No. 99-991174 JAN 12 2000

IN THE
Supreme Court of the United States

HOLLIS EARL ROBERTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, authorizes the Secretary of the Interior—"in his discretion"—to acquire land "for Indians." The Secretary has acquired thousands of properties across the country pursuant to Section 5, including office buildings, houses, residential lots, and other sundry parcels. All told, the acquisition of such property has removed vast areas of land from state and local jurisdiction, and correspondingly expanded federal and tribal jurisdiction. The questions presented are:

1. Whether—as the Eighth Circuit has held and the Tenth Circuit declined to hold below—the standardless delegation by Congress of totally "discretion[ary]" authority to an Executive official to acquire land "for Indians" is an unconstitutional delegation of legislative power; and

2. Whether, if not, an Executive official's acquisition of off-reservation property pursuant to this authority is enough—standing alone—to transform the property into "Indian country" under 18 U.S.C. § 1151, a question of touchstone jurisdictional significance on which the federal circuits are divided.

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Petitioner Hollis Earl Roberts respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 185 F.3d 1125 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Eastern District of Oklahoma on the jurisdictional issues raised here is reported at 904 F. Supp. 1262 and reproduced at App. 38a.

JURISDICTION

The judgment of the Tenth Circuit was entered on August 3, 1999. App. 1a. The Tenth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc on September 14, 1999. App. 53a. On December 2, 1999, Justice Breyer extended the time to file a petition for a writ of certiorari to and including January 12, 2000. App. 54a. The jurisdiction of the Tenth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 8, Clause 3 of the Constitution gives Congress the authority "[t]o regulate commerce * * * with the Indian Tribes."

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, provides in pertinent part:

> The Secretary of the Interior is hereby authorized, 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, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

The provisions of 25 U.S.C. § 465 are reproduced in full at App. 55a-56a, together with 18 U.S.C. §§ 1151 and 1153.

INTRODUCTION

This petition raises profound questions concerning the structure of our constitutional government and the scope of Indian country codified by 18 U.S.C. § 1151, arising in a context that has touchstone jurisdictional significance for the division of federal, state, and tribal authority over thousands of properties and vast areas of land across the country.

The first question concerns the limits on the delegation of legislative power vested in Congress by Article I. As this Court observed long ago: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, 143 U.S. 649, 692 (1892). Over the past half century, however, "the principle that Congress c[an] not simply transfer its legislative authority to the Executive [has fallen] under a cloud." *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607, 674-675 (1980) (Rehnquist, J., concurring in the judgment). As a result, at the same time that questions concerning the breadth of legislative delegations have arisen with new urgency in a variety of regulatory contexts, conflict and confusion have smoldered in the lower courts over the application and even continuing viability of the nondelegation doctrine.

Guidance is sorely needed from this Court on this basic principle of constitutional government, and this case presents an ideal vehicle for providing it. It presents a challenge to Section 5 of the Indian Reorganization Act of 1934 ("Section 5"), 25 U.S.C. § 465, which authorizes the Secretary of the Interior—"in his discretion"—to acquire property in trust "for Indians." The Tenth Circuit below expressly rejected the conclusion of the Eighth Circuit that the delegation of this purely "discretion[ary]" power violates the nondelegation rule. App. 17a–18a. Three Terms ago, this

Court granted certiorari in the Eighth Circuit case and, at the request of the United States vacated the Eighth Circuit decision and remanded to the Secretary for reconsideration of his decision under newly issued regulations that are inapplicable here. The same issue is squarely presented here—but without the wrinkle that caused vacatur in the Eighth Circuit case—and now should be decided.

The second question presented follows from the first: if Section 5 permissibly delegates to the Executive carte blanche to acquire property in trust for Indians, then is the fact that off-reservation property was acquired pursuant to Section 5 enough—standing alone—to transform the property into Indian country within 18 U.S.C. § 1151? Conflict and confusion surround that issue as well. While acknowledging the directly contrary position of the Eighth Circuit, the Tenth Circuit below answered this question in the affirmative. But at the same time, the Tenth Circuit could not agree into which Section 1151 category of Indian country the property at issue in this case—an office complex located in downtown Durant, Oklahoma—fits. For its part, the United States took the position that the property was Indian country even though it freely conceded that the property did not fit into *any* of the Section 1151 categories.

Indian country is the touchstone for delineating federal, state, and tribal sovereignty over property, as well as jurisdiction over activities occurring on it. Acting pursuant to Section 5, the Secretary has acquired thousands of properties across the country ranging from office buildings like the one in this case to houses to industrial sites—even a former Sears department store. *See Ringsred* v. *City of Duluth*, 828 F.2d 1305 (8th Cir. 1987). As this case illustrates, many of these properties are not only off-reservation, they are just off Main Street in towns across the country. If the Secretary is free to stockpile such properties for Indians—with no guidance at all from Congress on what

standards to apply in doing so—then this Court should decide whether the mere fact that the Secretary has elected to do so transforms the property into full-blown Indian country within the meaning of Section 1151.

STATEMENT OF THE CASE

1. Hollis Earl Roberts ("Roberts") served as Principal Chief of the Choctaw Nation of Oklahoma for 19 years, and was vested with "'the Supreme executive power of this Nation.'" App. 2a (quoting *Constitution of the Choctaw Nation of Oklahoma*, article VI, sec. 1). In June 1995, he was charged in an eight-count indictment in the Eastern District of Oklahoma with aggravated sexual abuse, sexual abuse, and abusive sexual contact, in violation of 18 U.S.C. §§ 2241, 2242, and 2244. The indictment alleged that Roberts had forced unwanted sexual actions on members and employees of the Choctaw Nation in the administrative offices used by Roberts. Roberts contended that any such acts were consensual, and that the charges were part of a scheme to remove him as Principal Chief of the Choctaw Nation. He was convicted on three counts and is currently serving a sentence of imprisonment.

Federal jurisdiction over the prosecution was predicated on the Indian Major Crimes Act, 18 U.S.C. § 1153. That Act provides that "[a]ny Indian who commits" specified offenses "within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." *Id.* Thus, it was an element of the offense that the actions at issue took place "within the Indian country"—an allegation that Roberts challenged at every turn. The alleged "Indian country" in which the acts at issue took place is an office building complex located at 16th and Locust Streets in Durant, Oklahoma. The complex formerly housed the Oklahoma Presbyterian College for Girls but now

houses administrative offices of the Choctaw Nation, as well as offices of and a museum operated by the Red River Valley Historical Association.

The process by which the United States came to hold title to the property began in 1975, when the United States Marshal for the Eastern District of Oklahoma conveyed the property to the Historical Association. App. 41a. On July 19, 1976, the Association conveyed the property to the Durant Chamber of Commerce. About three weeks later, the Chief of the Choctaw Nation—Roberts's predecessor—requested that the United States accept the property in trust for the tribe, and six days later the Chamber of Commerce conveyed the property to the United States in trust for the Choctaw Nation. While the United States thus acquired title to the property at issue by August 11, 1976, no official of the federal government had yet purported to approve the request to accept the land in trust for the Choctaw Nation. That action did not occur until August 25, 1976, when the Area Director of the Bureau of Indian Affairs for Muskogee, Oklahoma executed his approval of the trust transaction.

The only statutory basis for acquisition of this property by the United States in trust for the Choctaw Nation is Section 5, which provides that "[t]he Secretary of the Interior is hereby authorized, in his discretion, to acquire * * * any interest in lands * * * for the purpose of providing land for Indians." 25 U.S.C. § 465. At the time the United States acquired the Durant property, there were no regulations addressing the exercise of the discretion afforded by this provision; such regulations came into existence only in 1980—more than three years after the property in this case was acquired. *See* 45 Fed. Reg. 62036 (1980).

Since at least 1974, the Secretary has delegated his authority "with respect to the management of all Indian affairs and all matters arising out Indian relations" to the

Commissioner of Indian Affairs. *See* 39 Fed. Reg. 32166-67 (1974) (replacing item-by-item delegations dating from 1949 with general delegation of authority). The authority delegated by the Secretary has been redelegated to BIA Area Directors. 34 Fed. Reg. 637 (1969). *See* App. 50a-51a. Thus, under these authorities, the Area Director who took the office buildings in this case in trust for the Choctaw Nation had authority to do so only by redelegation of the authority granted to the Secretary by Section 5.

2. Roberts moved to dismiss the indictment against him on jurisdictional grounds. In particular, he argued that the building complex is not Indian Country within 18 U.S.C. § 1151 because—while the property may be held in trust by the United States—the property does not fit into any of the categories codified by Section 1151. That is, the complex is neither an Indian reservation, dependent Indian community, nor allotment.[1] Roberts also argued that the Secretary lacks authority to take land into trust for tribes in the first place because Section 5 provides no standards to guide the exercise of the discretion it confers, and therefore constitutes an unconstitutional delegation of authority. The District Court rejected these contentions. *See* App. 47a.

The Tenth Circuit affirmed. With respect to the issues presented here, the Court first considered Roberts's "fervent

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[1] Section 1151 defines Indian Country as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

argument that the property's trust status does not establish Indian Country" under Section 1151. App. 4a. There is no question that the office complex is not part of any federally designated Indian reservation or allotment, and it does not resemble a dependent Indian community in any conventional sense; indeed, the government *conceded* as much. *See infra* at 23. But the Tenth Circuit nevertheless held that "lands owned by the federal government in trust for Indian Tribes are Indian Country pursuant to 18 U.S.C. § 1151." App. 7a. In reaching this conclusion, the Tenth Circuit declined "to affix" any "categorical label" to the property at issue in accordance with the terms of Section 1151. App. 11a.

The Court of Appeals also rejected Roberts's argument that Section 5 "unconstitutionally delegates standardless authority to the Secretary." App. 17a. While the court recognized that the Eighth Circuit had so held in *South Dakota* v. *United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), it dismissed that opinion because this Court vacated it after the government changed its legal position when it sought review in this Court. *See* 519 U.S. 919 (1996). The Tenth Circuit below expressly disclaimed reliance on the BIA regulations—adopted after the acquisition at issue here—purporting to find standards limiting the Secretary's discretion in "the statute itself." App. 18a n.8. The Tenth Circuit also relied on certain "goals" identified in the legislative history, and found that the Secretary had not transgressed any of the standards articulated there. *Id.* Rejecting all other arguments on appeal, the court affirmed Roberts's conviction.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE CONFLICT AND CONFUSION OVER THE CONTINUING VITALITY OF THE NONDELEGATION DOCTRINE AND ITS APPLICATION TO SECTION 5 OF THE INDIAN REORGANIZATION ACT.

1. Federal jurisdiction over the charges against Roberts was based solely on a decision by an Area Director from Muskogee to acquire a building complex that used to be a girls school but came to house the administrative offices of the Choctaw Nation. The authority for that decision was a delegation from the Secretary of the Interior, and subsequent redelegation by his delegate, of the statutory authority set out in Section 5, 25 U.S.C. § 465—*i.e.*, the purely "discretion[ary]" authority to acquire land "for Indians."

This exceptionally broad delegation squarely implicates the constitutional nondelegation doctrine—a doctrine "rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989). This doctrine has been recognized by this Court since at least *Field* v. *Clark*, 143 U.S. at 492, but it has existed since the days of Locke. *See Loving* v. *United States*, 517 U.S. 748, 758-759 (1996); John Locke, *Second Treatise of Government* 87 (R. Cox ed. 1982) ("The power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands"). Today, the doctrine is shrouded in doubt.

Over the past half century, the nondelegation doctrine has fallen "under a cloud," *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.* ("*Benzene*"), 448 U.S. at 675

(Rehnquist, J., concurring in the judgment), spawning debate among Members of this Court,[2] judges in the lower courts,[3] and those in the academy.[4] While the Tenth Circuit below upheld the statute against Roberts's nondelegation doctrine challenge—squarely holding that "the statute itself provides [adequate] standards for the Secretary's exercise of discretion," App. 18a n.8—its decision conflicts with the conclusion of the Eighth Circuit on the very statute in question. This Court should grant certiorari to address the important and recurring issues concerning the nondelegation doctrine and its application to the limitless delegation of jurisdictionally-significant authority under Section 5.

2.a. In *South Dakota* v. *United States Department of Interior*, 69 F.3d 878 (8th Cir. 1995), the Eighth Circuit considered South Dakota's challenge to a decision by the Assistant Secretary of the Interior to acquire 91 acres of land—located seven miles from the reservation of the Lower

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[2] *See infra* at 16.

[3] *See, e.g., American Trucking Ass'ns* v. *United States Envtl Protection Agency*, 175 F.3d 1027, 1034-40 (D.C. Cir. 1999) (finding nondelegation doctrine violated); *id.* at 1057-62 (Tatel, J., dissenting in part) (criticizing majority for "ignor[ing] the last half-century of Supreme Court nondelegation jurisprudence"). *See also American Trucking Ass'ns* v. *United States Envtl Protection Agency*, 195 F.3d 4 (D.C. Cir. 1999) (modifying panel opinion); *id.* at 14 (Silberman, J., dissenting from denial of rehearing en banc); *id.* at 16 (Tatel, J., joined by Edwards, C.J., and Garland, J., dissenting from denial of rehearing en banc) ("The panel's nondelegation holding plainly involves a question of exceptional importance warranting en banc review. * * * [T]he panel depart[ed] from a half century of Supreme Court separation-of-powers jurisprudence.") (citation and internal quotation marks omitted). The *ATA* case is discussed more fully *infra* at 17-18.

[4] *See, e.g.*, Symposium, *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, 20 Cardozo L. Rev. 731 (1999) (various articles on nondelegation doctrine).

Brule Tribe of Sioux Indians and partially within the City of Oacoma, South Dakota—in trust for the Tribe. The Secretary moved to dismiss the suit on the ground that the acquisition was "committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2); *Heckler* v. *Chaney*, 470 U.S. 821, 828-830 (1985). The Eighth Circuit, however, held Section 5 unconstitutional under the nondelegation doctrine.

The court noted that Section 5 "defin[es] no boundaries to the exercise of this [land acquisition] power," and "leaves the Secretary free to acquire for a multitude of purposes, for example, to expand a reservation, to provide farm land for rural Indians, to provide a factory for unemployed urban Indians, to provide a golf course for tribal recreation, or to provide a lake home for a politically faithful tribal officer." 69 F.3d at 882. "Indeed," the Eighth Circuit observed, the terms of the statute would "permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present. There are no perceptible 'boundaries,' no 'intelligible principles' within the four corners of the statutory language that constrain this delegated authority—except that the acquisition must be 'for Indians.'" *Id.*

Turning to the statute's legislative history, the court found that Congress had an "agrarian focus" in mind when it adopted Section 5, *id.* at 883, but "failed to include [in the statute] standards to reflect its limited purpose." *Id.* Nor, given the fact that the Secretary had interpreted the statute "as broadly as possible," *id.* at 884, was there any potentially relevant narrowing construction offered by the agency. "The result," the Eighth Circuit held, "is an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free from judicial review. It is hard to imagine a program more at odds with separation of powers principles." *Id.* at 885.

It is just that program, however, that the Tenth Circuit upheld below. Barely pausing to consider the reasoning or context of the Eighth Circuit's opinion in *South Dakota*, the Tenth Circuit below was content to observe that, because the *South Dakota* decision has been vacated by this Court, "it has no precedential value to us." App. 18a. It is true that the Eighth Circuit decision was vacated, but it is clear that the vacatur rested on a ground not applicable to this case. Thus, while the Eighth Circuit's decision may no longer be binding, the reasoning it articulated would have compelled a different result in this case had it been adopted by the Tenth Circuit.

The court below was unable to discern the basis for this Court's action in *South Dakota*, App. 18a, but the record in that case makes clear that the vacatur was based on the Secretary's supplementation of regulations first issued in 1980—nearly half a century after Section 5 was adopted—which were inapplicable to the 1976 acquisition at issue here. Having lost the *South Dakota* case in the court of appeals, "the federal government * * * abandoned the position" that the exercise of authority by the Secretary under Section 5 is unreviewable and "issued a final regulation that acknowledges and affords an opportunity for judicial review of his Section 5 decisions." Pet. for Cert. in *United States Dep't of Interior* v. *South Dakota*, No. 95-1956, at 24 (filed June 3, 1996) ("*South Dakota* Petition"). The government urged the Court to vacate the Eighth Circuit's judgment and remand the case with instructions to further remand to the Secretary to reconsider the acquisition at issue. *Id.* at 24-26. The Court did so, over the dissent of Justice Scalia, joined by Justices O'Connor and Thomas. *See* 519 U.S. 919 (1996).

As the Tenth Circuit acknowledged below, neither the Section 5 regulations nor the procedure for reviewing decisions made under those regulations—on which this Court's vacatur in *South Dakota* was based—were available at the time of the acquisition of the property at issue here.

App. 18a n.8. Instead, the Tenth Circuit decision rested on its view that "the *statute itself* provides standards for the Secretary's exercise of discretion." *Id.* (emphasis added). *See also* App. 18a (the statute "place[s] additional limits on the Secretary's discretion"). For that proposition, the Tenth Circuit cited its earlier decision in *McAlpine* v. *United States*, 112 F.3d 1429, 1432 n.3 (10th Cir.), *cert. denied*, 522 U.S. 984 (1997)—which relied on Judge Murphy's *dissent* in *South Dakota*.

Thus, it could not be clearer that the reasoning of the Eighth Circuit in *South Dakota* and the Tenth Circuit below are squarely in conflict. While the Eighth Circuit held that Section 5 "define[s] no boundaries to the exercise of this [acquisition] power," 69 F.3d at 882, and contravenes the nondelegation doctrine, the Tenth Circuit held that "the statute itself" provides the standards necessary to avoid a delegation problem. App. 18a & n.8. In reaching this holding, the Tenth Circuit relied on the views of the judge who dissented from the Eighth Circuit's decision. While the Eighth Circuit decision was ultimately vacated by this Court, the only basis suggested to the Court for doing so is inapplicable to this case. Quite plainly, this case would come out differently under the rationale of *South Dakota*.

b. The circuit conflict does not end there. Like the Eighth Circuit, the Eleventh Circuit has also recognized that "the statute itself"—on which the Tenth Circuit relied below — provides no intelligible principle to guide the Secretary in the exercise of the discretion it grants. In *Florida Department of Business Regulation* v. *United States Department of Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986), the court held that the Secretary's decision under Section 5 was an unreviewable exercise of discretion. It relied, *inter alia*, on its view that Section 5 "does not

delineate the circumstances under which exercise of this discretion is appropriate." *Id.* at 1256.[5] The Tenth Circuit rejected the Eleventh Circuit's *Florida* decision in *McAlpine* v. *United States*, *supra*, based on its view that the regulations under Section 5 provided sufficient guidance "[e]ven assuming that the statutory language contained in § 5 of the IRA does not provide 'law to apply' in this case." 112 F.3d at 1434. Now that the court has reached a similar conclusion in a case in which the regulations are indisputably inapplicable, it has plainly rejected the view of the Eleventh Circuit on the statute as well.

3. The conflict over the constitutionality of Section 5 is far from academic. As the United States has noted, "[f]or more than 60 years, Section 5 has provided the primary mechanism for the federal government to restore and replace tribal lands," and has been the source of authority for "thousands of acquisitions (covering an estimated 9 million acres)." *South Dakota* Petition at 16, 17. Literally thousands of applications, moreover, are pending before the Secretary to acquire additional lands pursuant to Section 5. *See* 64 Fed. Reg. 17574, 17580 (1999) (in 1996, 6941 applications were filed with the Secretary to place lands in trust).

The myriad properties and vast areas of land taken into trust under Section 5 are insulated from state and local control in several significant respects. First, as specifically stated in Section 5 itself, trust land is exempt from state and local taxation. *See* 25 U.S.C. § 465 (Section 5 "lands or rights shall be exempt from State and local taxation."). *See also Cass County, Minn.* v. *Leech Lake Band of Chippewa*

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[5] The case did not involve a constitutional challenge to the statute, 768 F.2d at 1252, but the Eleventh Circuit's conclusion that Section 5 confers standardless authority on the Executive to acquire land into trust bears directly on the question presented here.

Indians, 524 U.S. 103, 114 (1998) (Section 5 sets forth "procedure by which lands held by Indian tribes may become tax-exempt"). Second, as discussed more fully in Part II below, many lower courts—including the Tenth Circuit below—have adopted the position that trust land is "Indian country" for jurisdictional purposes, removed from state civil and criminal jurisdiction in the absence of the tribe's consent. 25 U.S.C. §§ 1321, 1322. Current Interior regulations also provide that such land is generally exempt from state and local land use regulation. 25 C.F.R. § 1.4.

The conflicting decisions of the courts of appeals introduce great uncertainty about the very nature and control of the lands at issue. So long as a cloud exists over the Secretary's authority to take lands into trust under Section 5, the taxing, regulatory, and civil and criminal authority over vast areas of land is subject to challenge and confusion. As this Court has observed, however, "[s]ound judicial policy does not encourage a situation which necessitates constant adjudication of the boundaries of state and federal competence." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 376 (1959). That is, jurisdictional determinations should be clear, and not shrouded in doubt. The Court should eliminate that doubt here.

4. The nondelegation issue implicated by the decision below, moreover, reaches far beyond the particular context at issue here, for debate over this fundamental separation of powers doctrine continues unabated. While it has become commonplace to observe—as the Court of Appeals did below—that "only twice in its history, and not since 1935" has the Court "invalidated a statute on the ground of excessive delegation of legislative authority," App.19a n.9,[6]

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[6] *See A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935).

the Court has not repudiated the doctrine, and various Members of the Court have continued to discuss—and rely on—its validity in a variety of contexts. *See, e.g., Clinton* v. *City of New York*, 524 U.S. 417, 484 (1998) (Breyer, J., dissenting) ("The 'nondelegation' doctrine represents an added constitutional check upon Congress' authority to delegate power to the Executive Branch. And it raises a more serious obstacle here"); *Loving*, 517 U.S. at 758-759, 771-773; *Touby* v. *United States*, 500 U.S. 160, 164-165 (1991); *Benzene*, 448 U.S. at 646 (plurality opinion) (rejecting broad construction of statute urged by agency to avoid nondelegation problem); *id.* at 671-688 (Rehnquist, J., concurring in the judgment) (concluding that statute at issue violates nondelegation doctrine). Other Members of the Court—and commentators[7]—have assumed that the doctrine is all but dead. *See, e.g., Mistretta* v. *United States*, 488 U.S. at 416 (Scalia, J., dissenting) ("What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny * * * ?"); *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 352-353 (1974) (Marshall, J., joined by Brennan, J., dissenting) (nondelegation doctrine "has been virtually abandoned by the Court for all practical purposes").

Given the unsettled state of the Court's teaching on the nondelegation doctrine, lower courts are at a loss to determine how and when—or, indeed, whether—to apply it.

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[7] *See, e.g.*, Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. Pa. L. Rev. 759, 839 (1997) ("we live in a constitutional world where the nondelegation doctrine remains dead"); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 Yale L.J. 529, 549 (1997) ("the nondelegation doctrine is effectively dead"); Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 Geo. Wash. L. Rev. 479, 541 (1995) (doctrine has "receded into purgatory").

As described above, the lower courts' confusion is evident in the conflicting analyses of the unlimited delegation in Section 5, but recent opinions make clear that the confusion is not limited to that context. The most prominent example is the *American Trucking Associations* case, *supra*, in which a sharply divided panel of the D.C. Circuit found that "the construction of the Clean Air Act on which EPA relied in promulgating [the regulations] at issue here effects an unconstitutional delegation of legislative power." 175 F.3d at 1033. The dissent, meanwhile, had little difficulty concluding that no nondelegation doctrine problem existed, relying on "the last half-century of Supreme Court nondelegation jurisprudence" and the First Circuit's rejection of "a similar nondelegation challenge" to the Clean Air Act. *See id.* at 1057, 1058 (Tatel, J., dissenting in part) (citing *South Terminal Corp.* v. *EPA*, 504 F.2d 646 (1st Cir. 1974)).

The disagreements deepened in the several opinions issued upon resolution of EPA's petition for rehearing and rehearing en banc. The panel majority observed that "the approach of the *Benzene* case, in which the Supreme Court itself identified an intelligible principle in an ambiguous statute, has given way to the approach of *Chevron*," 195 F.3d at 8, under which the *agency* may come up with intelligible principles not found in the statute itself. Judge Silberman dissented from denial of rehearing en banc, arguing that the panel's remand to the agency for it to devise a limiting principle "undermines the purpose of the nondelegation doctrine"—"to ensure that *Congress* makes the crucial policy choices that are carried into law." *Id.* at 15 (emphasis added). Judge Tatel, joined by two other judges, also dissented. He found the debate about the proper remedy once an illegitimate delegation is identified to have "no relevance to the constitutional question we face" because, in his view, the statutory standards at issue are "far more specific than

the sweeping statutory delegations consistently upheld by the Supreme Court for more than sixty years." *Id.* at 16.

The cacophony of opinions in the D.C. Circuit—not to mention the circuit conflict over Section 5 and the confusion evidenced in other court of appeals decisions[8]—are an unavoidable result of this Court's own ambivalent approach to the nondelegation doctrine since 1935, under which "the boundaries limiting the scope of congressional delegation to the executive branch remain only dimly perceivable." *Id.* at 14 (Silberman, J., dissenting from denial of rehearing en banc). Guidance is needed from this Court on this fundamental separation of powers principle.

5. This case is an ideal vehicle for providing such guidance. The Tenth Circuit below held that "the statute itself" provides the constitutionally required guidance for Executive action. App. 18a n.8. The statute, however, contains no limiting principle whatever to guide the Secretary's exercise of power, providing instead that the acquisitions it authorizes are "in his discretion." The only proviso is that they be "for Indians," but—as the Eighth Circuit held and experience has shown—that is no practical limitation at all on the Secretary's exercise of "discretion" in determining what types of property to acquire under Section 5.

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[8] *See, e.g., Terran v. Secretary of Health & Human Servs.*, 195 F.3d 1302, 1314-15 (Fed. Cir. 1999) (rejecting application of doctrine); *id.* at 1321 n.1 (Plager, J., dissenting) (declining to join majority discussion of "the more difficult question of whether the statute as written complies with the minimum requirements for a valid delegation of legislative power"); *Stupak-Thrall v. United States*, 89 F.3d 1269, 1283 n.17 (6th Cir. 1996) (Boggs, J., dissenting from denial of rehearing en banc) ("the concerns about democratic legitimacy behind the non-delegation doctrine have not disappeared"); *id.* at 1300 (doctrine "may be largely dead, or barely breathing, but it is not totally dead"), *cert. denied*, 519 U.S. 1090 (1997).

Moreover, as it applies to this case and to thousands of earlier acquisitions, the broad delegation in Section 5 is unadorned by any administrative effort to establish principles to limn this uncabined discretion; the property here was acquired long before the Secretary passed any regulations under Section 5.[9] This case, accordingly, presents a direct challenge to the breadth of the statutory delegation.

Nor does the context in which Section 5 operates provide any basis for concluding that Congress would somehow be unable to enact limiting principles due to complexity or expertise. Instead, the raw authority granted here could readily have been exercised or cabined by Congress. *Cf. Mistretta*, 488 U.S. at 372 (nondelegation "jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives"); *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 145 (1941).

In short, there are no special factors at work in this case that would prevent the Court from considering the basic question of the continuing vitality of the nondelegation doctrine. Given the confusion over the doctrine's role in

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[9] The existence of regulations is in any event no answer to the nondelegation problem. One of the "important functions" served by the doctrine is to "ensure[] * * * that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Benzene*, 448 U.S. at 685 (Rehnquist, J., concurring in the judgment). Relying on an *agency* effort to make those determinations "undermines the purpose of the nondelegation doctrine." *ATA*, 195 F.3d at 15 (Silberman, J., dissenting from denial of rehearing *en banc*). Thus, when there are no intelligible principles to be found in the statute itself, the doctrine requires invalidation of the statute, rather than reliance on an *Executive* action. *See id.*

separation of powers jurisprudence, the widespread use of the specific authority at issue here, and the significant consequences that flow from its exercise—including, as here, the establishment of federal criminal jurisdiction—this Court should grant review to consider the recurring and important issues surrounding the nondelegation doctrine.

II. THE COURT SHOULD RESOLVE THE CONFLICT AND CONFUSION OVER THE INDIAN COUNTRY STATUS OF OFF-RESERVATION PROPERTY ACQUIRED BY THE SECRETARY PURSUANT TO SECTION 5.

1. This case presents a second issue on which the lower courts also need guidance: if the delegation in Section 5 passes constitutional muster, is the Secretary's standardless decision to acquire off-reservation property for the United States to hold in trust for Indians sufficient—standing alone—to transform the property into "Indian country" within the meaning of Section 1151? The federal circuits are divided on this important jurisdictional issue, and the Tenth Circuit decision below answering this question in the affirmative conflicts with the intent of Congress, as well as with this Court's own precedents.

2.a. Congress—which has plenary authority over Indian affairs, *see* U.S. Const. art. I, § 8, cl. 3—has the first and final say over what is Indian country. *See Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 534 (1998) ("Whether the concept of Indian country should be modified is a question entirely for Congress."); *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913) (United States' dealings with Indians "are to be determined by Congress, and not the courts"). In exercising this authority, Congress has codified three categories of Indian

country: (a) "Indian reservation[s]"; (b) "dependent Indian communities"; and (c) "Indian allotments." 18 U.S.C. § 1151.[10]

As is evident from the text of the statute, "Section 1151 of 18 U.S.C. does not directly address the status of tribal trust lands located outside Indian reservations, unless the lands are used for the residence of a dependent Indian community." Cohen, *supra*, at 45. Nor does Section 5 of the Indian Reorganization Act; it gives the Secretary carte blanche to acquire property in trust for Indians, and provides that such land "shall be exempt from State and local taxation," 25 U.S.C. § 465, but it is silent as to the property's Indian country status under Section 1151. As a result, "the Indian country status of trust lands located outside reservation boundaries is"—as the leading commentator has put it—"uncertain." Cohen, *supra*, at 45.

b. The federal circuits have added to the uncertainty by issuing conflicting rulings on this basic jurisdictional question. In *United States* v. *Stands*, 105 F.3d 1565, 1572 & n.3 (8th Cir.), *cert. denied*, 522 U.S. 841 (1997) (emphasis added), for example, the Eighth Circuit held that "[f]or jurisdictional purposes, tribal trust land beyond the boundaries of a reservation [acquired pursuant to Section 5] is ordinarily *not* Indian country."[11] Other circuits, however, have taken the

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[10] Most Indian country has been expressly designated by Congress as an Indian reservation (§ 1151(a)) or allotment (§ 1151(c)). *See* Felix S. Cohen, *Handbook of Federal Indian Law* 28 (1982). In *Venetie*, 522 U.S. at 528-530, this Court held that Section 1151(b) was intended to codify its prior decisions in *United States* v. *Sandoval*, *supra* (Pueblo Indian communities are Indian country), and *United States* v. *McGowan*, 302 U.S. 535 (1938) (Reno Indian Colony is Indian country), which involved lands that were "like Indian reservations generally." 522 U.S. at 529. As such, the dependent Indian community category of Section 1151(b) is—as *Venetie* recognizes—a "limited" one. *Id.* at 527.

[11] The *Stands* court noted that "[i]n some circumstances, off-reservation tribal trust land may be considered Indian country," but none of the circumstances it identified are implicated here. 105 F.3d at 1572 n.3.

opposite position. *See, e.g., Penobscot Indian Nation* v. *Key Bank of Maine*, 112 F.3d 538, 547 n.12 (1st Cir.) (tribal trust land ordinarily is Indian country), *cert. denied*, 522 U.S. 913 (1997); *Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d 908, 920 (1st Cir. 1996) (same); *Langley* v. *Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985) ("whether lands are merely held in trust for the Indians or whether the lands have been officially been proclaimed a reservation, the lands are clearly Indian country").[12]

While acknowledging the directly contrary position adopted by the Eighth Circuit in *Stands*, the Tenth Circuit below held that "lands owned by the federal government in trust for Indian tribes *are* Indian Country pursuant to 18 U.S.C. § 1151." App. 7a & n.2 (emphasis added). *See also Buzzard* v. *Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.) (tribal trust land ordinarily meets Indian country test), *cert. denied*, 510 U.S. 994 (1993). In so holding, the Tenth Circuit refused "to affix" any "categorical label" to the property at issue in this case under Section 1151. App. 11a.

c. In addition to deepening the circuit conflict over the Indian country status of off-reservation trust land, the Tenth Circuit's Indian country analysis conflicts with the statutory scheme, as well as with this Court's precedents. As is plain

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The first is where the trust land is a "de facto reservation or dependent Indian community." *Id.* The other "situation in which tribal trust land may be considered Indian country" is where it is an "allotment * * * transferred to the United States in trust for a tribe" and, thus, "still an allotment" covered by Section 1151(c). *Id.* at 1572 n.5. In other words, according to the Eighth Circuit, tribal trust land may be Indian country when it fits into one of the existing categories of Section 1151.

[12] The BIA has apparently sided with those circuits that treat off-reservation trust property as Indian country. *See* 64 Fed. Reg. at 17578 ("[I]f land were taken in trust by the Secretary, such trust land would then qualify as Indian country and [the tribe occupying it] would have all the powers that pertain within Indian country.").

from the text of Section 1151, "Indian country exists * * * *only if* the land in question" fits into one of the three categories codified in Section 1151—"Indian reservations," "dependent Indian communities," and "allotments." *Venetie*, 522 U.S. at 527 n.2, 530 (emphasis added). *See also United States* v. *John*, 437 U.S. 634, 648 & n.17 (1978) (Indian country determination depends on whether property in question fits within one of the "three categories of land" codified in Section 1151). Courts "are not free" to create a *fourth* category for lands held in trust by the United States that do not qualify under the terms of Section 1151. *Venetie*, 522 U.S. at 534.

Astonishingly, in this case even the United States concedes that the property at issue does not fit within any of the categories codified by Section 1151. *See* U.S. Resp. Br. in *United States* v. *Roberts*, No. 98-7057 (10th Cir.), at 20 ("The portions of appellant's brief dealing with reservations, dependent Indian communities and allotments are not discussed herein because such arguments and authorities are inapplicable to this case. *The government has never argued that the tribal complex is part of a reservation, dependent Indian community or allotment.*") (emphasis added). That concession—which admittedly was made before this Court's decision in *Venetie*—alone compels the conclusion that the property at issue is not Indian country within Section 1151 and, thus, not Indian country period. *See Venetie*, 522 U.S. at 527 & n.2, 526. But far from so holding, the Tenth Circuit embraced the government's *ultra vires* approach to the Indian country determination, and held that the property at issue was Indian country without bothering "to affix" any "categorical label" to it under Section 1151. App. 11a.

To the extent the Tenth Circuit attempted to fill the void by suggesting that the property is something between an "informal reservation[]" and "dependent Indian communit[y]," *see id.*, its decision also plainly conflicts with this Court's precedent. *Venetie* makes clear that the

dependent Indian community category of Section 1151(b) was intended to cover lands that amount to informal reservations under this Court's prior cases and, thus, are "like Indian reservations generally." 522 U.S. at 529. *See also id.* at 527 (Section 1151(b) "refers to a limited category of Indian lands that are neither reservations nor allotments"). In concluding that both "informal" reservations and "dependent Indian communities * * * continue to exist under [Section 1151] and Supreme Court jurisprudence," the Tenth Circuit missed one of the central teachings of *Venetie*.[13]

Like most if not all off-reservation trust property, the property at issue in this case is not a reservation, and it is not a dependent Indian community either. Indeed, Section 1151(b) expressly requires that the property at issue be an "Indian community." That textual predicate was present in *Venetie*, *see id.* at 523 (land at issue was "home to the Neets'aii Gwich'in Indians"), *McGowan* (Reno Indian colony), and *Sandoval* (Pueblo Indian communities), but it is clearly absent

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[13] The Tenth Circuit relied on dicta in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 n.2 (1995), and *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993), that Indian country includes "formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." *See* App. 6a-7a. But that dicta must be read in light of *Venetie*, which makes clear that what the Court previously has referred to as "informal reservations" are in fact dependent Indian communities under Section 1151(b).

The Tenth Circuit also relied on the fact that "the IRA authorizes the Secretary to acquire lands in trust for tribes, and contemplates the Secretary may officially declare them to be reservations." App. 10a (citing 25 U.S.C. § 467). But as Professor Cohen has explained, "[a]ny implication that lands purchased for tribes under section 5 of the IRA would constitute a reservation is *negated* by section 7 of that Act, 25 U.S.C. § 467, which authorizes the Secretary to proclaim lands purchased under section 5 to be a reservation." Cohen, *supra*, at 45 n.158 (emphasis added).

here. *See Webster's New College Dictionary* 227 (1995) ("community" is "[a] group of people residing in the same locality and under the same government"). Indians do not reside in the building complex at issue here or make their homes there; they—along with non-Indians who operate a local historical association and museum in the same offices—simply perform various administrative tasks there. *See* App. 4a-5a. The fact that the building complex was placed in trust pursuant to Section 5 does not transform it into something it is not—a "dependent Indian community."[14]

Of course, it is precisely because the property at issue—as the government conceded—defies characterization under any of the categories codified in Section 1151 that the Tenth Circuit was unable "to affix" a "categorical label" to it. App.11a.

3. While the Tenth Circuit decision clearly conflicts with the statutory scheme and decisions discussed above, this Court has never squarely addressed the Indian country status of off-reservation trust property, and the fact that it has not done so reinforces the need for guidance here. Generally speaking, in those instances in which the Court has held that tribal trust land is Indian country, the property also qualified as either a reservation, *e.g.*, *John*, 437 U.S. at 649; dependent Indian community, *e.g.*, *McGowan*, 302 U.S. at 538; or allotment, *e.g.*, *United States* v. *Pelican*, 232 U.S. 442, 449 (1914). That is not the case, however, with respect to a great deal of property held in trust by the United States for Indians —including the building complex here. In holding that off-reservation trust land is necessarily Indian country within Section 1151, the Tenth Circuit below and other courts have

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[14] In his treatise, Professor Cohen suggested that off-reservation tribal trust lands might constitute Indian country under the "dependent Indian community" category of Section 1151 when such lands are "actually used for *tribal residence* under federal supervision." Cohen, *supra*, at 45 n.158 (emphasis added). That is obviously not the case here.

relied on this Court's decision in *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). But *Potawatomi* is hardly dispositive.

That case involved a tribal immunity challenge to state taxation of sales at a store operated by Indians on off-reservation trust land. In concluding that tribal immunity doctrine blocked the tax, the Court observed that "*this* trust land * * * qualifies as a *reservation* for *tribal immunity purposes*." *Id.* (emphases added). Far from establishing any categorical rule that off-reservation trust land is Indian country, the *Potawatomi* Court stated that "the test for determining whether land is Indian country does *not* turn upon whether that land is denominated 'trust land' or 'reservation.'" *Id.* at 514 (emphasis added). Moreover, because *Potawatomi* involved a state taxation issue, the Court did not decide—and did not need to decide—the question whether Congress intended off-reservation trust land to fall within any of the Section 1151 categories; indeed, Section 5 itself provides that lands taken into trust by the Secretary are immune from state taxation. *See supra* at 15.[15]

Nevertheless, because the lower courts have read *Potawatomi*'s treatment of the trust land's status in more than one way—the Tenth Circuit below, for example, thought *Potawatomi* supported the conclusion that off-reservation trust land is Indian country with Section 1151, whereas the Eighth Circuit in *Stands* was not at all deterred by *Potawatami* in reaching the opposite conclusion—the

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[15] In addition, the land in *Potawatomi* was fundamentally different than the building complex in this case: *Congress* specifically authorized the tribe to convey the land in *Potawatomi* to the United States in trust. *See* Act of Jan. 2, 1975, Pub. L. No. 93-591, 88 Stat. 1922. Accordingly, the trust land in *Potawatomi* was not subject to the vagaries of a standardless decision made pursuant to Section 5, but instead bore the imprimatur of a congressional decision that the land in question should be taken into trust.

decision has only engendered more confusion over the question presented here.[16]

4. The Court should put an end to this conflict and confusion by granting certiorari in this case and holding that off-reservation trust land acquired by the Secretary pursuant to Section 5 is not Indian country unless it fits into one of the categories established by Section 1151. That is surely the result intended by Congress.

As this Court has already recognized, Section 1151 spells out three discrete categories of Indian country, and does not include lands taken into trust by the Secretary under Section 5. Congress could easily have included such a category, but it did not do so. At the same time, in Section 5 Congress specifically provided that lands taken into trust are exempt from state and local taxation—an attribute shared by Indian

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[16] Making matters worse, in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), the Court essentially reached the opposite result as in *Potawatomi*. *Mescalero* involved the question whether an Indian tribe was immune from state taxation for the operation of a ski resort on off-reservation land. The resort was "developed under the auspices of the Indian Reorganization Act of 1934" on land that was "leased from the United States Forest Service for a term of 30 years." 411 U.S. at 146. Although "the ski resort land was not technically 'acquired' 'in trust for the Indian tribe,'" *id.* at 155 n.11 (quoting Section 5), the Court concluded that it was on the same footing as Section 5 trust land because "it would have been meaningless for the United States, which already had title to the forest, to convey title to itself for the use of the Tribe." *Id.* (quotation omitted); *see id.* ("We think the lease arrangement here in question was sufficient to bring the Tribe's interest in the land within the immunity afforded by Section [5]."). Nevertheless, unlike the trust land in *Potawatomi*, the *Mescalero* Court held that the parcel before it was not immune from state taxation. In *Potawatomi* the Court purported to distinguish *Mescalero* on the ground that it did not involve trust property, but it did not address the Court's conclusion in *Mescalero* that the ski resort was on equal footing with trust land under Section 5. *See Potawatomi*, 498 U.S. at 511.

country—but stopped well short of saying that lands acquired under Section 5 are Indian country within Section 1151. In addition, the Indian Major Crimes Act—which establishes federal jurisdiction here—provides jurisdiction over specified offenses occurring within Indian country as codified by Section 1151, *see Negonsott* v. *Samuels*, 507 U.S. 99, 102-103 (1993), but does not refer to offenses occurring on trust lands acquired pursuant to Section 5.

As in other areas of federal Indian law, over time the lower courts have strayed from—and lost sight of—these basic textual guideposts. It is time for this Court to step in and give effect to the intent of Congress that Indian country be confined to the categories codified in Section 1151.

III. THE QUESTIONS PRESENTED ARE UNDENIABLY IMPORTANT AND RECURRING.

The importance of the first question presented is beyond cavil. The nondelegation principle is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, 143 U.S. at 692. Questions over the application and state of that principle have arisen with increasing urgency in the modern regulatory state, and they are squarely raised here. The Court ought to decide whether the sort of legislative blank check penned by Section 5 is permissible under our constitutional scheme and, if so, resolve the uncertainty over what—if any—limit the nondelegation doctrine places on Congress today.

The question whether off-reservation property acquired pursuant to Section 5 is Indian country within Section 1151 is also undeniably important. As BIA recently put it, a finding that off-reservation land is Indian country results in "the establishment of a new sovereign or jurisdictional presence." 64 Fed. Reg. at 17577. *See also* Brent Eckersley,

Narragansett Indian Tribe of Rhode Island *v.* Narragansett Electric Company*: When Dependent Indian Communities Fall Within Indian Country*, 21 Am. Indian L. Rev. 193, 193 (1997) ("One of the most important, although often confusing concepts of Indian law is 'Indian country.'"). Such a finding also triggers federal jurisdiction over a host of offenses under the Indian Major Crimes Act that otherwise would remain within the exclusive province of the States.

Both issues are recurring—and will continue to recur until resolved by this Court. The confusion over the non-delegation doctrine is not going away until this Court resolves it. With the passing of the reservation and allotment eras, moreover, Indians have increasingly become involved in off-reservation activities. *See, e.g., Oklahoma Tax Comm'n* v. *Chickasaw Nation*, *supra* (retail store); *Potawatomi Tribe*, *supra* (same); *Mescalero*, *supra* (ski resort). Thousands of off-reservation properties across the country are already held in trust by the United States for Indians, and an astounding volume of requests by Indians to take lands into trust are pending. *See supra* at 14; 64 Fed. Reg. at 17580. In determining whether or not such lands are Indian country, both questions presented by this petition must be confronted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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