No. 17-1432

# In The
# Supreme Court of the United States

COUNTY OF AMADOR, CALIFORNIA,

*Petitioner,*

v.

UNITED STATES DEPARTMENT OF INTERIOR,
IONE BAND OF MIWOK INDIANS, et al.,

*Respondents.*

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

## BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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## AMICUS CURIAE SUBMIT THIS BRIEF IN SUPPORT OF PETITIONER

The California State Association of Counties ("CSAC") respectfully submits this brief as amicus curiae in support of Petitioner.

## INTERESTS OF THE AMICUS CURIAE[1]

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

CSAC's member counties have a significant interest in the question of which tribal lands are eligible to be taken into trust by the Secretary of the Department of Interior under the Indian Reorganization Act, ("IRA"). 25 U.S.C. §§ 5101 et seq. When such land is taken into trust, not only is it removed from the tax

[1] The parties have consented to the filing of this brief. The parties were notified more than ten days prior to the due date of this brief of the intention to file. This brief was not authored in whole or in part by counsel for any party. No person or entity other than amicus curiae made a monetary contribution to this brief's preparation or submission.

roll, but successful trust acquisitions also mean the loss of zoning, planning, and other regulatory control for local government. Further, because trust status is a prerequisite for establishing a new tribal gaming operation, "the fee-to-trust process serves as a critical first step in the expansion of tribal gaming," which has the potential to alter the character of an entire jurisdiction. Kelsey J. Waples, *Extreme Rubber-Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 Pepp. L. Rev. 251, 254-55 (2012).

## STATEMENT OF THE CASE

CSAC joins in and refers to the Statement of the Facts found in Petitioner's Petition for Writ of Certiorari ("Writ Petition" at 5-15).

## SUMMARY OF THE ARGUMENT

The IRA defines "Indian" as "members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation. . . ." 25 U.S.C. § 5129 (formerly 25 U.S.C. § 479). This Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), provided important guidance to the Department of Interior on the scope of its authority under the IRA by concluding that the phrase "'now under Federal jurisdiction' in [§ 5129] unambiguously refers to those tribes that were under

federal jurisdiction of the United States when the IRA was enacted in 1934." *Id.* at 395.

Notwithstanding this clear limitation, the Ninth Circuit Court of Appeals in this case, as well as the District of Columbia Circuit in an earlier case, have taken the position that "recognition" of a tribe need not have occurred by 1934, and also that "federal jurisdiction" can be shown by a variety of factors that are less than formal, legal jurisdiction. *County of Amador v. United States Dep't of Interior*, 872 F.3d 1012, 1022, 1026 (9th Cir. 2017); *Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, 830 F.3d 552, 560 (D.C. Cir. 2016). These decisions conflict with decisions from the Fifth Circuit and this Court. *United States v. Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974); *United States v. John*, 437 U.S. 634, 650 (1978). *See* Writ Petition at 27. Given the critical nature of these issues, this Court should grant the Writ Petition to resolve the conflict.

In addition, the Secretary's interpretation of the IRA, which has been upheld by the Ninth Circuit in this case, evades the conclusion of this Court that "Congress left no gap in 25 U.S.C. § [5129] for the agency to fill" when "it explicitly and comprehensively defined the term [Indian] by including only three discrete definitions." *Carcieri*, 555 U.S. at 391. Contrary to the conclusion reached in the decision below, the context, history and intent of the IRA illustrate that the definition of "Indian" requires that two things occurred in 1934: (1) federal jurisdiction over the tribe; and (2) recognition of the tribe. This Court should

grant review to correct the erroneous interpretation below.

Finally, the recurring nature and the significance of this issue warrant this Court's attention. As the Department of Interior readily acknowledges, the "*Carcieri*-analysis" that the Department now undertakes as part of the fee-to-trust process has the Department "up to [its] eyeballs in litigation on these matters." *Carcieri: Bringing Certainty to Trust Land Acquisitions Before the Senate Comm. on Indian Affairs*, 113th Cong., 1st Sess. 113-214 (2013) (statement of Kevin Washburn, Assistant Secretary – Indian Affairs, U.S. Department of the Interior).

From the local government perspective, the impacts are significant. The fee-to-trust administrative process nearly always results in a trust application being granted, even over the objections of, or negative impacts on, the local community. In a similar vein, many tribes have significant economic development plans at stake and have a critical need to understand whether they are eligible to avail themselves of the land restoration opportunities under the IRA.

Therefore, it is of critical important to all sides of this debate that this Court grant review and provide clarity as to which tribes are within the definition of "Indian" in the IRA.

## ARGUMENT

### I. The Standard Adopted by the Ninth Circuit for Establishing Federal Jurisdiction is Overly Broad and Vague, and Warrants Supreme Court Review.

In *Carcieri*, this Court determined that the phrase "now under federal jurisdiction" in the IRA's definition of Indian "unambiguously refers to those tribes that were under federal jurisdiction of the United States when the IRA was enacted in 1934." 555 U.S. at 395. A significant, recurring issue following the *Carcieri* decision is what is required to demonstrate that a tribe was "under federal jurisdiction" in 1934.

The Department of Interior has established a two-part inquiry construing "under federal jurisdiction." First, the Department looks for dealings or relevant acts on or before 1934 that "generally reflect Federal obligations, duties, responsibilities for or authority over the tribe by the Federal Government." If that can be established, the Department next assesses whether such federal jurisdiction was intact in 1934. The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, Office of the Solicitor, U.S. Dept. of Interior, M-37029 (Mar. 12, 2014).[2]

The Ninth Circuit decided it need not apply *Chevron* deference to that interpretation, but rather afforded it "great deference" based on what the court described as proper use of historical context and evidence of the

[2] Available online at: https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf.

Department's intent to be bound by that interpretation. *County of Amador v. United States Dep't of Interior*, 872 F.3d 1012, 1025 (9th Cir. 2017). Based on that great deference, the court held that " 'under Federal jurisdiction' should be read to limit the set of 'recognized Indian tribes' to those tribes that already had *some* sort of significant relationship with the federal government as of 1934, even if those tribes were not yet 'recognized.' " *Id.* (emphasis in original).

In so ruling, the court rejected the County's argument that in 1934, federal jurisdiction unambiguously required a showing of federally-supervised land reserved for those Indians, or a valid treaty. *Id.* The court found the County's view was too narrow and would merely duplicate the recognition requirement, since tribes with federally-supervised reserved land would also be recognized. *Id.* The court also rejected as too broad the suggestion that all tribes in existence in 1934 were under federal jurisdiction because the federal government had authority over tribes even when it did not exercise that authority in relation to a particular tribe. *Id.*

And yet, the court fails to explain why the standard it puts forward (some sort of significant relationship with the federal government as of 1934), or the interpretation adopted by the Department (obligations, duties, responsibilities for or authority over the tribe) would not also be overbroad and encompass nearly every tribe. Given the long history and special relationship between the federal government and tribes, it seems quite likely that with some detailed

research, one could identify "some sort" of significant relationship with the federal government for every tribe that was in existence in 1934. Indeed, the Department of Interior does not describe the impact of the *Carcieri* decision as limiting the number of tribes that are eligible to have land taken into trust, but rather as requiring the Department "jump through a lot more hoops to take land into trust for any tribe," and then dealing with the uncertainty that comes with whatever litigation may follow. *Carcieri: Bringing Certainty to Trust Land Acquisitions Before the Senate Comm. on Indian Affairs*, 113th Cong., 1st Sess. 113-214 (2013) (statement of Kevin Washburn, Assistant Secretary – Indian Affairs, U.S. Department of the Interior).

The present case illustrates the point. The Department of Interior concluded that the Ione Band was under federal jurisdiction in 1934 despite the fact that the tribe had no federally supervised land, had no treaty with the United States, received no services from the federal government, and had no members enrolled with the Indian Office. Further, the Ione Band was not invited to conduct an IRA election even while two other nearby tribes (Jackson Rancheria and Buena Vista Rancheria). *See* Writ Petition at 17. Given the IRA's requirement that tribes be permitted the opportunity to vote on whether the IRA would apply to their tribe (25 U.S.C. § 5125), the failure to be offered an election raises a significant presumption that there was no "federal jurisdiction" in 1934, creating a high burden for a tribe to overcome.

Notwithstanding the lack of connection between the tribe and the federal government, the Ninth Circuit concluded that the federal government's unsuccessful efforts in 1915 to acquire land for the Ione Band created a significant enough relationship for the Ione Band to be considered under federal jurisdiction. *County of Amador*, 872 F.3d at 1027. Such a broad interpretation is consistent with the Department's view that it takes more work to process a trust application after *Carcieri* because it must do extensive research to identify something in the history of the tribe that can be articulated as meeting the "under federal jurisdiction" standard. But it is not consistent with any common understanding of the meaning of jurisdiction, nor with this Court's decision in *Carcieri* limiting the application of the IRA's definition of Indian.

This is an issue that deserves this Court's attention. Both local government and tribal interests would significantly benefit from clarification on the meaning of "under federal jurisdiction." Such clarification would allow all interests to understand what land is potentially eligible to be taken into trust, and any land that is taken into trust would not suffer from a cloud on the title that currently exists.

## II. The Structure, Intent, and History of the IRA Illustrates that the Definition of Indian Requires a Temporal Limitation.

In the opinion below, the Ninth Circuit agreed with the Department of Interior's interpretation of the

IRA that a tribe does not have to be "recognized" in 1934 to be included within the IRA's definition of "Indian." *County of Amador*, 872 F.2d at 1024. In so ruling, the court misreads the structure, intent and history of the IRA.

There are three categories within the definition of "Indian" in the IRA:

> (1) all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction;
>
> (2) all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation; and
>
> (3) all other persons of one-half or more Indian blood.

25 U.S.C. § 5129.

The structure of Section 5129 illustrates Congressional intent to place temporal limitations on all three of these definitions. As this Court held in *Carcieri*, the first definition is unambiguously limited to "those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." 555 U.S. at 391. The second definition specifically states that the person must be descended from a person who resided within the boundaries of a reservation as it existed in 1934. Finally, this Court determined that the third definition is limited to persons who met the

definition "at the time the Act was passed." *United States v. John*, 437 U.S. 634, 651 (1978).

Similarly, as this Court noted in *Carcieri*, Congress was aware how to express both current and future events in the IRA, and did just that in other sections of the Act. 555 U.S. at 389 (citing 25 U.S.C. § 5111 (formerly 25 U.S.C. § 468)[3] and 25 U.S.C. § 5116 (formerly 25 U.S.C. § 472)[4].) Congress is presumed to act intentionally when it uses language in one part of a statute that is omitted from another. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002). Thus, the use of "now" in the definition, as opposed to "now and hereafter" as used in other parts of the Act, coupled with the temporal limitations placed on all three parts of the definition of Indian, indicate that recognition of the tribe must have also occurred by 1934 to fall within the definition.

The intent to include a temporal component is further bolstered by the purpose of the IRA. One of the primary purposes of the IRA is to promote self-governance by encouraging tribal organizations to create more formal governance structures. 25 U.S.C. § 5123;

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[3] "The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe."

[4] "Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter."

*Morton v. Mancari*, 417 U.S. 535 (1974); Comment, Tribal Self-Government and the Indian Reorganization Act of 1934, 70 Mich. L. Rev. 955 (1972).

In addition, the IRA did not apply to any reservation that did not vote to be covered by its terms. 25 U.S.C. § 5125. The Act directed the Secretary of Interior to hold such votes within one year of the passage of the Act, which was later extended to June 18, 1936. *Id.*; Act of June 15, 1935, ch. 260, § 2, 49 Stat. 378. And, indeed, the Department took the steps needed to implement that directive and conducted such elections between 1934 and 1936. The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, Office of the Solicitor, U.S. Dept. of Interior, M-37029 (Mar. 12, 2014).

With this focus on holding elections to approve tribal constitutions and bylaws, and holding special elections to decide whether to accept or reject the IRA's benefits, it is hardly surprising that the Act would include a temporal element – e.g., a mechanism for recognizing those tribes that engaged in the self-governance process that the IRA was designed to encourage. It is just further confirmation that Congress intended the provisions of the IRA to apply only to tribes that were recognized at its enactment.

Finally, the legislative history of the IRA demonstrates Congressional intent to limit the IRA's application to tribes that were recognized in 1934. The definition of Indian was drafted by the Department of Interior under the direction of then-BIA Commissioner

John Collier, who provided testimony to the U.S. House of Representatives via memorandum explaining that "Indians to whom charters may be granted include all persons of Indian descent who are *members of existing tribes*, or descendants of members and now reside within *existing reservations*. . . ." *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 6, 22 (1934) (emphasis added). This same explanation was provided to the Senate during its committee hearings. *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Governance and Economic Enterprise: Hearings on S. 2755 Before the S. Comm. on Indian Affairs*, 73d Cong. 85 (1934).

All of these things taken together – the structure of the definition, the specific words selected by Congress, the intent of the Act, and the Act's legislative history – contradict the Ninth Circuit's conclusion below that there is no temporal component in recognition of a tribe in the IRA's definition of Indian. This Court should grant review to resolve the issue.

## III. The Writ Petition Should be Granted to Address a Recurring Issue of National Importance that Impacts Both Tribes and Local Government.

Finally, this Court should grant the Writ Petition because the question of whether there is a temporal element to tribal recognition, and the issue of what constitutes being "under federal jurisdiction" for purposes of

the IRA, are recurring and in need of resolution. They are also significant issues that have the power to determine a tribe's economic development or a local government's ability to control the uses and character of its community. Granting the Writ Petition and clarifying these issues would resolve the uncertainty and continued litigation that continues post-*Carcieri.*

The Department of Interior's interpretation of the IRA's definition of Indian has been litigated numerous times following this Court's decision in *Carcieri*. *Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016); *Stand Up for California! v. United States Dep't of Interior*, 919 F.Supp.2d 51 (D.D.C. 2013); *KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012). While the Ninth Circuit here, and the D.C. Circuit in the *Grand Ronde* decision, upheld the Department of Interior's interpretation of the definition of Indian, the First Circuit has stated that the ability of the Department to take land into trust, absent Congressional action, for tribes that were not recognized in 1934 raises a "serious issue." *KG Urban Enterprises*, 693 F.3d at 11.

The importance of these issues cannot be overstated. A detailed review of the fee-to-trust process that analyzed all fee-to-trust applications processed by the Bureau of Indian Affairs Pacific Region between 2001 and 2011 shows that 100% of the proposed fee-to-trust applications submitted to that office were granted, and that the BIA "did not conclude that a single factor weighed against acceptance of the land into trust." Kelsey J. Waples, *Extreme Rubber-Stamping:*

*The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 Pepp. L. Rev. 251, 278 (2012). This means that even though the process requires notice to local government and consideration of such factors as impact on tax rolls and land use conflicts, as a practical matter, submitted fee-to-trust applications are overwhelmingly likely to be approved. *Id.* Thus, the question of which tribes and what land is eligible to participate in this process is in many ways the deciding factor in whether land is taken into trust. It is therefore critical for both local governments and tribal interests.

## CONCLUSION

Amicus therefore respectfully request that the Court grant the Petition filed herein.

Dated: May 14, 2018

Respectfully submitted,

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