upstate Citizens*, 841 F.3d at 572).

b. Petitioners' contrary arguments lack merit.

i. Petitioners suggest (Pet. 24-25, 27-28) that under the IRA, the Secretary's acquisition of land in trust for the benefit of a tribe transfers only bare title to the federal government and the tribe. But as just discussed, where Congress authorizes the Secretary to place land in trust for an Indian tribe, such land qualifies as Indian country. See, *e.g.*, *Oklahoma Tax Comm'n*, 498 U.S. at 511; *Venetie*, 522 U.S. at 527. It is therefore subject to federal and tribal jurisdiction.

Petitioners only briefly address the court of appeals' determination that the Parcel qualifies as Indian country. Petitioners suggest (Br. 23) that "[t]here is no issue here of tribal sovereignty over 'Indian Country'" because the Parcel was previously privately owned, Indians have not historically lived on it, and it is separate from the Tribe's reservation. But the definition of Indian country includes no overarching requirement of prior Indian ownership or habitation. See 18 U.S.C. 1151. And as this Court has explained, "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.'" *Oklahoma Tax Comm'n*, 498 U.S. at 511.

"Rather, [this Court] ask[s] whether the area has been 'validly set apart for the use of Indians as such, under the superintendence of the government.'" *Ibid.* (quoting *United States* v. *John*, 437 U.S. 634, 648-649 (1978)); see pp. 11-13, *supra*.

ii. Contrary to petitioners' contention (Pet. 28), the decision below does not "create" an "inconsistency" with *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020). *McGirt* did not concern the IRA or jurisdiction for purposes of IGRA; rather, it held that Congress did not disestablish the Muscogee Creek Reservation in Oklahoma. In reaching that determination, the Court explained that "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *Id.* at 2464.

As petitioners observe (Pet. 27), the Court in *McGirt* observed by way of analogy that the federal government once issued land patents to homesteaders in the West, and that such action did not diminish the United States' sovereignty over that land. 140 S. Ct. at 2464. The Court's analogy, however (like *McGirt* itself) concerned the transfer of title *from* a sovereign to individuals. *Ibid.* Nothing in that discussion suggests that the Secretary's action under the IRA in taking land into trust for a tribe—a "domestic dependent nation[] that exercise[s] inherent sovereign authority," *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (citations and internal quotation marks omitted)—fails to confer jurisdiction on the tribe.

iii. Petitioners also err in asserting that the court of appeals was required to consider the jurisdictional issue here by applying a presumption that the "historic police powers of the States" are not superseded by federal law unless that is the "clear and manifest purpose of

Congress." Pet. 28 (quoting *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009)) (emphasis omitted). As this Court has often recognized, see pp. 19-21, *infra*, the federal government has "plenary" power over Indian affairs. *United States* v. *Lara*, 541 U.S. 193, 200 (2004) (citations omitted). The *Wyeth* presumption does not apply, because there is no "historic presence of state law," 555 U.S. at 566 n.3, over Indian affairs.

Indeed, this Court has long "emphasized the special sense in which the doctrine of preemption is applied" in the Indian law "context." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983). As the Court has explained, "[a]lthough a State will certainly be without jurisdiction if its authority is pre-empted under familiar principles of pre-emption," its cases "d[o] not limit pre-emption of State laws affecting Indian tribes to only those circumstances." *Id.* at 333-334. That is because the "unique historical origins of tribal sovereignty and the federal commitment to tribal self-sufficiency and self-determination make it treacherous to import notions of pre-emption that are properly applied to other contexts." *Id.* at 334 (brackets, citation, ellipses, and internal quotation marks omitted). Thus, in the field of Indian affairs, "[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *Ibid.*; see *Fisher* v. *District Court of Sixteenth Judicial District*, 424 U.S. 382, 386 (1976) (per curiam) (finding state law preempted where it "infringed on the right of reservation Indians to make their own laws and be ruled by them") (citation omitted). Petitioners have not at-

tempted to demonstrate that all aspects of state jurisdiction survive the Secretary's decision to take land into trust for a tribe under the relevant standards.

c. The court of appeals also correctly rejected petitioners' related assertion that, under the Enclave Clause or 40 U.S.C. 3112, any transfer of jurisdiction pursuant to the IRA requires state consent or cession. Pet. App. 19-21.

i. As the court of appeals observed (Pet. App. 19-20 & n.6), the Enclave Clause provides a mechanism for the United States to acquire *exclusive* jurisdiction over land within a state. U.S. Const. Art. I, § 8, Cl. 17; see *Paul* v. *United States*, 371 U.S. 245, 263 (1963); *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525, 538 (1885) (State consent is necessary for the federal government to obtain "the right of exclusive legislation within the territorial limits of any State."). But "[w]hen land is taken into trust by the federal government for Indian tribes, the federal government does not obtain such categorically exclusive jurisdiction over the entrusted lands." *Upstate Citizens*, 841 F.3d at 571. As this Court has explained, Indian reservation lands do not fall within the Enclave Clause because "the lands remain part of [the state's] territory and within the operation of her laws," particularly as applied to non-Indians. *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 650 (1930); see *Nevada* v. *Hicks*, 533 U.S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border."); see also *Hicks*, 533 U.S. at 363-365 (upholding a state's right to enter a reservation to execute a search warrant related to off-reservation conduct). Lands taken into trust under Section 5108 likewise do not fall under "exclusive" federal jurisdiction in the sense contemplated by the Enclave Clause. *Paul*, 371 U.S. at 263.

Although petitioners cite the Enclave Clause (Pet. 19, 22, 36), they do not grapple with the court of appeals' reasoning. Nor do they suggest that the decision below conflicts with any decision of this Court or of another court of appeals. To the contrary, the Second Circuit in *Upstate Citizens* rejected an Enclave Clause challenge for the same reasons as the court of appeals here. See 841 F.3d at 572 ("Because federal and Indian authority do not wholly displace state authority over land taken into trust pursuant to § 5 of the IRA, the Enclave Clause poses no barrier to the entrustment that occurred here.").

ii. The court of appeals also correctly rejected petitioners' reliance on 40 U.S.C. 3112. Pet. App. 19-21 & n.6. That statute provides certain conditions under which "the head of a department, agency, or independent establishment of the Government * * * may accept or secure, from the State in which land * * * that is under the immediate jurisdiction, custody, or control of the [government official] is situated, consent to, or cession of, any jurisdiction over the land or interest not previously obtained." 40 U.S.C. 3112(b). As the court of appeals explained, Section 3112 does not apply because the federal government did not "accept[] jurisdiction 'from the State.'" Pet. App. 20. Rather, the government exercised its power under the IRA to take the Parcel into trust for the benefit of the Tribe. That power "is derived from Congress' broad general power, pursuant to the Indian Commerce Clause, to legislate with respect to Indian tribes." *Id.* at 21. The resulting transfer of jurisdiction occurred "by operation of law." *Id.* at 20.

Petitioners suggest (Pet. 31) that the court of appeals erred by construing Section 3112 to focus on the

federal government's acceptance of jurisdiction, rather than on a state's cession or consent. But the court focused on the federal government's "acceptance" because that is the focus of Section 3112; indeed, the statute uses some form of the term "accept" six times. See 40 U.S.C. 3112. And petitioners provide no support for the broad assertion that "Section 3112 covers *any* acquisition, in whole or in part, of jurisdiction," and thus mandates state cession or consent in every case. Pet. 31. Nor do petitioners suggest that *any* court has interpreted Section 3112 to apply in similar circumstances, *i.e.*, when the government takes land into trust for an Indian tribe or Congress creates or expands a reservation. See Pet. 31-32.

2. Petitioners argue in the alternative (Pet. 33-38) that, if the IRA confers tribal jurisdiction over trust lands, then it exceeds Congress's enumerated powers. The court of appeals correctly rejected that argument, and further review of this issue is not warranted.

a. "[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes." *Lara*, 541 U.S. at 200. Those powers derive from the Indian Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, and the Treaty Clause, U.S. Const. Art. II, § 2, Cl. 2, among other sources. See *Lara*, 541 U.S. at 200-204; see also, *e.g.*, *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913); *United States* v. *Kagama*, 118 U.S. 375, 384 (1886). On numerous occasions, this Court has described Congress's authority over Indian affairs "as 'plenary and exclusive.'" *Lara*, 541 U.S. at 200 (citing *Negonsott* v. *Samuels*, 507 U.S. 99, 103, (1993); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979)); see also, *e.g.*, *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S.

163, 192 (1989) (reiterating that the Indian Commerce Clause provides Congress with "plenary power to legislate in the field of Indian affairs"); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 535 (1832) ("By the constitution of the United States, the establishment and regulation of intercourse with the Indians belonged, exclusively, to the government of the United States.").

Congress's constitutional authority with respect to Indian tribes has, from the time of the Founding, consistently been understood to include power over the acquisition, sale, and regulation of Indian land. See *City of Sherrill*, 544 U.S. at 204 (describing the Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137); see generally *Cohen's Handbook of Federal Indian Law* §§ 5.02[4], 15.03, at 394-395, 997-999. In *Venetie*, for example, the Court expressly recognized Congress's constitutional power to create Indian country: "The federal set-aside requirement * * * reflects the fact that because Congress has plenary power over Indian affairs, see U.S. Const. Art. I, § 8, Cl. 3, some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country." 522 U.S. at 531 n.6; see *John*, 437 U.S. at 652-654 (upholding federal criminal jurisdiction over lands that had been acquired through Acts of Congress and held in trust for the Mississippi Choctaws). In 1934, Congress exercised that power in the IRA by conferring authority on the Secretary of the Interior to take land into trust for Indian tribes. 25 U.S.C. 5108. And as noted above, see p. 13, *supra*, this Court has identified Section 5108 as "provid[ing] the proper avenue" for the federal government to assume control over land for the benefit of tribes. *City of Sherrill*, 544 U.S. at 221.

In recognition of this long, unbroken history of federal supervision of tribal lands, the courts of appeals have uniformly upheld Section 5108 against various constitutional challenges. See, *e.g.*, *Carcieri* v. *Kempthorne*, 497 F.3d 15, 39-40 (1st Cir. 2007) (en banc) (rejecting challenges under the Indian Commerce Clause, the Tenth Amendment, and the Enclave Clause), rev'd on other grounds, 555 U.S. 379 (2009); see also *County of Charles Mix* v. *United States Dep't of the Interior*, 674 F.3d 898, 902 (8th Cir. 2012) (rejecting challenge under the Guarantee Clause); *Michigan Gambling Opposition*, 525 F.3d at 32-33 (rejecting challenge under the non-delegation doctrine); *South Dakota* v. *United States Dep't of the Interior*, 423 F.3d 790, 797-798 (8th Cir. 2005) (same), cert. denied, 549 U.S. 813 (2006); *United States* v. *Roberts*, 185 F.3d 1125, 1136-1137 (10th Cir. 1999) (same), cert. denied, 529 U.S. 1108 (2000).

b. Petitioners do not contend that the decision below, which upheld Section 5108, conflicts with the decision of any other court of appeals. Instead, petitioners offer two primary arguments as to why Section 5018 is unconstitutional. Neither is persuasive.[4]

i. Petitioners contend (Pet. 33-35) that because the Indian Commerce Clause does not expressly state that the federal government may acquire land in trust for a tribe without state consent or cession, Congress lacked the authority to provide for such acquisition in the IRA. That is incorrect.

As an initial matter, this Court has located Congress's "broad general powers to legislate in respect to

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[4] Petitioners also rely (Pet. 36) on the Enclave Clause of the Constitution. As previously discussed, see pp. 17-18, *supra*, however, the Enclave Clause does not apply here.

Indian tribes," *Lara*, 541 U.S. at 200, not only in the Indian Commerce Clause, but also in the Treaty Clause, among other sources. See *id.* at 200-204. In addition, this Court has made clear that "[t]he States' inherent jurisdiction" over Indian country within their borders "can of course be stripped by Congress." *Hicks*, 533 U.S. at 365 (addressing reservation lands) (citing *Draper* v. *United States*, 164 U.S. 240, 242-243 (1896)); see *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 62 (1996) ("States * * * have been divested of virtually all authority over Indian commerce and Indian tribes."). For instance, "[c]riminal jurisdiction over offenses committed in 'Indian country'" is governed by a framework of federal laws, and "Congress has plenary authority to alter these jurisdictional guideposts." *Negonsott*, 507 U.S. at 102-103 (citation omitted); see *John*, 437 U.S. at 652-653 (Congress may displace state criminal jurisdiction even where such jurisdiction previously "went unchallenged" and "federal supervision over [a tribe] has not been continuous"); cf. Pet. App. 15 n.4 (noting that "under Public Law 280, 18 U.S.C. 1162(a), California retains 'broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State'") (quoting *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987)).

Petitioners relatedly contend (Pet. 36-37) that notwithstanding Congress's plenary authority in this area, the IRA violates the Tenth Amendment. As the court of appeals recognized, however, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." Pet. App. 22 (quoting *New York* v. *United States*, 505 U.S. 144, 156 (1992)). Because the

Constitution grants Congress "broad general powers to legislate in respect to Indian tribes," *Lara*, 541 U.S. at 200, and Congress exercised such power in enacting the IRA, the statute does not violate the Tenth Amendment. See *Carcieri*, 497 F.3d at 39-40 (so holding).

ii. Petitioners also contend (Pet. 34-35) that if the Secretary's action in taking land into trust under the IRA confers jurisdiction on a tribe, then the statute "would be at odds" with the Admissions Clause, which provides that new states may not be formed within the jurisdiction of existing states, "nor * * * by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of Congress." U.S. Const. Art. IV, § 3, Cl. 1. But by taking land into trust for an Indian tribe, the federal government does not create a new state; the Admissions Clause thus is not implicated. Nor does petitioners' argument gain support from this Court's decision in *Idaho* v. *United States*, 533 U.S. 262 (2001), which concerned title to submerged lands. The Court there applied a "'strong presumption against defeat of a State's title'" to "land beneath navigable waters," *id.* at 272-273 (citation omitted)—a presumption that has no application here.

Petitioners also observe (Pet. 38-39) that the Parcel was not reserved from California prior to statehood. But for purposes of determining whether land is Indian country, this Court has not "differentiated between lands taken into trust prior to statehood of the State in which the lands lie and those lands taken into trust after." Pet. App. 50. For example, *John*, *supra*, and *United States* v. *McGowan*, 302 U.S. 535 (1938), involved Indian lands that were taken into trust (*John*)

and set aside (*McGowan*) for the tribes *after* the affected states entered the Union. See *John*, 437 U.S. at 639-640, 649; *McGowan*, 302 U.S. at 537-539. In both cases, the Court held that tribal and federal jurisdiction was established as a result of the lands being secured for the tribes. *John*, 437 U.S. at 649; *McGowan*, 302 U.S. at 539. Petitioners point to no decision limiting the federal government's post-statehood authority to take land into trust for an Indian tribe. Further review is unwarranted.

3. Even if the questions presented otherwise warranted this Court's review, this case would present an unsuitable vehicle because of an ongoing challenge to the Secretarial Procedures. In *Stand Up for California!* v. *U.S. Dep't of the Interior*, 959 F.3d 1154 (9th Cir. 2020), plaintiffs challenged the Secretarial Procedures alleging, among other things, that they violate the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and the Clean Air Act, 42 U.S.C. 7401 *et seq.* *Stand Up for California!*, 959 F.3d at 1157-1158. The Ninth Circuit affirmed in part, vacated in part, and remanded to the district court with regard to the environmental claims. *Id.* at 1156-1157, 1165-1166. That review is ongoing. See, *e.g.*, 16-cv-2681 D. Ct. Doc. 83 (E.D. Cal. Jan. 19, 2021) (taking under submission motions for summary judgment).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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