No. 16-572

In The Supreme Court of the United States

CITIZENS AGAINST RESERVATION SHOPPING, *et al.*,

Petitioners,

v.

SALLY JEWELL, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, District Of Columbia Circuit

PRECAUTIONARY MOTION OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND AMADOR COUNTY, CALIFORNIA, TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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PRECAUTIONARY MOTION OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND AMADOR COUNTY, CALIFORNIA, TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The California State Association of Counties ("CSAC") and Amador County, California, hereby respectfully request that this Court permit the filing of the *amicus* brief submitted herewith in support of the petition for writ of certiorari.

This motion is labelled "precautionary" for two reasons.

First, it is not clear that the consent of the parties is even required for the filing of this *amicus* brief. Under Rule 37(4) of this Court, a county like Amador County need not obtain the permission of the parties to file an *amicus* brief. And while CSAC is a private entity, (1) its members consist entirely of California counties, and (2) it is not clear that having CSAC on a brief along with the County requires consent if the same brief could be filed by the County without permission. (In other words, it is not clear if the exemption under Rule 37(4) applies only when an *amicus* brief is submitted solely on behalf of a governmental entity, or any time a governmental entity is one of the parties on whose behalf a brief is submitted.)

Second, as of the date that this brief is being finalized for printing (November 23, 2016), no party has refused to give its consent to the filing of this brief, and five of the six parties have affirmatively consented.

Written consents from the following parties are submitted herewith:

- Petitioners Citizens Against Reservation Shopping, *et al.*;
- Respondents Sally Jewell, *et al.*;
- The Cowlitz Indian Tribe;
- Clark County, Washington; and
- The City of Vancouver, Washington.

The sole remaining party – the Confederated Tribes of the Grand Ronde Community of Oregon – has simply not yet given a response either way.[1]

As set forth in the "Interest of Amici Curiae" section contained in the proffered brief, *amici curiae* have a vital interest in this case, which – if left uncorrected by this Court – could have profound negative impacts on local governments across the nation.

[1] The Thanksgiving holiday required the brief to be submitted for typesetting and printing sooner than would normally be the case.

For these reasons, CSAC and Amador County respectfully request that leave to file this amicus brief be granted.

Respectfully submitted,

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November 23, 2016

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND AMADOR COUNTY, CALIFORNIA, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

Amici curiae have a vital interest in this case because the D.C. Circuit's decision misinterprets the Indian Reorganization Act of 1934 (the "IRA"), which grants the Secretary of Interior (the "Secretary") authority to take land within any State into trust "for Indians." 25 U.S.C. § 5108 (formerly 25 U.S.C. § 465). The impacts of trust acquisition on local governments are profound. Land taken into trust for Indians is removed from state and local jurisdiction; counties lose their taxing authority; their land use restrictions and environmental regulations do not apply; and their ability to protect the public on trust land is effectively eliminated. 25 C.F.R. § 1.4(a). Additionally, depending on the use to which the trust land is put – for example, when a large-scale, Las Vegas-style casino is approved under the Indian Gaming Regulatory Act ("IGRA") – trust decisions can adversely affect counties with respect to their budgets, infrastructure, environment,

[1] Pursuant to this Court's Rule 37.2(a), *amici* state that notice was provided to counsel for petitioners and respondents of the intent of *amici* to file this brief at least 10 days prior to the deadline to file the brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party. No person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

public safety and emergency services. In such circumstances, counties like *amici* have minimal ability to mitigate those adverse effects because neither they nor their States have any remaining authority over the trust lands. This can be true with respect to trust acquisitions on behalf of existing tribes as well, but the D.C. Circuit's expansive misinterpretation of the IRA, if adopted nationally, would raise the prospect of many more belatedly "recognized" tribes seeking trust lands at the expense of both the counties in which they are located and neighboring citizens within those counties.

Amicus **California State Association of Counties ("CSAC")** represents all 58 of California's counties before the California Legislature, administrative agencies and the federal government. CSAC places a strong emphasis on educating the public about the value and need for county programs and services. Because many of its member counties currently do, or in the future may, face similar issues to the ones Amador County is grappling with now (discussed below), CSAC has been active for many years on the issue of fee-to-trust reform and the application of *Carcieri*. *See, e.g.*, Letter from CSAC to Hon. John Barrasso, Chairman, Sen. Comm. on Indian Affairs, July 28, 2015, *available online at* http://www.counties.org/sites/main/files/file-attachments/csac_letter_of_support_to_chairman_barrasso_-_s__1879.pdf (last visited Nov. 7, 2016).

Amicus **Amador County, California**, is a small, rural county in the Sierra Nevada mountains and foothills, with a total population under 39,000 persons, and with limited road and related infrastructure and

public services. There is already one large, Las Vegas-style Indian casino and hotel complex in the County at the Jackson Rancheria; consequently, the County has faced demands on County resources, including the traffic it generates on narrow local roads, which creates serious public safety problems and traffic delays. A second, three-person tribe – the Buena Vista Rancheria – has also obtained permission from the federal government to open another casino in Amador County. And the County is currently challenging a 2012 decision by the Secretary to acquire trust lands for gaming purposes on behalf of a *third* tribe – the "Ione Band of Miwok Indians," a purported Indian "tribe" that the Department "reaffirmed" in 1994, rather than follow the federal acknowledgement regulations.[2]

The addition of a third new casino would overwhelm the County with demands for public safety and other services, clog County roadways by generating far more traffic than they can handle, and harm air and water quality, among other adverse impacts. The County's challenge, which presents virtually identical issues to this one, is currently pending in the Ninth Circuit. *County of Amador v. United States Department of Interior*, No. 15-17253 (9th Cir.).

[2] Though the Department had previously convinced a federal district court that those regulations were the exclusive means of administrative recognition, *see Ione Band of Miwok Indians v. Burris*, No. S-90-0993-LKK/EM (E.D. Cal. Apr. 23, 1992) (order granting summary judgment to federal defendants), the Department abruptly changed course in the face of political pressure from certain members of Congress.

SUMMARY OF ARGUMENT

In *Carcieri v. Salazar*, 555 U.S. 379 (2009) ("*Carcieri*"), this Court held that the Secretary's authority to take land into trust on behalf of "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction" unambiguously refers to a recognized tribe "under federal jurisdiction" on June 1, 1934, rather than a recognized tribe "under federal jurisdiction" at the time the Secretary sought to take the land into trust. *Id*. at 391.

Ever since *Carcieri* was decided, the Department of Interior (which was on the losing end of that decision), has sought to undermine the limitations on the Secretary's authority articulated by this Court, and to regain the authority the Department previously believed itself to have: to take land into trust on behalf of any Indian tribe without restriction.

To that end, the Department has repeatedly sought congressional alteration of the IRA,[3] but having

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[3] *See* Testimony of Kevin Washburn, Asst. Sec'y – Indian Affairs, before the Sen. Comm. on Indian Affairs, on "A Path Forward: Trust Modernization & Reform for Indian Lands," July 8, 2015, *available online at* http://www.indian.senate.gov/sites/default/files/upload/files/KWTestimonyTM%26Rindianlands-7-8-15%28Final%29.pdf (last visited Nov. 7, 2016) ("Washburn Testimony") (head of the BIA testifying in support of a "Carcieri fix" – legislation designed to overrule *Carcieri*); Tr. of BIA Carcieri Tribal Consultation: Arlington, Va., Wed., July 8, 2009, p. 17:6-11 (Comments of Acting Principal Assistant Secretary for Indian Affairs George Skibine), *available online at* http://www.bia.gov/cs/groups/public/documents/text/idc-001871.pdf (last visited Nov. 3, 2016) (expressing goal to "acquire land into trust and to make sure that the *Carcieri*

so far failed to convince Congress of the wisdom of such an alteration, the Department instead seeks to achieve the same result by means of a tortured statutory "interpretation" of the existing IRA. Since the decision in *Carcieri*, the Department has begun to construe the terms "recognized" and "under federal jurisdiction" so expansively as to eviscerate the limits on Secretarial authority to acquire land for Indians that Congress intended to impose by defining the term "Indian" as it did.

In this case, unfortunately, the D.C. Circuit sanctioned the Secretary's transparent end-run around Congress's intended limitations. That court accepted the Secretary's limitless definitions of "recognized" and "under federal jurisdiction," deferring to them under *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). But the D.C. Circuit's decision to grant deference conflicts with this Court's precedents, which have held that *Chevron* deference is not warranted where – as here – circumstances indicate that Congress did not intend to delegate the power to fill interpretative gaps in a statute to the agency. *United States v. Mead Corp.*, 533 U.S. 218, 227 & 229-30 (2001). In this case, in defining "Indian" as it did, Congress did not intend to leave an interpretive gap for the Secretary to fill with respect to that definition – a fact recognized by this Court in *Carcieri*. *See* 555 U.S. at 391 (majority opinion) ("Congress

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decision . . . is not an impediment, cannot be – is not impediment for such a goal.").

left no gap in 25 U.S.C. § 479 for the agency to fill"); *id*. at 397 (Breyer, J., concurring) ("Congress did not intend to delegate interpretive authority to the Department.").

The D.C. Circuit's ruling is also erroneous because the Secretary's interpretations of "recognized" and "under federal jurisdiction" are not reasonable interpretations of those terms. In adopting the IRA, Congress clearly intended that the requirement that land only be taken into trust for "Indians" that are members of a "recognized tribe now under federal jurisdiction" would be a meaningful limitation on the Department's ability to acquire trust lands for Indians. The Secretary's proffered interpretations, accepted by the D.C. Circuit, nullify those limitations.

The decision below threatens to have dramatic negative consequences for local governments nationwide. If the D.C. Circuit's misinterpretation is not corrected by this Court, and especially if it is adopted by other courts, local governments across the nation face the prospect of extraordinarily disruptive and unpredictable efforts by previously-unrecognized tribes to have land taken into trust and out of the local governments' taxing and regulatory jurisdiction. Moreover, allowing the issues presented herein to go unresolved would put local governments in an untenable position where they can *theoretically* challenge individual trust decisions, but in which no practical mechanism for removing land from trust currently exists,

raising the specter of Pyrrhic local government legal victories.

ARGUMENT

I. The D.C. Circuit Erred In Affording *Chevron* Deference To The Secretary's Interpretation Of "Recognized" And "Under Federal Jurisdiction."

The facts of this case – which are ably set forth by Petitioners – demonstrate the breadth of the power the Secretary now seeks to aggrandize in the name of statutory interpretation. The pending Ninth Circuit appeal by *amicus* Amador County, noted above, also provides a striking example. In the Amador County case, the only interactions between the federal government and the Ione Band's ancestors at the time the IRA was adopted in 1934 were: (1) *unsuccessful* efforts by a local BIA agent to obtain land for Ione-area Indians under a land-purchase program designed for landless California Indians "without regard to the possible tribal affiliation of the members of the group" (a fact that even the Department itself acknowledged was "not conclusive as to the Band's recognized tribal status");[4] (2) a claim that some members of the Band are descendants of Indians who negotiated an *unratified* treaty with government in the mid-1800s, though the

[4] *County of Amador v. United States DOI*, 136 F. Supp. 3d 1193, 1214 (E.D. Cal. 2015) (quoting 2006 Indian lands determination).

treaty makes no mention of the Ione Band of Miwok Indians;[5] and (3) the inclusion of several Band-members' ancestors on a list of Ione-area Indians in 1906, which also did not distinguish those Indians' tribal affiliations.[6]

The federal government has never held land for the Ione Band or its members; it never provided services or benefits to Band-members before 1994; and – unlike the Indians on the Jackson and Buena Vista Rancherias – the "Ione Band of Miwok Indians" was conspicuously not invited to organize as a "tribe" under the IRA upon its passage, though Section 18 of the IRA as originally enacted required the Secretary to hold a special election, within one year of the "passage and approval of the Act," for each Indian tribe then under federal jurisdiction, to decide whether the tribe wished to be organized under the IRA, and adopt a tribal constitution. Indian Reorganization Act, June 18, 1934, ch. 576, 48 Stat. 988, § 18.

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[5] *Id*. at 1208; *see also Robinson v. Jewell*, 790 F.3d 910, 917 (9th Cir. 2015), *cert. denied*, 2016 U.S. LEXIS 2194 (U.S. Mar. 28, 2016) (an unratified treaty is a "legal nullity"); *Malone v. Bureau of Indian Affairs*, 38 F.3d 433, 438 (9th Cir. 1994) ("The California Indian population is unique in this country and must be understood in historical context. In the 1850s, Congress failed to ratify treaties that the Federal Government had entered into with Indian tribes in California. Thus, although they were eventually recognized in Federal law as individual 'Indians of California,' many California Indians are not members of federally recognized tribes.").

[6] *County of Amador v. United States DOI*, 136 F. Supp. 3d at 1211.

Nevertheless, the Secretary has concluded that the failed land acquisitions, an unratified treaty negotiated approximately 150 years ago, and inclusion of Ione-area Indians on a non-tribal-specific list, though each insufficient in itself to establish federal recognition and jurisdiction over the Band, reflect a "course of dealings" that demonstrate an intention by the Federal government to exercise authority over the "tribe."

This is not an isolated problem limited to the Ione Band and Amador County; the Secretary has "reaffirmed" other tribes on similar facts, disregarding the regulations that the Department promulgated to govern the Secretary's decision-making in both the acknowledgement and trust acquisition contexts. When the Secretary "reaffirmed" the Tejon Tribe in 2012, the Office of the Inspector General investigated the decision and concluded, "We found that the Tejon Tribe, along with several other American Indian groups, submitted petitions requesting reaffirmation. . . . These petitions were outside the Part 83 acknowledgment process, which is the official process for recognizing Indian groups as tribes. . . . We could not find any discernible process [the Assistant Secretary] and his staff might have used to select the Tejon Tribe for recognition above the other groups."[7]

If circumstances such as those presented by this case and by the Amador County case constitute "recognition" – and especially if they constitute "jurisdiction"

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[7] https://www.doioig.gov/sites/doioig.gov/files/Tejon_ROI_FINAL_PUBLIC.pdf.

– then those terms are essentially meaningless, and virtually any would-be tribe will qualify for land under the IRA. (Which appears to be the point, given the Department's hostility to *Carcieri*.) Such open-ended authority to acquire land for (nontreaty) "tribes" that were not already living on federally-owned lands is the very result Congress sought to avoid in adopting the definition of "Indian" in IRA § 19.

A. The Legislative History Of IRA § 19 Indicates That Congress Did Not Intend To Delegate Interpretive Authority To The Department With Respect To The Definition Of "Indian."

The chief refrain of the Department in these cases is a familiar one: The Department argues that the statute is ambiguous, so the Court must defer to the Department's action under *Chevron*. The D.C. Circuit panel that decided this case granted that deference, but *Chevron* deference is simply not warranted under the circumstances of this case.

In *United States v. Mead Corp.*, this Court held that *Chevron* deference must be given to an agency's reasonable interpretation of an ambiguous statute *only when circumstances suggest that Congress intended to delegate to the agency the power to fill gaps*. 533 U.S. at 227, 229-30 (declining to give deference to tariff classification ruling by the United States Customs Service, absent an indication that Congress intended such a ruling to carry the force of law).

In *Carcieri*, a majority of this Court declined to give *Chevron* deference to the Secretary's interpretation of § 479 (since recodified at 25 U.S.C. § 5129), holding that "Congress left no gap in 25 U.S.C. § 479 for the agency to fill" when "it explicitly and comprehensively defined the term [Indian] by including only three discrete definitions." 555 U.S. at 391. Likewise, Justice Breyer's concurrence – on which the Department so heavily relies – did not give the Secretary's interpretation of "now under federal jurisdiction" deference, even though he regarded the language as ambiguous. *Id*. at 396 (Breyer, J., concurring). Justice Breyer noted that "the provision's legislative history makes clear that Congress focused directly upon that language, believing it definitively resolved a specific underlying difficulty," and that "[t]hese circumstances indicate that Congress did not intend to delegate interpretive authority to the Department. Consequently, its interpretation is not entitled to *Chevron* deference, despite linguistic ambiguity." *Id. at* 396-97.

As reflected in the legislative history of the IRA, the specific underlying difficulty Congress thought it was resolving by defining "Indian" as it did was to prevent Indian "tribes" (other than treaty tribes) from taking advantage of the Act "unless they are enrolled [with the Indian Office] at the present time,"[8] or "[i]f

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[8] *Hearings on S.2755 and S.3645: A Bill to Grant to Indians Living Under Federal Tutelage the Freedom To Organize for Purposes of Local Self-Government and Economic Enterprise, Before the S. Comm. on Indian Affairs*, 73d Cong., 2d Sess., pt. 2, p. 264 (May 17, 1934) (available on Lexis-Nexis) (Chairman Wheeler).

they are actually residing within the present boundaries of an Indian reservation at the present time. . . . "[9]

During consideration of the IRA, several Senators voiced concerns that (1) there were already a number of self-identified "Indians" and "tribes" on whose behalf the government owned land, but who really should not have been under federal supervision, and (2) concerns that the definitions of "Indian" and "tribe" in Section 19 were so broad that they threatened to create more such "Indians" and "tribes" who would be able to take advantage of the provisions of the Act, against the wishes of the Senators.[10]

As examples of the abuses the legislative sponsors wished to avoid, the bill's chief co-sponsor in the Senate, Senator Wheeler, noted that former Vice President Charles Curtis, whose claim to be an "Indian" was dubious, "ha[d] lands today under the supervision of the Department," which Senator Wheeler deemed "idiotic."[11] The Senator also pointed to the specific case of a so-called "tribe" in California, living on federal land, which in the Senator's estimation had no business being under federal supervision. He believed that "Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way."[12] Commissioner Collier, when asked if other such "Indians" would be able

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[9] *Id.* (Commissioner Collier).

[10] *Id.* at 265-67.

[11] *Id*. (Chairman Wheeler)

[12] *Id.* at 266.

to take advantage of the Act replied, "If they are actually residing *within the present boundaries of an Indian reservation* at the present time."[13]

Senator Wheeler cautioned that the purpose of the IRA was not to deal with the problem of those "tribes" already (but improperly) under federal supervision.[14] Nevertheless, he and other Senators were anxious that the IRA not intensify the problem.[15] Thus, as "Representative Edgar Howard, who co-sponsored the IRA with Senator Burton Wheeler" observed, "For purposes of this act, [Section 19] defines the persons who shall be classed as Indian. *In essence, it recognizes the status quo of the present reservation Indians* and further includes all other persons of one-fourth Indian blood. . . ."[16]

The Secretary's post-*Carcieri* interpretations of "recognized" and "under federal jurisdiction" would create the very problem the drafters of the IRA sought to avoid. And given their careful attention to the language of the Act on this very point, it cannot be said that Congress intended to leave any interpretive gap

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[13] *Id.* at 265 (emphasis added).

[14] *Id.* at 263-64.

[15] *Id.* at 265-67.

[16] *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1220 n.10 (D. Haw. 2002), *aff'd*, 386 F.3d 1271 (9th Cir. 2004) (quoting Congressional Debate on Wheeler-Howard Bill (1934) in THE AM. INDIAN AND THE UNITED STATES, Vol. III (Random House 1973)) (emphasis in original).

for the Secretary to fill in deciding what "Indian" meant for purposes of the IRA.[17]

B. The Secretary's Proposed Interpretations Of "Recognized" And "Under Federal Jurisdiction" Are Not Reasonable In Light Of Congress's Clear Intention That Those Terms Act As Limitations On The Secretary's Authority To Take Land Into Trust For Indians.

1. "Recognition" is a political, rather than "cognitive" concept, and the legislative history of the IRA shows that it was required to exist as of 1934 as well.

The Department has advanced the view in this litigation that "recognition" of a tribe (unlike jurisdiction) need not have existed in 1934 – that subsequent "recognition" is sufficient. Thus, in this case, it has agreed to accept trust lands for a "tribe" that was not "recognized" until 2002. Alternatively, the Department has urged that "recognition" in a merely "cognitive" or "anthropological" sense, rather than as referring to

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[17] Also notable is that the Secretary's "interpretations" of these terms is not contained in a regulation or formal adjudicatory decision. Those "interpretations" were first promulgated in the Record of Decision at issue in this case, and later incorporated into an opinion of the Solicitor's office. Neither of those actions warrant *Chevron*-style deference. *See Christensen v. Harris Cnty*., 529 U.S. 576, 587 (2000); *Wilderness Society v. United States FWS*, 353 F.3d 1051, 1068 (9th Cir. 2003) (en banc) (Solicitor's opinions not entitled to *Chevron* deference).

the existence of a government-to-government relationship between the tribe and the federal government, suffices. In other words, a "tribe" as interpreted by the Department is "recognized" if "federal officials simply knew or realized that an Indian tribe existed." *See Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 75 F. Supp. 3d 387, 397 (D.D.C. 2014).

The legislative history confirms that no such temporally open-ended meaning was intended. The IRA's first definition of Indian originally included only the "recognized Indian tribe" requirement, and not the phrase "now under federal jurisdiction." And yet it was in addressing that original version that Chairman Wheeler – the IRA's Senate sponsor – stated that the IRA was being enacted "to take care of the Indians *that are taken care of at the present time*";[18] he again stated that Indians of "less than half blood" would not qualify as "Indian" "unless they are enrolled [with the Indian Office] at the present time";[19] Commissioner Collier stated that Indians would not qualify unless they "are actually residing within the present boundaries of an Indian reservation at the present time";[20] and the IRA's House sponsor explained that the IRA's "definition of 'Indian' " "recognizes the status quo of the present reservation Indians"[21] (emphases added). In other words, the 1934 temporal limitation was understood to

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[18] *Hearings* at 263 (emphasis added).

[19] *Id*. at 264.

[20] *Id.* at 265.

[21] *See* note 15, *supra*.

be implicit in the notion of a "recognized tribe" even before "now" was added to the statute.

As for the notion that merely "cognitive" recognition of a tribe is sufficient for purposes of the IRA, the decision below noted that interpretation, but it was not the basis on which the Secretary or the Court of Appeals determined that the Cowlitz Band could be regarded as recognized; rather, the Secretary concluded (and the D.C. Circuit agreed) that formal "political" recognition in 2002 was sufficient. *See* 830 F.3d at 559-602. Thus, the alternative interpretation of "recognition" as merely cognitive "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

But even on the merits, this interpretation is inconsistent with longstanding court- and administrative interpretations right up until the time that *Carcieri* was decided (and even thereafter), which treat "recognition" as a legal term of art referring to the formal political establishment of a government-to-government relationship.[22] Treating recognition as a

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[22] *See, e.g.*, Appropriations Act of March 3, 1871, ch. 120, § 1, 6 Stat. 544 (codified as amended at 25 U.S.C. § 71) (abrogated the Executive's power to treat with Indian tribes in unequivocally political terms: "No Indian nation or tribe within the territory of the United States shall be *acknowledged or recognized* as an independent nation, tribe, or power with whom the United States may contract by treaty." (emphasis added)); *United States v. Chavez*, 290 U.S. 357, 363 (1933) (only Congress could determine " 'to what extent, and for what time [Indian tribes] *shall be recognized and dealt with as dependent tribes* requiring the guardianship and

protection of the United States."); "Procedures for Establishing that An American Indian Group Exists As An Indian Tribe," 43 Fed. Reg. 39361, 39361-62 (Sept. 5, 1978) (adopting the Part 83 federal acknowledgment regulations and emphasizing that "Maintenance of tribal relations – a political relationship – is indispensable."); 25 C.F.R. § 83.1 (to be a "Federally recognized Indian tribe" an entity must be one "with which the United States maintains a government-to-government relationship."); 25 C.F.R. § 292.8 (defining a tribe that was "at one time formally recognized" for purposes of IGRA's "restored lands" exception with reference to a "government-to-government relationship"); *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015) (en banc) ("Federal recognition 'is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government.' ") (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3], at 134-35 (2012 ed.)); H.R. Rep. No. 103-781, 103d Cong., 2d Sess., 2 (1994) (cited by COHEN'S HANDBOOK) (" 'Recognized' is more than a simple adjective; it is a legal term of art. It means that the government acknowledges as a matter of law that a particular Native American group is a tribe by conferring a specific legal status on that group, thus bringing it within Congress legislative powers. . . . A formal political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe. . . ."); *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127, 131 (D.D.C. 2015) ("Federal 'recognition' of an Indian tribe is a term of art that conveys a tribe's legal status vis-à-vis the United States – it is *not* an anthropological determination of the authenticity of a Native American Indian group. . . . Federal recognition specifically denotes 'the federal government's decision to establish a government-to-government relationship by recognizing a group of Indians as a dependent tribe under its guardianship[,]' [citation], and such recognition 'is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes by virtue of their status as tribes,' 25 C.F.R. § 83.2.").

merely "cognitive" concept is a transparent ruse, recently adopted by the Department as an end-run around this Court's ruling in *Carcieri*.

2. The Secretary's proposed interpretation of "under federal jurisdiction" is so broad as to cover circumstances that are not "jurisdictional" in any normal sense of the word.

The Department has interpreted the phrase "under federal jurisdiction" as broadly as possible, to mean that prior to 1934 the government had "taken an action or series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members – that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." This expansive concept of "jurisdiction" has been broadly applied to mean virtually any contact with a tribe before 1934 – even in circumstances that are not "jurisdictional" in any normal sense of the word. The understanding of what it meant for a tribe to be "under federal jurisdiction" in 1934 was more limited: a tribe that did not live on Federally-reserved land and did not have a ratified treaty, executive order, or tribe-specific legislation, was not "under federal jurisdiction."

Ample case law holds that the basis of federal jurisdiction over an Indian tribe is Congress's relationship to the tribes as a guardian to a ward. *See, e.g.*,

United States v. Kagama, 118 U.S. 375, 383-84 (1886) (Congress's ability to invest the federal courts with jurisdiction over a crime committed by one Indian against another on reservation lands was based on the fact that "These Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."); *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *In re Blackbird*, 109 F. 139, 143 (W.D. Wisc. 1901) ("*The true and unimpeachable ground of federal jurisdiction in such a case as this is that the Indians placed upon these reservations in the states are the wards of the government*, and under its tutelage and superintendence, and that, congress having assumed jurisdiction to punish for criminal offenses, that jurisdiction is exclusive." (emphasis added)).

Thus, it is significant that in 1925, the Comptroller General of the United States opined that:

> There exists no relation of guardian and ward between the Federal Government and Indians who have no property held in trust by the United States, have never lived on an Indian reservation, belong to no tribe with which there is an existing treaty, and have adopted the habits of civilized life and become citizens of the United States by virtue of an act of Congress. The duty of relieving the indigency of

> such Indians devolves upon the local authorities the same as in the case of any other indigent citizens of the State and county in which they reside.

5 Comp. Gen. 86 (Aug. 3, 1925) (available on Lexis-Nexis). Department officials were still relying on that opinion a decade later, when the IRA was adopted. *See No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1182 (E.D. Cal. 2015) (quoting an August 15, 1933, letter from then-Superintendent of Indian Affairs, Sacramento, O.H. Lipps, to then-Commissioner of Indian Affairs Collier, noting that Ione-area Indians "are classified as non-wards under the rulings of the Comptroller General because they are not members of any tribe having treaty relations with the Government, they do not live on an Indian reservation or rancheria, and none of them have allotments in their own right held in trust by the Government. They are living on a tract of land located on the outskirts of the town of Ione.").

In other words, it was well-understood at the time the IRA was adopted and first implemented that for a tribe to be under "federal jurisdiction" (in the absence of a treaty or tribe-specific legislation) it was necessary for the tribe to have land held in trust on its behalf; otherwise, that tribe was subject to state and local jurisdiction like anyone else. And crucially, the legislative history of the IRA itself specifically noted, "Indians under Federal jurisdiction *are not subject to State*

laws"[23] – an understanding consistent with the long-standing case law of this Court. *See Ward v. Race Horse*, 163 U.S. 504, 507-08 (1896) (Indian who killed game outside the boundaries of a reservation in violation of Wyoming state laws could be prosecuted by the State); *Kennedy v. Becker*, 241 U.S. 556 (1916) (state could prosecute Indian for illegal spear-fishing off the reservation); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (citing congressional action dating back to 1834 – including the passage of the IRA – for the proposition that "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians *on a reservation*." (emphasis added)).[24]

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[23] *Hearings* at 213 (testimony of Richard L. Kennedy, representing Indian Rights Association) (emphasis added).

[24] *See also United States ex rel. Marks v. Brooks*, 32 F. Supp. 422, 424 (N.D. Ind. 1940) (citing pre-1934 cases for the proposition that "to grant the relief asked for [enjoining a state court prosecution for violation of state law], it is necessary for this court to definitely decide that the plaintiff, being a Miami Indian, is subject only to the jurisdiction of the United States court. The court is thus obliged to decide in this injunction action the exact status of the Miami Indians residing in Indiana – are they citizens of the United States and subject to all the laws of the state of Indiana as such citizens, or are they wards of the United States government residing on a reservation? If they are wards of the government and residing on a reservation, as plaintiff alleges, the law is clear that the state of Indiana would have no power to interfere with the Indians through any state regulations.").

II. The D.C. Circuit's Erroneous Decision Threatens To Have Substantial Negative Impacts On Local Governments Nationwide.

The importance of the issues presented by this petition, and the importance of their prompt resolution by this Court, cannot be overstated from the perspective of local governments.

A decision by the Secretary of Interior to take land into trust can be highly disruptive to local governments, ejecting those governments from their long-standing taxing, regulatory and environmental authority over territory that they previously regulated. Counties must make long-term strategic plans for developing and funding infrastructure, including identifying areas for development and areas for preservation and providing for the annexation of newly developing urban areas. And counties must decide how to allocate their limited resources for essential governmental services, such as police, fire, road maintenance, and social services. The ability to remove land from state and local jurisdiction can undermine those long-term planning efforts by eliminating the tax revenues a county may have been relying on or introducing development on a scale never anticipated.

It is even more disruptive when new tribes can suddenly be recognized and then land can be taken into trust on their behalf. It is one thing to deal with trust applications from tribes that were recognized and genuinely under federal jurisdiction in 1934; they are known quantities with whom counties often have

working relationships. But as this case, the *County of Amador* case, and others demonstrate, the Secretary's expansive interpretations of the IRA give her virtually unlimited authority to broaden the number of tribes who may have land taken out of local government jurisdiction and the geographic area that she could affect. The economic incentives of IGRA only encourage would-be tribes to seek that result and to reach to those areas with the greatest economic potential.

Since the *Carcieri* decision in 2009, the federal government has taken more than 300,000 acres of land into trust for tribes, and the Department has made clear that if the vitality of *Carcieri* is lessened – the inevitable effect of the D.C. Circuit's decision – the rate of land acquisition will only quicken.[25] From the county perspective, it is imperative that the Court address this issue now.

Moreover, delaying resolution of these critical issues threatens to deprive local governments of a practical remedy for erroneous trust decisions. Following the Eighth Circuit's decision in *South Dakota v. United States DOI*, 69 F.3d 878 (8th Cir. 1995), the Department adopted regulations to delay implementation of a decision to take land into trust for 30 days, to allow for judicial review, after which the Quiet Title Act ("QTA") was regarded as making the trust decision conclusive. 61 Fed. Reg. 18082 (Apr. 24, 1996); *Dept. of the Interior v. South Dakota*, 519 U.S. 919, 920 (1996) (Scalia, J., dissenting). Once this Court decided

[25] *See* Washburn Testimony, *supra*, note 3, at p. 1.

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012), holding that the QTA does not bar a challenge to an illegal trust acquisition, the Secretary amended the regulations to delete the 30-day waiting period so the Department could begin taking lands into trust immediately upon deciding to do so. 78 Fed. Reg. 67928, 67930 (Nov. 13, 2013). And while *Patchak* creates the *theoretical* possibility that land could be ordered removed from trust after its acquisition, that remedy may prove to be illusory as a practical matter. The federal government has aggressively argued that actually providing this remedy "would be an extraordinary step, and there are no clear procedural steps to guide this process."[26] Moreover, if the government moves forward with substantial trust acquisitions and permits tribes to build Indian casinos or other major projects[27] on the trust parcels while litigation drags on for years, a local government's

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[26] *See* Affidavit of Bruce W. Maytubby [Region Director of the Eastern Regional Office of the Bureau of Indian Affairs] in Opposition to Plaintiffs' Motion for Preliminary Injunction or Writ, *Littlefield v. United States Department of Interior*, No. 1:16-cv-10184-WGY (D. Mass. filed June 17, 2016) (ECF No. 38-1), ¶ 5.

[27] *See* Joe Eaton, "Outsiders Target Indian Land for Risky Business" (Center for Public Integrity), Nov. 18, 2008, *available online at* https://www.publicintegrity.org/2008/11/18/3632/outsiders-target-indian-land-risky-business (last visited Nov. 9, 2016) ("The Cortina landfill is one among dozens of projects across the country for which developers and Native Americans are using Indian sovereignty to bypass state and local regulations and build projects that other communities shun – projects ranging from landfills, big box stores and a massive power plant to casinos, motorcycle tracks and billboards.").

ability to mitigate the significant negative impacts of project construction is effectively nullified.

In sum, allowing the crucial issues presented by this petition to fester without resolution by this Court puts local governments in an untenable position.

CONCLUSION

Amici Amador County and CSAC respectfully request that the Court grant the petition for certiorari.

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