No. 14-12004-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF ALABAMA,

Plaintiff-Appellant,

v.

PCI GAMING AUTHORITY, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:13-cv-00178-WKW-WC

BRIEF OF UNITED SOUTH AND EASTERN TRIBES, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND SUPPORTING AFFIRMANCE

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Dated: September 17, 2014

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1, the undersigned certifies that *Amicus* United South and Eastern Tribes, Inc. ("USET") is not a publicly held corporation, or a subsidiary or affiliate of any other corporation, and no publicly owned corporation owns more than 10% of its stock.

Pursuant to 11th Cir. R. 26.1-1, USET certifies that in addition to the interested parties identified by Appellees, the following entities have an interest in this case:

Alabama-Coushatta Tribes of Texas – USET Member Tribe

Aroostook Band of Micmacs – USET Member Tribe

Catawba Indian Nation – USET Member Tribe

Cayuga Nation – USET Member Tribe

Chitimacha Tribe of Louisiana – USET Member Tribe

Coushatta Tribe of Louisiana – USET Member Tribe

Eastern Band of Cherokee Indians – USET Member Tribe

Houlton Band of Maliseet Indians – USET Member Tribe

Jena Band of Choctaw Indians – USET Member Tribe

Mashantucket Pequot Tribal Nation – USET Member Tribe

Mashpee Wampanoag Tribe – USET Member Tribe

Miccosukee Tribe of Indians of Florida – USET Member Tribe

Mississippi Band of Choctaw Indians – USET Member Tribe

Mohegan Tribe – USET Member Tribe

Narragansett Indian Tribe – USET Member Tribe

Oneida Indian Nation – USET Member Tribe

Passamaquoddy Tribe – Indian Township – USET Member Tribe

Passamaquoddy Tribe – Pleasant Point – USET Member Tribe

Penobscot Indian Nation – USET Member Tribe

Poarch Band of Creek Indians – USET Member Tribe

Saint Regis Mohawk Tribe – USET Member Tribe

Seminole Tribe of Florida – USET Member Tribe

Seneca Nation of Indians – USET Member Tribe

Shinnecock Indian Nation – USET Member Tribe

Tunica-Biloxi Tribe of Louisiana – USET Member Tribe

United South and Eastern Tribes, Inc. – Amicus Curiae

Wampanoag Tribe of Gay Head (Aquinnah) – USET Member Tribe

Respectfully submitted,

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STATEMENT OF THE ISSUES

Amicus United South and Eastern Tribes, Inc. ("USET") adopts the Statement of the Issues set forth in Appellee's brief, and does not repeat that Statement here.

STATEMENT OF INTERESTS OF *AMICUS CURIAE*

The United South and Eastern Tribes, Inc. ("USET") is a non-profit organization representing 26 federally recognized Indian tribes in 12 states stretching from Texas to Maine. USET-member tribes had the earliest contact with European colonists, the earliest contact with the newly formed States, and the earliest contact with the new United States. They have the longest continuous direct relationship with the United States government, and a long history of working with the Indian Reorganization Act of 1934 ("IRA").

USET-member tribes today retain only small remnants of their original homelands. The IRA was enacted in 1934 to help tribes regain economic self-sufficiency and control over their own affairs. For many years, USET-member tribes have relied on the authorities in the IRA to realize its promise to revitalize tribal self-government, restore tribal landholdings and develop diversified and self-sustaining economies benefitting Tribal citizens and the surrounding community alike. The IRA is an area of federal Indian law in which USET has particular interest and expertise.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Alabama (the "State") seeks to collaterally attack the trust status of lands that have been held in trust by the United States for the Poarch Band of Creek Indians (the "Tribe") pursuant to the Indian Reorganization Act (the "IRA") for over nine and up to 20 years. USET agrees with the Tribe that the claims made by the State cannot be raised in this case and in this forum, and were properly dismissed by the District Court.

Yet in its brief the State raises novel claims that seek to vastly and impermissibly expand the import and the holding of the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), which involved a USET-member tribe, the Narragansett Indian Tribe. As a predicate to bringing its state law claims, the State seeks to invoke *Carcieri* to invalidate the trust status of lands that had been taken into trust for the Tribe many years ago. Although it is the party seeking affirmative redress from the courts, the State suggests that the *Carcieri* decision somehow shifts the burden to the Tribe to demonstrate that the land was properly acquired into trust.

Under the State's novel theory of the case, after *Carcieri* tribes must affirmatively demonstrate they were "under federal jurisdiction" in 1934 before taking any action on their trust lands consistent with their rights as tribes under tribal or federal law. Most significantly, the State suggests that a tribe that had been

recognized after 1934 would find it difficult to show it was "under federal jurisdiction" in 1934. The theories advanced by the State find no support in either the plain language of the IRA or in the Supreme Court's *Carcieri* decision.

We submit this brief *amicus curiae* to provide the Court with additional information about the IRA and the import of the *Carcieri* decision that we believe are not fully addressed in the briefs of the parties to this case, and that illustrates that the State's purportedly *Carcieri*–based arguments are unfounded.[1]

ARGUMENT

In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court held that the phrase "now under Federal jurisdiction" in the IRA, Pub. L. No. 73-383, § 19, 48 Stat. 984 (codified at 25 U.S.C. § 479), meant that the Narragansett Indian Tribe, a USET-member tribe, had to demonstrate that it was "under Federal jurisdiction" at the time the IRA was enacted in 1934 in order to be eligible to have land taken into trust. The IRA authorizes the Secretary of the Interior to take land into trust for Indians, and defines "Indian" to include tribes "now under Federal jurisdiction." *Id.*

The narrow question addressed by the Court in *Carcieri* was whether the phrase "now under Federal jurisdiction" referred to 1934 when the IRA was enacted, or to the time the Secretary acts to take land into trust for a tribe. *Carcieri*, 555 U.S.

[1] This brief *amicus curiae* is filed with the consent of the parties pursuant to Fed. R. App. P. 29(a).

at 382. The Court held that "now under Federal jurisdiction" referred to 1934. *Id.* The Court had no occasion to explain what it meant to be "under Federal jurisdiction" in 1934 because it determined, based on a concession made by the United States, that the Narragansett Indian Tribe was not "under Federal jurisdiction" in 1934.[2] The Court in *Carcieri* did not hold that a tribe must also be "recognized" in 1934.

After the *Carcieri* decision, when considering a new fee to trust application, the Secretary of Interior must determine (1) whether the tribe is recognized at the time it submits its application, and (2) whether the tribe was "under Federal jurisdiction" in 1934. Nothing in the Court's decision suggests that a tribe whose land has already been taken into trust must demonstrate it was "under federal

[2] The Court's holding with regard to the Narragansett Indian Tribe was not based on an application of the Tribe's factual circumstances. Rather, it relied on the fact that the petition for certiorari had asserted that the Tribe was not under federal jurisdiction in 1934 and that "[t]he respondents' brief in opposition declined to contest this assertion." *Carcieri*, 555 U.S. at 395-396. Because the United States failed to contest it, the petitioner's allegation was automatically accepted by operation of the Court's procedural rules. *Id.* ("Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case."). Furthermore, the Tribe -- which was not a party to the case -- had no opportunity to object to the petitioner's allegation or prove a factual basis for federal jurisdiction in 1934. Indeed, Justices Souter and Ginsberg noted that the parties simply did not understand that the issue was present. The two justices dissented from the Court's straight reversal and stated that they would have remanded the case so that the United States and the Narragansett Tribe would have had the opportunity to argue that the Tribe was "under Federal jurisdiction." 555 U.S. at 401.

jurisdiction" in 1934, particularly in a case such as this one, where the complaining party sat on its claims well beyond the applicable statute of limitations. As the concurring opinions in the *Carcieri* decision recognize, "under Federal jurisdiction" and "recognized Indian tribe" historically had two separate meanings, and must be given separate effect. In this brief, *Amicus Curiae* provides additional information and background to the Court on the separate genesis and meaning of these two terms historically.

I. THE DETERMINATION OF WHETHER A TRIBE WAS "UNDER FEDERAL JURISDICTION" IN 1934 MUST BE MADE AGAINST THE BACKDROP OF FEDERAL INDIAN LAW AND ACCOUNT FOR THE UNIQUE HISTORY AND CIRCUMSTANCES OF EACH TRIBE

The Supreme Court has not defined what it means to be "under federal jurisdiction" in 1934. That is an inquiry that has traditionally been left by Congress and the Courts to the Executive Department to make. After *Carcieri*, it is incumbent upon the Secretary, at the time she decides whether to take land into trust in the first instance, to determine whether a tribe was "under federal jurisdiction" in 1934. The determination of whether a tribe falls under the jurisdiction of the United States for purposes of the IRA must be made by the Secretary on a case-by-case basis and be measured against the backdrop of well-established principles of Indian law, as well as the unique history and circumstances of each tribe and its relationship to the United States.

Federal jurisdiction over Indian tribes is rooted in the Constitution, and has been given expression in federal statutes since the beginning of the Republic. It has been invoked to enact laws that divested tribes of much of their lands and destroyed their economies, and invoked again, as it was in the IRA, with the intent to reverse those laws.

The United States has established a wide variety of relations with tribes arising out of historical and other circumstances. In some cases, these relationships have been broad and all encompassing; in others they have been limited. However the relationship is established and whatever its scope, any relationship with the United States can only be withdrawn by the United States. It is a longstanding principle of federal Indian law that once a tribe has been determined to fall under the jurisdiction of the United States, it remains under the jurisdiction of the United States unless it has voluntarily abandoned tribal relations or jurisdiction has been unambiguously terminated by an explicit Act of Congress. An important corollary to this rule is that a tribe may have been under federal jurisdiction even though federal officials were unaware of it at the time.

A. The Constitutional Backdrop for Federal Jurisdiction Over Tribes

Federal jurisdiction to deal with Indian tribes is exclusive of State jurisdiction and has a constitutional dimension grounded in provisions such as the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Treaty Clause, U.S. Const.

art. II, § 2, cl. 2. One of the abiding concerns of the Framers of the Constitution was that the Indian tribes – both those who already fell under the jurisdiction of the original United States, and those that did not – would ally themselves with foreign powers. *See generally*, Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 St. John's L. Rev. 153, 166-170 (2008). The Indian Commerce Clause was adopted by the Continental Congress in part to remedy difficulties with Article IX of the Articles of Confederation, which had been interpreted by some of the States to authorize them to treat directly with the tribes. *Id. at* 166-170. In the Framers' eyes, this interpretation of Article IX impermissibly interfered with the federal-tribal relationship and necessitated adoption of the Indian Commerce Clause. *Id*.

Upon adoption of the Constitution in 1789, Congress possessed sole and exclusive jurisdiction over the affairs of all Indian tribes in the United States. For example, one of the very first acts of the first Congress was to enact the Trade and Intercourse Act which asserted exclusive federal power with regard to trading with Indians. The Act provided that "no person shall be permitted to carry on any trade or intercourse with the Indian tribes… ." Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137.[3]

[3] Though initially temporary, the Trade and Intercourse Act was reenacted several times with minor changes and additions. Congress made the law permanent in 1802, and amended the Act again in 1834.

The courts have consistently upheld the notion that the United States exercises original authority over all Indian tribes throughout its borders. *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *United States v. Kagama*, 118 U.S. 375, 384-85 (1886). This constitutional power is "a continuing power of which Congress could not divest itself." *United States v. Nice*, 241 U.S. 591, 600 (1916).

B. The Indian Reorganization Act of 1934 Was Enacted to Strengthen Tribal Governments and Bring Economic Improvement to Indian Communities

In 1934, Congress enacted the IRA with the "overriding purpose" of "establish[ing] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). That "sweeping" legislation manifested a sharp change of direction in federal Indian policy. *Id*. It replaced the assimilationist policy characterized by the General Allotment Act of 1887, 25 U.S.C. § 331 *et. seq.*, which had been designed to "put an end to tribal organization" and to "dealings with Indians . . . as tribes." *United States v. Celestine*, 215 U.S. 278, 290 (1909). It was preceded by lengthy consultations with tribes, straw votes among tribal memberships, extensive public debate, and lengthy hearings before Congress.[4]

[4] *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before H. Comm. on Indian Affairs*, 73d Cong. 2d Sess. (1934); *To Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645*, 73d Cong. 2d Sess. (1934). *See also*

The IRA was intended to improve tribal governance and tribal economies as well as help restore a land base for tribes. It authorized Indian tribes to adopt their own constitutions and bylaws, Pub. L. No. 73-838, § 16 (codified at 25 U.S.C. § 476), and to incorporate for business purposes, *id.* at § 17 (codified at 25 U.S.C. § 477). In addition, the IRA authorized the Secretary to take steps to improve the economic and social condition of Indians, including: adopting regulations for forestry and livestock grazing on Indian units, *id.* at § 6 (codified at 25 U.S.C. § 466), making loans to Indian-chartered corporations "for the purposes of promoting … economic development," *id.* at § 10 (codified at 25 U.S.C. § 470), paying expenses for Indian students at vocational schools, *id.* at § 11 (codified at 25 U.S.C. § 471), and giving preference to Indians for employment in government positions relating to Indian affairs, *id.* at § 12 (codified at 25 U.S.C. § 472). It also allowed tribes to decide, by referendum, whether to exclude their reservation from the IRA's application. *Id.* at § 18 (codified at 25 U.S.C. § 478).

In service of the broader goal of encouraging the Indian tribes "to revitalize their self-government" and to take control of their "business and economic affairs," Congress also sought to assure they had a solid territorial base by "put[ting] a halt to the loss of tribal lands through allotment." *Mescalero Apache Tribe v. Jones*, 411

S. Rep. No. 73-1080 (1934); H.R. Rep. No. 73-1804 (1934); H.R. Rep. No. 73-2049 (1934).

U.S. 145, 151 (1973).[5] The IRA thus prohibited any further allotment of reservation lands, Pub. L. No. 73-838, § 1 (codified at 25 U.S.C. § 461), extended indefinitely the periods of trust or restrictions on individual Indian trust lands, *id.* at § 2 (codified at 25 U.S.C. § 462), provided for the restoration of surplus unallotted lands to tribal ownership, *id.* at § 3(a) (codified at 25 U.S.C. § 463(a)) and prohibited any transfer of restricted Indian lands, with limited exceptions, other than to the tribe or by inheritance, *id.* at § 4 (codified at 25 U.S.C. § 464).

The IRA was generally intended to apply to all tribes, except those electing to affirmatively opt out of the IRA.[6] 25 U.S.C. § 478. Tribes in Oklahoma and Alaska

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[5] The federal policy of allotment resulted in the loss of 90 million acres of Indian lands. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (2005 ed.). Since the IRA was enacted, only about 8 percent of those lands have been restored to tribal status. *Executive Branch Authority to Acquire Trust Lands for Indian Tribes*: *Oversight Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. (2009) (testimony of the National Congress of American Indians). As of 2010, 95 percent of trust land applications were for non-gaming purposes. Memorandum from Ken Salazar, Sec'y of Indian Affairs, to Larry Echohawk, Assistant Sec'y of Indian Affairs (Jun. 18, 2010).

[6] Pub. L. No. 73-383, § 13, 48 Stat. 984, 986-87 (1934). Some tribes did exclude themselves, including the Navajo Nation. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.05, n.542 (2005 ed.). Congress later extended the provisions of Section 5 of the IRA to those tribes who had voted to opt out of the IRA. 25 U.S.C. § 2202 ("The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title…").

were initially exempted from much of the IRA, but in 1936 Congress extended protections to tribes in those two states.[7]

Section 5 of the IRA authorizes the Secretary to acquire lands "for the purpose of providing land for Indians," and provides that title to such lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired…." 25 U.S.C. § 465.

Section 19 of the IRA, in turn, defines "Indian" as follows:

"[25 U.S.C.] § 479. Definitions.

"[a] The term 'Indian' as used in this Act shall include

"[1] all persons of Indian descent who are members of any recognized Indian tribe ***now under Federal jurisdiction,*** and

"[2] all persons who are descendents of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and

"[3] shall further include all other persons of one-half or more Indian blood . . . .

"[b] The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation . . . ."

25 U.S.C. § 479 (emphasis and subparagraphing added).

[7] In 1936 the main provisions of the IRA were extended to Alaska, 25 U.S.C. § 473a. The Oklahoma Indian Welfare Act applied similar principles to tribes in that State. 25 U.S.C. §§ 501-509.

The words "now under Federal jurisdiction" were added to Section 19 of the bill at the end of the Senate Committee on Indian Affairs hearing on the bill and enacted with limited discussion.[8]

C. A Tribe May Have Been Under Federal Jurisdiction in 1934 Even Though the United States Did Not Believe So at the Time

In his concurring opinion in *Carcieri*, Justice Breyer made it a point to note that a tribe could well have been under federal jurisdiction in 1934 even if the Federal Government did not know about it at the time:

> [A] tribe may have been "under Federal jurisdiction" in 1934 even though the Federal Government did not believe so at the time. We know, for example, that following the Indian Reorganization Act's enactment, the Department [of the Interior] compiled a list of 258 tribes covered by the Act; and we also know that it wrongly left certain tribes off the list. The Department later recognized some of those tribes on grounds that showed that it should have recognized them in 1934 even though it did not. And the Department has sometimes considered that circumstance sufficient to show that a tribe was "under Federal jurisdiction" in 1934—even though the Department did not know it at the time.

555 U.S. at 397-98 (internal citations omitted). Justice Breyer provides a series of examples of tribes recognized in the modern era and notes that the possibility that "later recognition reflects earlier 'Federal jurisdiction,'" could explain instances of early administrative practice cited in the dissenting opinion. *Id*. at 398-99.

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[8] Neither the text of the IRA nor its legislative history provide any explanation of what the term "now under Federal jurisdiction" meant. However, as discussed below, it is clear that the term "now under Federal jurisdiction" is a separate legal inquiry from what it means to be a "recognized Indian tribe."

D. Once A Tribe Is Under Federal Jurisdiction, It Remains Under Federal Jurisdiction Unless Explicitly Terminated By Congress Or Unless It Voluntarily Ceases Being A Tribe

By the time of the IRA, the disruptive effects of the allotment/assimilationist policy had spawned numerous challenges to continuing federal jurisdiction over given tribes, for a variety of factual circumstances. The Supreme Court uniformly rejected these challenges, insisting that federal jurisdiction continued, even as federal supervision shrank and state authority expanded over former tribal lands. *See Perrin v. United States*, 232 U.S. 478, 487 (1914) (upholding constitutionality of federal liquor law as applied to lands ceded by the Yankton Sioux Tribe, where "the tribal relation has not been dissolved"); *United States v. Nice*, 241 U.S. 591, 597 (1916) (upholding constitutionality of federal liquor law notwithstanding citizenship of allottees); *Hallowell v. United States*, 221 U.S. 317, 323 (1911) (upholding constitutionality of federal liquor law to scattered allotments notwithstanding widely applicable state law otherwise); *United States v. Pelican*, 232 U.S. 442, 447 (1914); and *Tiger v. Western Inv. Co.*, 221 U.S. 286, 298 (1911) (upholding constitutionality of federal prohibition against conveyance of allotment without secretarial consent).

In all such cases, the federal relationship had diminished in quality and extent because of prevailing federal policy, and yet the federal relationship continued. The Court applied the same rule in each case: "the tribal relation may be dissolved and

the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial." *United States v. Nice*, 241 U.S. at 591; *see also Tiger v. Western Inv. Co.*, 221 U.S. at 315 ("it may be taken as well settled doctrine of this Court that Congress, in pursuance of long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease").

In its seminal *United States v. John* decision, the Supreme Court applied this principle in setting out the rule that a tribe will remain under federal jurisdiction even when the United States does not continually exercise its jurisdiction over the tribe. *United States v. John*, 437 U.S. 634 (1978). In *John*, the Court considered whether federal criminal jurisdiction existed over a Choctaw Indian residing on an Indian reservation in Mississippi. The State argued that federal jurisdiction no longer existed:

> [S]ince 1830 the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State, and the Federal Government long ago abandoned its supervisory authority over these Indians. Because of this abandonment, and the long lapse in the federal recognition of a tribal organization in Mississippi, the power given Congress [under the Indian Commerce Clause] cannot provide a basis for jurisdiction.

Id. at 652. The Court rejected this argument, holding instead that "[n]either the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians,

long ago removed from Mississippi, *nor the fact that federal supervision over them has not been continuous*, destroys the federal power to deal with them." *Id.* at 653 (emphasis added). Thus, federal jurisdiction remained intact, even during those periods when it was not actively employed.

Similarly, in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), the Passamaquoddy Tribe brought suit against the Secretary of the Interior, requesting a declaratory judgment that the Trade and Intercourse Act (25 U.S.C. § 177) applied to the Tribe. The Secretary argued that because the Tribe was not formally federally recognized (either by treaty, statute, or other agreements), there was no trust relationship. The court rejected this argument:

> [O]nce Congress has established a trust relationship with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease. *Neither the Passamaquoddy Tribe nor the State of Maine, separately or together, would have the right to make that decision and so terminate the federal government's responsibilities.*
>
> We turn, then, to whether Congress itself has manifested at any time a determination that its responsibilities under the Nonintercourse Act should cease with respect to the Tribe. … We agree with the district court that any withdrawal of trust obligations by Congress would have to have been 'plain and unambiguous' to be effective. We also agree that there is no affirmative evidence that Congress at any time terminated or withdrew its protection under the Nonintercourse Act. *The federal government has been largely inactive in relation to the Tribe and has, on occasion, refused requests by the Tribe for assistance.* Intervenor argues that this course of dealings is sufficient in and of itself to show a withdrawal of protection. However, refusing specific requests is quite different from broadly refusing ever to deal with the Tribe, and, as stated above, there is no evidence of the latter.

Id. at 380 (internal citations omitted) (emphasis added). Thus, even with a period of inaction between the Federal Government and the Tribe, the trust relationship remained intact because Congress had never acted explicitly and unambiguously to terminate jurisdiction over the Tribe.

Thus, the rule in *John* remains the law today: unless unambiguously terminated by Congress, a tribe that comes under the federal jurisdiction of the United States remains under the federal jurisdiction of the United States even if there have been periods where the United States failed to actively exercise its jurisdiction over the tribe.[9] But where a tribe has not been arbitrarily recognized as a tribe, has maintained tribal relations and has not been expressly and unambiguously terminated by Congress, the tribe remains under federal jurisdiction.

[9] To be sure, Congress's authority to place Indian tribes under its jurisdiction is not without limitation. First, as the Supreme Court noted in *United States v. Sandoval*, Congress cannot "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe." 231 U.S. 28, 46 (1913). Second, a tribe will no longer fall under the jurisdiction of the United States if it voluntarily ceases to be an Indian tribe. *Nice*, 241 U.S. at 600 (Congress' constitutional authority over Indian tribes exists "during the continuance of the tribal relation"). Third, as previously noted, a terminated tribe no longer falls under the jurisdiction of the United States when the termination is made explicit by Congress (although even then, Congress has the jurisdictional authority to reverse that termination).

II. THE *CARCIERI* DECISION DID NOT HOLD THAT THE IRA REQUIRES THAT A TRIBE BE A "RECOGNIZED INDIAN TRIBE" IN 1934 IN ORDER TO TAKE LAND INTO TRUST

Despite the breadth of federal jurisdiction over Indian tribes described above, the State suggests at various points in its brief that the fact that the Tribe was not recognized until 1984 renders it doubtful that the Tribe could show it was "under federal jurisdiction" in 1934. Although at some points the State acknowledges that whether a tribe is "under federal jurisdiction" in 1934 is a distinct inquiry, State's Brief at 18-19, at other points it conflates the two terms, and suggests that the Tribe has a duty to show it was both "recognized" and "under federal jurisdiction" in 1934. State's Brief at 26.

The IRA granted the Secretary of the Interior authority to take land into trust status for "any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. §§ 465, 479. In *Carcieri*, the Supreme Court concluded that the phrase "now under Federal jurisdiction" meant that an applicant tribe had to be "under Federal jurisdiction" at the time the IRA was enacted in 1934 in order to have land taken into trust. Nothing in the decision or the IRA suggests that an applicant tribe also must show that it was a "recognized Indian tribe" in 1934 in order to satisfy the requirements of the Act.

A. The *Carcieri* Decision Held That The Word "Now" Modifies The Phrase "Under Federal Jurisdiction" In Which It Was Included, Not The Phrase "Recognized Indian Tribe"

In *Carcieri*, the Supreme Court considered whether the Secretary of the Interior had authority to take land into trust for the Narragansett Indian Tribe. The Court noted that all parties had agreed that the issue turned on whether the Narragansett Indian Tribe qualified as "members of any recognized Indian tribe now under Federal jurisdiction." *Carcieri*, 555 U.S. at 388. The Court thus framed the question before it as follows:

> In reviewing the determination of the Court of Appeals, we are asked to interpret the statutory phrase "now under Federal jurisdiction" in § 479. Petitioners contend that the term "now" refers to the time of the statute's enactment, and permits the Secretary to take land into trust for members of recognized tribes that were "under Federal jurisdiction" in 1934. The respondents argue that the word "now" is an ambiguous term that can reasonably be construed to authorize the Secretary to take land into trust for members of tribes that are "under Federal jurisdiction" at the time that the land is accepted into trust.

Carcieri, 555 U.S. at 382.[10] Nowhere in its statement of the question does the Court make reference to the meaning of the phrase "recognized Indian tribe." The Court's ultimate holding in the case is similarly devoid of any mention of the meaning of the phrase "recognized Indian tribe," or whether the word "now" modifies "recognized Indian tribe." Rather, the holding mirrors the statement of the question: "for the

[10] The Court's decision in *Carcieri* was based on the first of the three categories of "Indian" in § 479, and does not implicate the other two categories of "Indian" set out in that section (*i.e.*, "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," or "all other persons of one-half or more Indian blood").

purposes of § 479, the phrase 'now under Federal jurisdiction' refers to a tribe that was under federal jurisdiction at the time of the statute's enactment" (*i.e.*, 1934). *Id*.

Justice Breyer, in a concurring opinion explaining the majority opinion, noted that the terms "recognized" and "under Federal jurisdiction" were not synonymous and that "[t]he statute, after all, imposes no time limit upon recognition." *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring); *cf. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. ___, 132 S. Ct. 2199, 2204 n.2 (2012) (citing Breyer concurrence in declining to address whether "under Federal jurisdiction" related to petitioners' claims that a tribe was also not federally recognized in 1934). Similarly, Justices Souter and Ginsberg distinguished "recognition" and "under Federal jurisdiction" in the concurring portions of their opinion:

> The disposition of the case turns on the construction of the language from 25 U.S.C. § 479, "any recognized Indian tribe now under Federal jurisdiction." Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content. As Justice Breyer makes clear in his concurrence, the statute imposes no time limit upon recognition, and in the past, the Department of the Interior has stated that the fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at the time. See Memorandum from Associate Solicitor, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980), Lodging of Respondents 7. And giving each phrase its own meaning would be consistent with established principles of statutory interpretation.

Carcieri, 555 U.S. at 400 (Souter, J., concurring in part and dissenting in part).

B. Basic Principles Of Statutory Construction Support The Secretary's Formulation

Basic principles of statutory construction instruct that the word "now" modifies "under Federal jurisdiction," and not "recognized Indian tribe." From a grammatical standpoint, the word "now" modifies only "under Federal jurisdiction," because it directly precedes only that phrase. *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1238 (D.C. Cir. 2008) (holding that "[t]he [modifying word] technically modifies only the verb that follows it"). It does not modify the phrase "recognized Indian tribe," since that is a separate phrase that appears before the modifier "now" is introduced. *United States v. Yermian*, 468 U.S. 63, 69 (1984). Furthermore, as an adverb, the modifier "now" clearly modifies only the adjective phrase "under Federal jurisdiction" rather than the subject noun "recognized Indian tribe." *Villanueva-Sotelo*, 515 F.3d at 1238 ("An adverb, in standard English, modifies almost anything except a noun.") (quoting Robert Funk Et. Al., The Elements of Grammar For Writers 62 (MacMillan 1991)).

C. Congress Did Not Impose A Temporal Limitation On Recognition In Section 479

"Recognized Indian tribe" and "under Federal jurisdiction" mean two different things, and the legislative history of the IRA indicates that Congress added the phrase "now under Federal jurisdiction" as a separate requirement in addition to

"recognized Indian tribe." As originally drafted, Section 19 of the IRA would have applied to members of any "recognized Indian tribe," and did not include the modifying phrase "now under Federal jurisdiction."[11] The Senators understood the bill as drafted to cover all recognized tribes:

> Commissioner Collier. This bill provides that any Indian who is a member of a recognized tribe or band shall be eligible to Government aid.
>
> Senator Thomas of Oklahoma. Without regard to whether or not he is now under your supervision?
>
> Commissioner Collier. Without regard; yes. It definitely throws open Government aid to those rejected Indians.

Hearing on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs, 73d Cong. at 80 (May 17, 1934). Near the end of the hearing, the Senate considered whether the term "recognized Indian tribe" was over or under-inclusive. Senator O'Mahoney attempted to clarify that the term "recognized Indian tribe" would include all recognized tribes, and Chairman Wheeler responded that it would:

> Senator O'Mahoney: … The first sentence of this section says, "The term 'Indian' shall include all persons of Indian descent who are

[11] Section 19 of the bill under consideration at the May 17, 1934 hearing read, in relevant part, as follows: "The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe, and all persons who are descendants of such members who were, on or about June 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all other persons of one fourth or more Indian blood." *Hearing on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs*, 73d Cong. at 234 (May 17, 1934).

> members of any recognized Indian tribe" – comma. There is no limitation of blood so far as that is concerned.
>
> Senator Frazier: That would depend on what is construed membership.
>
> Senator O'Mahoney: "The term 'tribe' wherever used in this act" – and that means up above – 'shall be construed to refer to any Indian tribe, band, nation, pueblo." …
>
> The Chairman: You would have to have a limitation after the description of the tribe.
>
> Senator O'Mahoney: If you wanted to exclude any of them you certainly would in my judgment.
>
> The Chairman: Yes; I think so. You would have to.

Hearing on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs at 266. After the Chairman expressed concerns that the provision could include people who were no longer Indians, Senator O'Mahoney suggested that the Chairman's concerns could be addressed with new language. Commissioner Collier then suggested adding the phrase "now under Federal jurisdiction:"

> Senator O'Mahoney: If I may suggest, that could be handled by some separate provision excluding from the benefits of the act certain types, but must have a general definition.
>
> Commissioner Collier: Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

Id.

Although there is no further discussion on the matter and the hearing ended shortly thereafter, this colloquy demonstrates three things. First, that the word "now" was inserted as part of the phrase "now under Federal jurisdiction." Second, that whatever the intent of Congress in adding the phrase, "now under Federal jurisdiction," it was added separately, and there is no indication that Congress intended the term "now" to modify the phrase "recognized Indian tribe" rather than "under Federal jurisdiction," the phrase in which it was included. Third, the hearing record demonstrates that, in many respects, the question of whether particular Indians were subject to federal law was not settled and remained to be resolved in the future.

Congress intended to remedy the uncertainty about which Indians were covered by the IRA in the IRA itself, by establishing a prospective process for addressing these issues. In the IRA, Congress defined "Indians" and provided that Indians could organize as tribes after the IRA was enacted – with such tribes enjoying the full benefits of the Act. So, for example, the IRA provides that "[a]ny Indian tribe shall have the right to organize for its common welfare and may adopt an appropriate constitution and by-laws," pursuant to an election administrated by the Secretary of the Interior. 25 U.S.C. § 476. Congress in the IRA clearly contemplated Indians organizing as tribes after the IRA was enacted.

And this was how the IRA was implemented. Following the IRA's enactment, the status of many tribes remained uncertain. Typically, these questions were resolved by the Department, through Solicitor's opinions. *See Carcieri*, 555 U.S. at 398-99 (Breyer, J., concurring) (referencing post-IRA Solicitor's opinions regarding the Stillaguamish, Mole Lake, Grand Traverse, Shoshone, St. Croix Chippewas and Nahma and Beaver Indians). This evolving process underscored that "recognition" of a tribe need not precede the IRA. This understanding was made explicit in a landmark Solicitor's Opinion issued shortly after enactment of the IRA in 1934, which detailed the inherent powers of Indian tribes preserved by the IRA. As the Solicitor there emphasized, these powers apply "to all Indian tribes recognized now *or hereafter* by the legislative or the executive branch of the Federal Government." Powers of Indian Tribes, 55 Interior Dec. 14, 89 (1934), *reprinted in* 1 U.S. Dep't of the Interior, Opinions of the Solicitor of the Dep't of the Interior Relating to Indian Affairs 1917-1974 447 (1970) (opinion of Oct. 25, 1934) (emphasis added).

D. Lower Courts Agree That *Carcieri* Does Not Hold That A Tribe Must Have Been "Recognized" In 1934

Since the IRA contemplated prospective recognition of Indian tribes, it cannot properly be understood to have required tribes to have been "recognized" in 1934. *Carcieri* held that a tribe must be "under Federal jurisdiction" in 1934 – meaning that there was a federal legal obligation at that time. But *Carcieri* did *not* hold that a tribe must also be "recognized" in 1934.

Courts that have considered this question since *Carcieri* treat this aspect of the Supreme Court's decision as self-evident. In *Sandy Lake Band of Mississippi Chippewa v. United States*, for example, the United States District Court for the District of Minnesota noted that:

> In *Carcieri*, the Supreme Court held that the term 'now' as used in Section 479 was unambiguous and imposed a temporal restriction on Indian tribes 'under Federal jurisdiction.' The Supreme Court in *Carcieri* did not reach the issue of whether the term 'any recognized Indian tribe' was unambiguous. Nor did the Supreme Court conclude that an Indian tribe must have been federally recognized in 1934 to be eligible for IRA benefits.

2012 WL 1581078, *8 n.1 (D.Minn. 2012), *aff'd*, 714. F.3d 1098 (8th Cir. 2013). Similarly, in *Stand Up for California! v. U.S. Dep't of Interior*, the United States District Court for the District of Columbia noted that the *Carcieri* decision "left unanswered" the question of "whether a tribe must have been 'recognized' in 1934 to be eligible for trust land." 919 F. Supp. 2d 51, 69 (D.D.C. 2013) (noting that the modern formal requirements for federal recognition were not contemplated in 1934 and do not apply in 1934).

CONCLUSION

The Court should affirm the District Court's dismissal of both counts of the State's Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,513 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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