No. 20-846

In The Supreme Court of the United States

CLUB ONE CASINO, INC., dba CLUB ONE CASINO,
GLCR, INC., dba THE DEUCE LOUNGE AND CASINO,

Petitioners,

vs.

DEB HAALAND, Secretary of the Interior,
in her official capacity; BRYAN NEWLAND,
Principal Deputy Assistant Secretary of the
Interior – Indian Affairs, in his official capacity;
UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

ARGUMENT

The government's response demonstrates why certiorari should be granted.

The government's position is as extreme as it is stark:

1. According to the government, if the subject of legislation involves Indian affairs it must be *assumed* that Congress "doubtless[ly] intended and understood" that it would be usurping traditional state powers and jurisdiction even when Congress is silent on usurping such powers and jurisdiction or limits the manner in which it does so. It matters not if the term "jurisdiction" is not used in the statute or that there is exactly *no* legislative history mentioning jurisdiction. In the government's view, normal canons of statutory interpretation and intent do not apply if the matter relates to Indian affairs. Instead, implicit intrusions into historic State powers and jurisdiction are simply *assumed*.

2. With respect to Congress's power, the government's position is that the Indian Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, trumps all. In the government's view, it is the preeminent power in the Constitution, overriding all other constitutional concerns, regarding the relations between the federal government and States' traditional and reserved rights and powers.

3. The government does not deny, but instead strongly urges, that its proffered rule is that it can take jurisdiction over State land, anytime, anywhere, so long as it does so for a tribal purpose. The government's theory is that it could accept land from a private developer in the middle of a major city in the name of a tribe to allow the developer to go forward with a commercial development opposed by the State so long as the tribe benefits.

4. The government seeks to justify this extreme position by arguing that no lower court has thus far denied its overreach. But neither has this Court approved it. This case presents a good vehicle to provide clarity on the issues. The offense to historic State police power—exercised not just by elected representatives, but here by the voters through a direct referendum—is clear. The proposed private casino/Tribe partnership use violates state law and needs newly created tribal jurisdiction to exist. The Ninth Circuit's opinion adopting the government's claim to expansive powers is clear. The opportunity to resolve the State territorial jurisdiction question is now.

I. What The Government Does Not Contest.

The government does not contest:

1. The Indian Gaming Regulatory Act requires tribal jurisdiction over, not just ownership of, land;

2. An overwhelming majority of millions of California voters rejected the use to which the private

party and the Tribe wish to put the specific parcel. The government's position flies in the face of direct, popular sovereignty over State-jurisdiction land;

3. States have inherent sovereignty and jurisdiction over lands within their borders;

4. The land at issue had always been an integral part of California, and under exclusive California jurisdiction, until a private party "gifted" it to an Indian tribe, in return for the Tribe's agreement to let the private party build and run a casino prohibited by California law on the property;

5. Its position is that with fee-title land acquisition—whether by purchase or gift—the government automatically secures jurisdiction over *any* State land at any time *without State consent* so long as it does so for an Indian purpose;

6. There was no mention of usurping State jurisdiction in the enactment of the Indian Reorganization Act;

7. The government is arguing for a special Indian affairs rule of statutory interpretation contrary to the normal statutory presumption that the States retain their historic police powers "unless that was the clear and manifest purpose of Congress";

8. The government's view of an all-powerful Indian Commerce Clause was never discussed, never hinted at, in the constitutional debates or Federalist papers.

II. The Statutory Question: Did Congress Silently Intend To Usurp State Jurisdiction In Enacting The Indian Reorganization Act?

A. Certiorari is needed to determine whether the normal presumption against interfering with State historic police powers in construing statutes applies when the federal subject is Indian affairs.

The government dismisses *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Opp. at 15-16. *Wyeth* is just one example of the general rule: "'[B]ecause the States are independent sovereigns in our federal system,' the Court 'assum[es] that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *CTS Corp. v. Waldburger*, 573 U.S. 1, 18-19 (2014) (citations and punctuation omitted); *see Utah Div. of State Lands v. United States*, 482 U.S. 193, 201 (1987) ("the strong presumption is against finding an intent to defeat" States' rights). In another case, the Ninth Circuit applied this interpretative rule to congressional action in pursuit of Indian interests. *Nation v. City of Glendale*, 804 F.3d 1292, 1298 (9th Cir. 2015) (applying "clear and manifest purpose" test to Indian lands issue).

The Opposition attempts to circumvent this established statutory intent rule, by saying that States don't have historic police powers over Indian affairs, so the rule should not apply. Opp. at 15-16. But the question isn't what *federal* interest is involved, it is what "historic police power of the State" is being displaced. It

does not matter if Congress is pursuing Indian affairs, immigration, foreign trade, interstate commerce, etc., *none* of which States can regulate. It matters what historic State police power is being canceled. Here, California has a historic police power in regulating land use. It bars casino gambling. Cal. Const. art. IV, § 19(e); Cal. Penal Code §§ 330, et seq. Its electorate directly rejected casino gambling on this parcel of land. Proposition 48; Petn. App. at 6, 33. That traditional State police power is being abrogated.

The government wants to avoid the "clear and *manifest* purpose" rule for a reason. All that the government and the Ninth Circuit have in terms of "clear and manifest purpose of Congress" to unilaterally secure territorial jurisdiction from States in the Indian Reorganization Act is supposition: Congress "doubtless intended and understood" that it was doing so. Petn. App. at 15; Opp. at 13. But not one word in the statute or its legislative history supports that "doubtless" hypothesis. *See Citizens Against Casino Gambling in Erie County v. Chaudhuri*, 802 F.3d 267, 285 (2d Cir. 2015) (recognizing that "neither the text of the IRA nor that of [another statute] explicitly states that lands that pass from fee to trust or restricted fee status are subject to tribal jurisdiction"). The statute has a single reference to State powers: "[S]uch lands or rights shall be exempt from State and local taxation," just like any other federally owned land under State jurisdiction. 25 U.S.C. § 5108. That reference is inconsistent with, and unnecessary if there were, a "clear and manifest intent" to dispossess States of overall jurisdiction.

Likewise, the government's dismissal of 40 U.S.C. § 3112, and its predecessor, Pub. Law 71-467, 46 Stat. 828 (1930), is disingenuous. Section 3112 applies to "secur[ing]" jurisdiction from a State, not just "accept[ing]." It "create[s] a definite method of acceptance of jurisdiction so that all persons could know whether the government had obtained 'no jurisdiction at all, or partial jurisdiction, or exclusive jurisdiction.'" *Adams v. United States*, 319 U.S. 312, 314 (1943). It applies generically to the United States assuming jurisdiction by whatever means.

Either there is a presumption against Congress dispossessing States of their historic police powers or there is not. Either the federal government has to obtain State consent to secure a transfer of jurisdiction over historic State lands or it does not. Certiorari is needed to resolve the issue.

B. The "Indian Country" label does not resolve the issue.

Much of the Opposition is premised on the "Indian Country" label, a label applied with *no* analysis in the Ninth Circuit opinion. *See* Opp. at 11-12, 14-15, 20-24; Petn. App. at 16. The phrase "Indian Country" appears nowhere in either the Indian Reorganization Act or the Indian Gaming Regulatory Act. The Indian Gaming Regulatory Act, in relevant part, is limited to "[a]ny Indian tribe having *jurisdiction* over the Indian lands" in question. 25 U.S.C. § 2710(d)(3)(A) (emphasis added). The issue is tribal *jurisdiction*, not the more general

"Indian Country" designation. 25 U.S.C. § 2710(d)(3)(A); see *id.* § 2703(4) ("Indian lands" are lands "over which an Indian tribe exercises governmental authority").

"Indian Country" is used in two distinct contexts. The first, its historic and the only context in which it is codified, *see* 18 U.S.C. § 1151, governs criminal jurisdiction over persons committing acts, generally by or against Indians. It has nothing to do with tribal land governance. That is the context in which "Indian Country" was used in *United States v. John*, 437 U.S. 634 (1978) (crime committed by an Indian on reservation land, land had been Indian land at time of State's admission and had been repurchased by the United States as reservation land) and *United States v. McGowan*, 302 U.S. 535 (1938) (sale of intoxicating liquors to Indians, on land under superintendence of the federal government "to protect and guard its Indian wards"). It is a premise for jurisdiction over persons founded on the concept that the federal government is exercising jurisdiction over, or to protect, Indians as "wards."

The second context in which "Indian Country" is used is in a generic sense of land that the federal government is actively managing *for dependent* Indian communities. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) ("*Venetie*"), a case on which the government relies, held that the "Indian Country" label did *not* apply where the tribe owned land in fee because there was no active "federal superintendence." *Id.* at 530, 533. Under *Venetie*, there must be more than land ownership. There must be ongoing

federal government superintendence and management. That is absent here where a private casino company will be the property's active manager.

In any event, nothing in the "Indian Country" jurisprudence talks about which comes first, superintendence or jurisdiction over the land. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (cited in *Venetie*, 522 U.S. at 527 n.1 for proposition 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," but addressing reservation land existing at statehood and continuously under federal government jurisdiction).

This Court has never indicated that the federal government can unilaterally secure jurisdiction over State land through mere land ownership or that by labelling the State land "Indian Country" it can effect a transfer of territorial jurisdiction from a State to the federal government or a tribe. Nor has this Court suggested that the federal government can "strip" a State of jurisdiction over *State* land if it does so for Indian purposes. The government cites *Nevada v. Hicks*, 533 U.S. 353, 365 (2001) for such a proposition, Opp. at 22, but *Hicks* involved concurrent State jurisdiction over land that, since before Nevada's statehood, had been reservation land, that is, land over which the State had *never* had exclusive territorial jurisdiction. This Court "read[s] general language in [its] judicial opinions as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not

then considering." *Illinois v. Lidster*, 540 U.S. 419, 424 (2004); *see Bucklew v. Precythe*, 139 S. Ct. 1112, 1140 (2019) (Breyer, J., dissenting) (citing *Lidster* for same).

By contrast, this Court has been clear that reservations of territorial jurisdiction will not be lightly implied and that, upon admission to the Union, States have plenipotentiary jurisdiction over the lands within their borders. *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001), following *Shively v. Bowlby*, 152 U.S. 1, 26-28 (1894) and *Lessee of Pollard v. Hagan*, 3 How. 212, 11 L.Ed. 565 (1845). The government seeks to distinguish *Idaho* by claiming that it involves submerged land. Opp. at 23. But a State's jurisdiction over dry land, and the presumption in its favor, is no less strong than it is over submerged land. "We have emphasized that 'Congress cannot, after statehood, reserve or convey submerged lands that have already been bestowed upon a State.' And that proposition applies *a fortiori* where virtually all of the State's public lands—not just its submerged ones—are at stake." *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009) (citing *Idaho*, additional citation omitted).

To the extent that the issue of federal usurpation of State jurisdiction over land turns on the polymorphous and constitutionally untethered concept of "Indian Country," that, too, compels certiorari.

C. This Court has never squarely addressed this issue.

The Opposition notwithstanding, this Court has *never* held that a transfer of fee land ownership from a private party to the United States to hold in trust for a tribe deprives a State of its preexisting *exclusive* territorial jurisdiction over that land. The Opposition's citations to that effect are all taken out of context.

McGirt v. Oklahoma, 140 S. Ct. 2452, 2464 (2020) is a direct parallel. Under *McGirt*, a sovereign's transfer of land *ownership* to individuals does not deprive the sovereign of jurisdiction. But according to the government (and the Ninth Circuit), a private individual's donation of land ownership to the United States to hold in trust for a tribe *automatically* deprives a sovereign State, without that State's consent, of *its* sovereignty. The two are inconsistent.

That this Court has previously denied certiorari—perhaps because the issue involved a more limited statute, was not better presented, or was not preserved—cannot be the standard for whether certiorari should be granted when an appropriate case is later presented. *See* Opp. at 10; *Upstate Citizens for Equality, Inc. v. United States*, 140 S. Ct. 2587 (2017) (No. 16-1320) (reacquiring lands in Tribe's historic "indigenous homeland"); *id*. (Thomas, J., dissenting from denial of certiorari); *Central N.Y. Fair Bus. Ass'n v. Zinke*, 137 S. Ct. 2134 (2017) (No. 16-1135) (issues not preserved below); *Citizens Against Casino Gambling in Erie Cnty. v. Chaudhuri*, 136 S. Ct. 2387 (2016) (No. 15-780)

(Seneca Nation-specific statute involving particularized Congressional intent, historic tribal land, and unique tribal jurisdiction mechanism); *Stop the Casino 101 Coal. v. Brown*, 575 U.S. 1027 (2015) (No. 14-1236) (tribe-specific separate statute creating a reservation).

Finally, that a handful of Circuits have weighed in on the issues here is no impediment for this Court's review. Instead, it shows that this Court's guidance is needed.

III. The Constitutional Issue: This Court Has Never Held The Indian Commerce Clause To Be All Powerful.

This Court has never held that the Indian Commerce Clause is without bounds. To the contrary, it has held that there *are* limits to what Congress can do under the Indian Commerce Clause. *E.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Indian Commerce Clause did not negate the Eleventh Amendment); *Nevada v. Hicks*, 533 U.S. at 363-65 (suggesting that there are limits to the Indian Commerce Clause). The broad language in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), regarding "plenary power to legislate in the field of Indian affairs," has to be taken in the context of the facts at issue there, which had nothing to do with seizing State jurisdiction over land. *See Illinois v. Lidster*, 540 U.S. at 424. In fact, that case *approved* State power to tax non-Indian oil and gas drilling on Indian land.

"The assertion of plenary authority must, therefore, stand or fall on Congress' power under the Indian Commerce Clause. . . . [N]either the text nor the original understanding of the Clause supports Congress' claim to such 'plenary' power." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659 (2013) (Thomas, J., concurring). The government does not acknowledge that there is no mention in the constitutional debates or the Federalist papers that Congress might be empowered to unilaterally take jurisdiction over State lands for Indians. *See* Petn. at 34; *see Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1662 (2018) (Thomas, J., dissenting) ("Those present at 'the founding,' [citing to majority], would be shocked to learn that an Indian tribe could acquire property in a State and then claim immunity from that State's jurisdiction."). And, such a reading would conflict with other constitutional provisions. Petn. at 34-38.

IV. This Case Provides The Right Vehicle To Resolve These Issues Now.

As an afterthought, the government claims that this case is not a good vehicle to resolve the issues at hand. Opp. at 24. But both the government's stark position and the Ninth Circuit's unrestrained adoption of it prove otherwise. The jurisdiction question is directly presented. It is now or never to address it in this case. At issue is the expressed intent of 4 million California voters and longstanding exclusive California jurisdiction, circumvented by the Tribe, a private casino entity, and the Ninth Circuit. Without certiorari, the Ninth

Circuit's unequivocal decision will stand as unchallenged precedent.[1]

Even if other efforts may succeed in delaying, requiring the reworking of, or even barring this one casino project, the Ninth Circuit's ruling means that this land has forever been taken from California's exclusive jurisdiction and is forever free from any California land use regulation. Petn. App. at 14.

It is hard to imagine these issues being so clearly presented in another case.

[1] The Opposition notes that petitioners did not challenge the Secretary's gaming or compact determinations, determinations *before* property ownership transferred and *before* any supposed displacement of California jurisdiction took place. *See* Opp. 5 n.1. A jurisdiction challenge earlier would not have been ripe. *See Stop the Casino 101 Coalition v. Salazar*, No. C 08-02846 Sl., 2009 WL 1066299, at *3 (N.D.Cal. Apr. 21, 2009), *aff'd*, 384 F. App'x 546, 548 (9th Cir. 2010) (no standing upon United States taking land in trust; both land transfer and casino approval had to take place before party had standing to challenge).

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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