No. 17-1432

In the Supreme Court of the United States

COUNTY OF AMADOR, CALIFORNIA, PETITIONER

v.

DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JEFFREY H. WOOD
Acting Assistant Attorney General
JOHN L. SMELTZER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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QUESTIONS PRESENTED

Under the Indian Reorganization Act of 1934, the Secretary of the Interior may take land into trust for "Indians," 25 U.S.C. 5108, a term that is defined to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. 5129. The questions presented are:

1. Whether the Secretary permissibly construed Section 5129 to authorize trust acquisitions for tribes that were "under Federal jurisdiction" in 1934 but not formally recognized by the Secretary until after that date.

2. Whether the Secretary permissibly determined that the Ione Band of Miwok Indians was "under Federal jurisdiction" in 1934 based, *inter alia*, on federal officials' continuous, though ultimately unsuccessful, efforts to acquire land to serve as the Band's reservation.

3. Whether the Secretary's decision to acquire land in trust within the Ione Band's historical territory, which followed formal federal recognition of the Band in 1994 after a period of nonrecognition, was "the restoration of lands for an Indian tribe that is restored to Federal recognition" within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. 2719(b)(1)(B)(iii).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-41) is reported at 872 F.3d 1012. The opinions of the district court (Pet. App. 42-116, 117-171) are reported at 136 F. Supp. 3d 1193 and 136 F. Supp. 3d 1166. The record of decision of the Bureau of Indian Affairs (Pet. App. 172-199 (excerpts)) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2017. A petition for rehearing was denied on January 11, 2018 (Pet. App. 200-201). The petition for a writ of certiorari was filed on April 11, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In May 2012, the Acting Assistant Secretary of the Interior for Indian Affairs issued a record of decision to acquire into trust for the Ione Band of Miwok Indians

approximately 228 acres in Amador County, California. Pet. App. 13, 172; see *id.* at 172-199 (excerpts of record of decision). The Acting Assistant Secretary also determined that the land, once taken into trust, would qualify as "the restoration of lands for an Indian tribe that is restored to Federal recognition" within the meaning of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2719(b)(1)(B)(iii). Pet. App. 172-178. The district court upheld those determinations (*id.* at 42-116), and the court of appeals affirmed (*id.* at 1-41).

1. a. Enacted in 1934, the Indian Reorganization Act (IRA), 25 U.S.C. 5101 *et seq.*,[1] "was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains." Pet. App. 7 (quoting *Cohen's Handbook of Federal Indian Law* § 1.05, at 81 (Nell Jessup Newton et al. eds., 2012) (*Cohen's*)). The IRA authorizes the Secretary of the Interior, "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands * * * within or without existing reservations * * * for the purpose of providing land for Indians." 25 U.S.C. 5108. The IRA defines "Indian" to 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 descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and * * * [3] all other persons of one-half or more Indian blood.

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[1] In 2016, Title 25 of the United States Code was reclassified, and the provisions of the IRA were renumbered.

25 U.S.C. 5129.

The IRA's first definition of "Indian" was addressed by this Court in *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), a case that involved a decision of the Secretary of the Interior to acquire land and hold it in trust for the Narragansett Tribe of Rhode Island. At issue was whether the Narragansett Tribe was a "recognized Indian tribe now under Federal jurisdiction" within the meaning of what is now Section 5129. The Secretary had determined that the phrase "'*now* under Federal jurisdiction'" meant that the tribe must be under federal jurisdiction "at the time that the land is accepted into trust." *Id.* at 382 (emphasis added; citation omitted). But based primarily on "the ordinary meaning of the word 'now'" and "the natural reading of the word within the context of the IRA," *id.* at 388, 389, the Court held that "the term 'now under Federal jurisdiction' in [Section 5129] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934," *id.* at 395.

In a concurring opinion, Justice Breyer discussed an issue that the Court did not address. He noted that "an interpretation that reads 'now' as meaning 'in 1934' may prove somewhat less restrictive than it at first appears." *Carcieri*, 555 U.S. at 397. That is because, under a fair reading of Section 5129, "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time." *Ibid.* For instance, he noted, historical evidence indicated that around the time of the IRA, federal officials "wrongly" treated some tribes as not being under federal jurisdiction. *Id.* at 398. If one of those tribes was later recognized, Justice Breyer explained, then the

tribe might qualify under the theory that "later recognition reflects earlier 'Federal jurisdiction.'" *Id.* at 399.

Justice Souter, joined by Justice Ginsburg, concurred in part and dissented in part. He agreed with Justice Breyer that "[n]othing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content." *Carcieri*, 555 U.S. at 400. He echoed as well Justice Breyer's view that "the statute imposes no time limit upon recognition," and further noted that "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 that time." *Ibid.* Justice Souter also explained that "giving each phrase its own meaning would be consistent with established principles of statutory interpretation." *Ibid.*

b. Congress enacted the IGRA in 1988 to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). The IGRA recognizes the "exclusive right" of Indian tribes to conduct gaming on "Indian lands," subject to certain conditions. 25 U.S.C. 2701(5); see 25 U.S.C. 2710. One such condition is that no tribe may conduct gaming activities on lands acquired in trust by the Secretary of the Interior after October 17, 1988, the IGRA's effective date, 25 U.S.C. 2719(a), unless the acquisition falls under one of several specified exceptions, 25 U.S.C. 2719(b) (2012 & Supp. IV 2016). Congress adopted those exceptions to ensure that later-recognized tribes, whose federal status was acknowledged only after the IGRA's enactment, would not be "disadvantaged relative to more established ones." *City of Roseville* v. *Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003), cert. denied, 541 U.S. 974

(2004). One such exception is the so-called restored-lands exception, under which a tribe may conduct casino gaming on after-acquired lands taken into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. 2719(b)(1)(B)(iii).

For two decades following the IGRA's enactment, the Interior Department applied the statutory exceptions to the ban on gaming on after-acquired lands on a case-by-case basis. In 2008, the Department for the first time promulgated regulations formally implementing the exceptions. 25 C.F.R. 292.1-292.26. The regulations specified that the restored-lands exception would only be applied to future trust acquisitions if the tribe for which land was acquired had been restored to recognition (a) by statute; (b) through a formalized administrative process; or (c) by a "Federal court determination." 25 C.F.R. 292.10. But the regulations also provided, in the form of a so-called grandfather provision, that a tribe could qualify for the restored-lands exception if the Department, "before the effective date of the[] regulations," had already "issued a written opinion" affirming "the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment, provided that the Department * * * retains full discretion to qualify, withdraw or modify such opinions." 25 C.F.R. 292.26(b).

2. a. The Ione Band descends from Indians who lived in "independent, self-governing groups" within Amador County and its environs. Pet. App. 3. In the 18th and 19th Centuries, the territorial distinctness of such groups was eroded by Spanish and Mexican missionary efforts and by the arrival of non-Indian settlers. *Ibid.* The discovery of gold nearby in 1848 led to an influx of non-Indian miners and prospectors, resulting in

even greater conflict and displacement. *Id.* at 4. In response, federal agents in 1851 negotiated a series of 18 treaties with California tribes designed to relieve them of some of the lands on which they lived and to secure their resettlement in "'safer' areas." *Ibid.* For the Ione Band's forebears, so-called "Treaty J" identified land in Amador County and promised to "'set [it] apart forever for the sole use and occupancy of the tribes whose representatives signed the treaty.'" *Ibid.*; see Pet. C.A. Supp. E.R. 488. Due to opposition from the California legislature, however, the U.S. Senate did not ratify any of the 18 treaties. Pet. App. 4.

In 1905, Congress acknowledged that, as a result of its inaction, many California tribes had been left destitute and lacking in land title or rights. Congress therefore authorized the Secretary of the Interior to investigate the situation and propose a solution. Pet. App. 5. Following that investigation, Congress carried out the Secretary's recommendation to appropriate funds for the Department of the Interior to use, in its discretion, to purchase lands for California Indians who were not then living on reservations. *Id.* at 6 (citing Act of June 21, 1906, ch. 3504, 34 Stat. 333). In 1915, a Department representative identified a group of Indians with an elected chief residing in a remote area near Ione, California. *Ibid.* He described these Ione Indians as "hav-[ing] stronger claims to their ancient Village than any others" he had visited. *Id.* at 6-7.

Between 1915 and 1935, Interior Department officials repeatedly attempted to purchase a 40-acre parcel on which the Ione Band was then residing. Pet. App. 7. Each time, however, "the purchase stalled because of problems with the title to the property." *Ibid.*; see *ibid.* (Department official stating in 1923 letter that he "had

tried very hard for five years to get this sale through") (brackets omitted); *ibid.* (Department official stating in 1930 letter that "we have for more than eight years been negotiating with owners of the land") (brackets omitted). As of the IRA's enactment in June 1934, the Department's efforts to purchase the land had not yet succeeded.

b. In 1972, members of the Ione Band still living on the 40-acre parcel filed a state-court action to quiet title to the land in their own names and for other "members of the Ione Band of Indians." Pet. C.A. Supp. E.R. 437-438. Around the same time, the Band asked the Interior Department to take the land into trust. Pet. App. 8. In a 1972 letter, the Commissioner of Indian Affairs stated that "Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated. As stated earlier, they are eligible for the purchase of land under the IRA." *Ibid.* (brackets and ellipsis omitted). The Commissioner thus agreed to accept the 40-acre parcel in trust, and he directed the Bureau of Indian Affairs (BIA) to assist the Band in organizing under the IRA. Gov't C.A. Supp. E.R. 446. Shortly thereafter, the state court issued a judgment quieting title to the "Plaintiffs, residents of the property in question." *Id.* at 447. The BIA did not, however, immediately implement the Commissioner's directives, and some Department officials questioned the correctness of the conclusion reached in the Commissioner's 1972 letter. Pet. App. 8-9.

In 1978, the Interior Department promulgated regulations providing procedures for acknowledging that certain Indian tribes exist. See 43 Fed. Reg. 39,361, 39,362 (Sept. 5, 1978). The BIA advised the Ione Band

to petition for recognition under this Federal Acknowledgment Process, now known as the "Part 83 process." Gov't C.A. Supp. E.R. 449; see 25 C.F.R. Pt. 83 (current regulations). In 1994, however, the Assistant Secretary for Indian Affairs determined that the Band need not undertake the acknowledgment process in light of the Commissioner's 1972 recognition of the Band, which the Assistant Secretary "reaffirm[ed]." Gov't C.A. Supp. E.R. 458. The Assistant Secretary "ordered that the Ione Band be included on the official list of 'Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs.'" Pet. App. 10. The Assistant Secretary further declared that the Department would "henceforth" include the Band on its list of federally recognized tribes. Gov't C.A. Supp. E.R. 458. The Department then included the Band on its 1995 list and has included it on every subsequent list. Pet. App. 10; see 83 Fed. Reg. 4235, 4237 (Jan. 30, 2018) (current list).

c. The Ione Band ultimately dropped its fee-to-trust request for the 40-acre parcel and instead submitted a fee-to-trust application for a different portion of its historic territory, known as the "Plymouth Parcels." Pet. App. 11. In 2003, the BIA initiated public notice-and-comment proceedings to study the impact of acquiring the Plymouth Parcels in trust for the tribe, including the land's potential use for tribal gaming. Gov't C.A. Supp. E.R. 525-527. As part of its application, the Band also sought a legal opinion from the Solicitor of the Interior that the Plymouth Parcels would be gaming-eligible under the IGRA if acquired in trust for the Band. Pet. App. 11. An Associate Solicitor issued such an opinion in 2006, concluding that the Assistant Secretary's 1994

reaffirmation of the Commissioner's 1972 determination amounted to a "restoration" of the Band's status as a recognized tribe, and that "[u]nder the unique history of its relationship with the United States, the Band should be considered a restored tribe within the meaning of IGRA." *Id.* at 12; see *ibid.* (Associate Deputy Secretary concurred in the 2006 opinion).

In 2012, the Interior Department issued a record of decision approving the Ione Band's request to take the Plymouth Parcels into trust (2012 Decision). Gov't C.A. Supp. E.R. 530-597; see Pet. App. 172-199 (excerpts). The Department determined that the Ione Band was eligible for a trust acquisition under the IRA because the Band was a federally recognized tribe that was under Federal jurisdiction in 1934. Pet. App. 178-199. In making that "under Federal jurisdiction" determination, the Department applied the two-part test that it articulated following this Court's decision in *Carcieri*.[2] That test asks: (1) whether, in or before 1934, the United States took an "action or series of actions" establishing or reflecting "Federal obligations, duties[,] responsibility for or authority over the tribe," *id.* at 182; and (2) whether such tribe's jurisdictional status "remained intact in 1934," *id.* at 184. The 2012 Decision determined that the two-part jurisdictional test was satisfied

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[2] The Department's test was formalized in a 2014 "M-Opinion" issued by the Solicitor of the Interior. See Memorandum from Hilary C. Tompkins, Solicitor, U.S. Dep't of the Interior, to the Secretary, regarding The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act (Mar. 12, 2014) (M-37029), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf. M-Opinions are binding on the Department unless overturned by the Solicitor, Secretary, or Deputy Secretary. See U.S. Dep't of the Interior, *Departmental Manual* Pt. 209, Ch. 3, § 3.2A(11), http://www.doi.gov/elips/browse.

as to the Ione Band. Among other things, it pointed to "consistent efforts" by federal officials to acquire land to serve as a reservation for the Band, a "substantial undertaking" that lasted for decades and "continued well past 1934." *Id.* at 186; see *id.* at 186-193. The 2012 Decision also found "no disruption in the relationship between the United State[s] and the Ione Band prior to and in 1934." *Id.* at 186.

The 2012 Decision further concluded that, once taken into trust, the Plymouth Parcels would be eligible for gaming under the IGRA's restored-lands exception. Pet. App. 172-176. It noted that, in 2006, an Associate Solicitor had issued an opinion finding that the Ione Band was a "restored tribe" and thus could invoke that exception. *Id.* at 174. The 2012 Decision endorsed the determinations upon which the 2006 opinion letter had been based: that the Department, after dealing with the Band as an Indian Tribe and granting it "recognition," had later "terminat[ed]" the relationship; that the Department subsequently "restor[ed]" the Band's "status as a recognized Tribe"; and that "the land being acquired" on the Band's behalf "is in an area that is historically significant to the Tribe." *Id.* at 175-176. Pointing to the 2006 opinion letter, the 2012 Decision also concluded that the Band's request fit squarely within the IGRA regulations' grandfather provision. The 2006 opinion letter was a "written opinion" issued "before the effective date of [the 2008 IGRA] regulations," and the letter had affirmed "the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment." *Id.* at 174 (quoting 25 C.F.R. 292.26(b)).

3. Petitioner filed suit under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, alleging that the

Secretary lacked authority to take the Plymouth Parcels into trust. Petitioner argued that the Ione Band was not "under Federal jurisdiction" in 1934 and therefore its members were not "Indian[s]" under the IRA's definition of that term. 25 U.S.C. 5129. Petitioner also claimed that the Secretary had acted arbitrarily in declaring the Plymouth Parcels to be gaming-eligible under the IGRA's restored-lands exception. 25 U.S.C. 2719(b)(1)(B)(iii). The Band intervened in support of the federal defendants. Pet. App. 14.

a. The district court granted respondents' motions for summary judgment. Pet. App. 42-116. Applying the framework of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the court determined that the phrase "under Federal jurisdiction" in Section 5129 is ambiguous and that the Interior Department's two-part test for determining whether a tribe was "under Federal jurisdiction" in 1934 is reasonable. Pet. App. 67-69. The court also ruled that the Department had reasonably applied that test to conclude that the Ione Band was "under Federal jurisdiction" in 1934. *Id.* at 69-97. As for petitioner's IGRA claim, the court held that the Department had reasonably construed and applied its grandfather rule, 25 C.F.R. 292.26(b), in concluding that the Band was a "restored tribe" within the meaning of the restored-lands exception. Pet. App. 98-112.

b. The court of appeals affirmed. Pet. App. 1-41. The court rejected petitioner's argument, raised for the first time on appeal, that the text of Section 5129, by defining "Indian" to include any member of a "recognized Indian tribe now under Federal jurisdiction," required the Interior Department to find *both* that the Ione Band was under federal jurisdiction in 1934 *and* that it was formally recognized by the United States in

a political sense in 1934. The court explained that the term "now" in Section 5129 is naturally read to modify the phrase that follows it ("under Federal jurisdiction"), rather than the phrase that precedes it ("recognized Indian tribe"). Pet. App. 18-19. The court thus concluded that the provision's text, "when read most naturally, includes all tribes that are currently—that is, at the moment of the relevant decision—'recognized' and that were 'under federal jurisdiction' at the time the IRA was passed." *Id.* at 19. The court also found that conclusion to be consistent with the IRA's "purpose and history." *Id.* at 20. Because "no comprehensive list of recognized tribes" existed in 1934, the court noted, it was "unlikely that Congress meant for the statute's applicability to a particular tribe to turn on whether that tribe happened to have been recognized by a government that lacked a regular process for such recognition." *Id.* at 22. The court also determined that its reading of Section 5129 was consistent with the provision's "drafting history" and with "Interior's history of administering the IRA." *Id.* at 22-23.

Next, the court of appeals determined that the Ione Band was "under Federal jurisdiction" in 1934. The court rejected petitioner's argument that the term should be construed to apply only to tribes then residing on federal reservations. Pet. App. 28. That reading, the court explained, would give virtually no effect to the separate requirement that a tribe must be "'recognized,'" because a "tribe that lived on a reservation in 1934 was almost certainly 'recognized' within any meaning of that term." *Id.* at 29. Instead, the court concluded that the term "'under Federal jurisdiction'" was most naturally read to denote "those tribes that already

had *some* sort of significant relationship with the federal government as of 1934." *Id.* at 30. And the court determined that the term was "best" read as covering tribes with which the United States had a course of dealing establishing or reflecting "'Federal obligations, duties, responsibility for or authority over the tribe.'" *Ibid.* The court also held that the Interior Department had correctly applied that test in this case, in light of the federal government's significant, continuous efforts between 1915 and 1941 to provide land for the Ione Band. *Id.* at 31-33.

Finally, the court of appeals rejected petitioner's IGRA claim, concluding that the Interior Department's acquisition of land within the Ione Band's historical territory would constitute "the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. 2719(b)(1)(B)(iii). After a period in which the federal government had disavowed its obligations towards the Band, the court noted, the Department "'reaffirmed' the Band's status as a recognized tribe" in 1994, and the Assistant Secretary "directed that the Band be included on the list of recognized tribes." Pet. App. 34. Petitioner nevertheless argued that the Band could not qualify as having been "restored to Federal recognition" because its recognition had occurred outside the formal administrative process specified in Part 83. But that argument, the court explained, ignored the Department's regulations implementing the IGRA, which contain a "grandfather provision" that may apply to a tribe restored to recognition outside the Part 83 process under certain limited circumstances. *Id.* at 38 (citing 25 C.F.R. 292.26(b)). The grandfather provision was consistent with the IGRA's text and purpose, the court explained, and petitioner did not dispute that the

contemplated land acquisition—which had been deemed to be gaming-eligible by the Department's 2006 opinion letter—satisfied that provision. *Id.* at 38-41.

ARGUMENT

Petitioner renews its contention (Pet. 26-30) that the phrase "recognized Indian tribe now under Federal jurisdiction" in 25 U.S.C. 5129 requires that the Ione Band *both* was officially "recognized" in 1934 *and* was "under Federal jurisdiction" in 1934. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. This Court recently denied a certiorari petition raising the same argument, see *Citizens Against Reservation Shopping* v. *Zinke*, 137 S. Ct. 1433 (2017) (No. 16-572), and denial is warranted here as well.

Petitioner also argues (Pet. 17-26) that the phrase "now under Federal jurisdiction" in Section 5129 "[u]nambiguously" refers only to those tribes either that had signed a "ratified treaty" or that were "liv[ing] on Federally-reserved land" in 1934. Pet. 17. That contention is similarly meritless, and the decision below rejecting it does not conflict with any other court of appeals decision.

Finally, petitioner argues that this Court should grant review of its IGRA claim to consider "when, if ever, an administrative agency may 'grandfather in' in non-final agency actions that are contrary to Congress's statutory intent as embodied in the agency's own interpretive regulations." Pet. 30 (capitalization altered). That question is not presented by this case; the court of appeals properly rejected petitioner's IGRA claim; and its decision did not create any circuit conflict.

1. a. The IRA defines the term "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. 5129. Congress thus placed the sole temporal modifier ("now") in the middle of the phrase, suggesting that it modifies only the second half ("under Federal jurisdiction"). See *Confederated Tribes of the Grand Ronde Cmty.* v. *Jewell*, 830 F.3d 552, 560 (D.C. Cir. 2016) (*Grand Ronde*), cert. denied, 137 S. Ct. 1433 (2017) ("Adverbs typically precede the adjectives and adverbs they seek to modify.") (citing Michael Strumpf & Avriel Douglas, *The Grammar Bible* 121 (2004)). Thus, as several Justices noted in *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), the temporal limitation can reasonably be read as governing when a tribe must be "under federal jurisdiction," but not when it must be "recognized." See *id.* at 400 (Souter, J., concurring in part and dissenting in part) (agreeing with Justice Breyer that "the statute imposes no time limit upon recognition"); cf. *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 458 (1998) ("[T]he phrase 'recognized as reasonable' might mean costs the Secretary (1) *has* recognized as reasonable * * * or (2) *will* recognize as reasonable.").

That reading is consistent as well with the IRA's background and context. For many years prior to enactment of the IRA, Congress pursued assimilationist policies, through the allotment of tribal lands and other means, designed to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992). The effect of those policies was to undermine tribal organization. As a con-

sequence, at the time the IRA was enacted, many federal reservations were homes to groups of Indians who descended from different tribes and lacked a common tribal organization; other tribes had no reservation at all, with members scattered in multiple locations. See *Halbert* v. *United States*, 283 U.S. 753, 759-760 (1931).

The IRA was expressly designed to reverse those trends, "by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains." Pet. App. 7 (quoting *Cohen's* § 1.05, at 81). Yet although Interior Department officials maintained records of Indians residing on reservations, the agency maintained no official record of all recognized tribes, which was not required by Congress until 1994. See Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, Tit. I, § 104, 108 Stat. 4792 (25 U.S.C. 5131). Thus, as the court of appeals noted, "[i]t seems unlikely that Congress meant for the [IRA's] applicability to a particular tribe to turn on whether that tribe happened to have been recognized by a government that lacked a regular process for such recognition." Pet. App. 22. It is instead reasonable to conclude that Congress would have expected Department officials to confirm the tribal status of Indian groups—and the eligibility of tribal members to receive IRA benefits based on tribal membership—after the IRA's enactment, in the course of the agency's efforts to implement it. Indeed, that is precisely how the Department has implemented the IRA since shortly after its passage. In 1937, for instance, the Department "recognized the Mole Lake Indians of Wisconsin as a tribe that was entitled to the IRA's benefits," even though the Department had previously believed that

the Tribe no longer existed, because further investigation revealed that the Department's previous belief was mistaken. *Id.* at 24.

b. Petitioner argues (Pet. 29) that allowing the Interior Department to take land into trust for tribes recognized after 1934 would "make[] the term 'recognized' meaningless," because the very act of taking land into trust for a tribe would itself "effectively recognize that tribe." Petitioner misunderstands the operation of the IRA. Under the statute, the Secretary may take land into trust "for Indians," 25 U.S.C. 5108, a term that includes members of tribes that, *inter alia*, have been "recognized," 25 U.S.C. 5129. A tribe seeking a trust-land acquisition thus must be recognized. See 25 C.F.R. 151.2(b) (defining "Tribe," for purposes of the land-acquisition regulations, as a group "recognized by the Secretary as eligible" for BIA services). The Secretary's decision to take land into trust cannot in *itself* furnish a basis for recognizing a tribe.

The snippets of legislative history upon which petitioner relies (Pet. 29-30) are not to the contrary. During a May 1934 Senate committee hearing, for instance, Chairman Wheeler stated that the IRA was not intended to benefit individuals who had no rights "at the present time." Pet. App. 218. But that statement was made in response to Senator Thomas's concern about "roaming" Indians, mere "remnants of a band," who were "not a tribe" and were "not under the authority of the Indian Office." *Id.* at 217. That description does not apply to tribes, like the Ione Band, that consistently were under federal jurisdiction prior to and in 1934. Petitioner also notes Commissioner Collier's observation, later at the same hearing, that individuals who failed to meet the minimum blood quantum would not fall within

the bill unless "actually residing within the present boundaries of an Indian reservation *at the present time*." Pet. 29 (quoting Pet. App. 221). Yet that statement responded to Senator Thomas's concern that a person might qualify as an Indian based solely on his status as a "descendant of Pocahontas." Pet. App. 221. Commissioner Collier explained that the IRA's second definition treats descent as a basis for federal protection only for "descendants" of tribe members who were, "on June 1, 1934, residing within the present boundaries of any Indian reservation." 21 U.S.C. 5129; see Pet. App. 220. His statement thus addressed Senator Thomas's confusion about Section 5129's second definition; it did not relate to the definition at issue here (namely, the first definition). The same is true of Representative Howard's statement, during a floor debate, that the IRA "recognizes the status quo of the present reservation Indians." Pet. 29 (citation and emphasis omitted). Finally, petitioner offers only speculation (Pet. 30), and no evidence, for the claim that any "temporal limitation was understood to be implicit in the notion of a 'recognized tribe.'"

c. Petitioner argues (Pet. 26-30) that the decision below conflicts with this Court's precedent, and creates a circuit conflict, regarding whether the IRA is limited to tribes that were officially "recognized" in 1934. That is incorrect. In the only other precedential decision to address the issue, the D.C. Circuit upheld the Interior Department's interpretation of Section 5129 as a "reasonable interpretation of the statute it is charged to administer." *Grand Ronde*, 830 F.3d at 563. As noted above, this Court denied a certiorari petition seeking review of that decision. See *Citizens Against Reservation Shopping*, *supra* (No. 16-572).

Petitioner incorrectly asserts (Pet. 27) that this Court impliedly construed the IRA's first definition of Indian differently in *United States* v. *John*, 437 U.S. 634 (1978). *John* addressed an unrelated issue regarding the definition of "'Indian country,' as that phrase is defined in 18 U.S.C. § 1151." *Id.* at 635. In the course of addressing that issue, the Court paraphrased the first definition in Section 5129, placing the phrase "in 1934" in brackets between "recognized" and "tribe," as opposed to where Congress placed the word "now" (after "tribe" and before "under Federal jurisdiction"). *Id.* at 650 (citing 25 U.S.C. 5129). *John* did not explain the placement of the bracketed words or otherwise construe Section 5129's first definition. Instead, *John* affirmed a reservation proclamation for the Mississippi Choctaws on the ground that they satisfied the IRA's third definition of Indian, relating to persons of "one-half or more Indian blood." *Ibid.* (citation omitted).

Petitioner notes (Pet. 27) that the Court in *John* observed that there was "no doubt" that Congress and the Department of the Interior "recognized" that some Mississippi Choctaws met the blood quantum requirement "at the time the [IRA] was passed." 437 U.S. at 650. Yet the word "recognized" does not appear in the blood-quantum definition, which was the only definition at issue there. The Court therefore appears to have simply used the word "recognized" to mean that Congress and the Department perceived or understood that many individuals met the blood quantum requirement, not in a more formal sense to connote political recognition of a tribal entity. *John* had no occasion to construe, and did not construe, the first definition, at issue here. Tellingly, when this Court examined the first definition in *Carcieri*, it did not even cite *John*, much less rely upon

it. See *Grand Ronde*, 830 F.3d at 563 (*Carcieri* "nowhere cite[d]" *John*).

Petitioner similarly misreads (Pet. 27-28) the Fifth Circuit's pre-*John* decision in *United States* v. *State Tax Commission*, 505 F.2d 633 (1974). Consistent with *John*, the Fifth Circuit observed that the Mississippi Choctaws were not under "government * * * supervision or control" in 1934 and that the Department of the Interior had not theretofore "assumed or exercised jurisdiction over them." *Id.* at 642 (quoting *Winton* v. *Amos*, 255 U.S. 373, 378 (1921)). Observing that the IRA "positively dictates that tribal status is to be determined as of June 1934," the Fifth Circuit held that the Mississippi Choctaws "did not * * * fall within" it. *Ibid.* The court thus equated "tribal status" with federal "jurisdiction"—what the Department now calls "jurisdictional status." Pet. App. 184. As explained in *Carcieri*, a tribe's jurisdictional status (*i.e.*, whether the tribe was "under Federal jurisdiction" in 1934) necessarily depends on facts and circumstances as they existed in 1934. See 555 U.S. at 395-396. But the Fifth Circuit in *State Tax Commission* did not address whether Department officials may "later recogni[ze]," during the IRA's implementation, "earlier 'Federal jurisdiction'" that existed on the date of the IRA's enactment. *Id.* at 399 (Breyer, J., concurring); see *State Tax Comm'n*, 505 F.2d at 642.

Nor did the Ninth Circuit address that question in *Kahawaiolaa* v. *Norton*, 386 F.3d 1271 (2004), cert. denied, 545 U.S. 1114 (2005). There, the court simply observed that Native Hawaiians are not "Indians" under the IRA because "[t]here were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934," and because the IRA specifically excludes persons of Indian

descent within federal territories other than Alaska. *Id.* at 1280 (citing 25 U.S.C. 5118, 5129). Again, the court did not specifically address the date of recognition.

2. The Interior Department reasonably concluded that the Ione Band was "under Federal jurisdiction" in 1934. In the 19th Century, federal agents negotiated a treaty with the Band's ancestors that set aside land in Amador County for them, but the California legislature successfully lobbied against ratification of the treaty. Pet. App. 4. In the early 1900s, Congress acknowledged responsibility for California Indians rendered landless by federal policy, and it enacted a series of laws appropriating funds to provide land for such Indians. See, *e.g.*, Act of June 21, 1906, ch. 3504, 34 Stat. 333. In 1915, the Interior Department identified the Ione Band as an appropriate beneficiary of a land purchase under those enactments, and the Department worked continuously up to and through the enactment of the IRA to acquire land on the Band's behalf. Pet. App. 187-193. Given Congress's then-recent efforts to aid the landless Indians of California, and the Department's ongoing attempts to acquire lands for the Band, there is little reason to believe that Congress would have intended to exclude the Band from the benefits of the IRA.[3]

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[3] Petitioner briefly argues (Reply Br. 6) that the Interior Department did not, in fact, consider the Ione Band to be "'under Federal jurisdiction'" in the months immediately after the IRA's enactment because the Band "was not invited to conduct an IRA election." That argument mischaracterizes the IRA's operation. The IRA required the Secretary of the Interior to conduct referendum elections to enable the residents of any *existing* reservation to "vote against [the IRA's] application." 25 U.S.C. 5125. Because there was no Ione reservation in 1934, the Secretary could not and did not conduct a referendum election among Ione Indians. But that says nothing

a. Petitioner argues that the phrase "now under Federal jurisdiction" in Section 5129 "[u]nambiguously" refers only to tribes that were (1) "living on federally-held land" or (2) that had signed a "ratified treaty" in 1934. Pet. 17, 21 (capitalization altered). No court of appeals has accepted that argument, and the court below was correct to reject it. Congress could easily have imposed either of those limitations textually, but it chose not to do so. Indeed, Congress specifically limited the IRA's *second* definition of "Indian" to persons of Indian descent "residing within * * * any Indian reservation," 25 U.S.C. 5129, and its failure to include a similar limitation in the first definition must be given effect. See *Carcieri*, 555 U.S. at 391 (Congress chose to create "three discrete definitions").

Petitioner's argument is also inconsistent with the "overriding purpose" of the IRA, which was to enable "Indian tribes * * * to assume a greater degree of self-government, both politically and economically." *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). That objective is not limited to Indians already located on existing reservations. In enacting the IRA, Congress authorized the Interior Department to declare new reservations, 25 U.S.C. 5110, in addition to taking land into trust for Indians, 25 U.S.C. 5108. Petitioner's interpretation thus depends on the counterintuitive premise that Congress intended to limit *new* reservations to "recognized Indian tribes" *already* living on reservations—despite the potentially greater needs of recognized tribes made landless by prior federal action.

Moreover, petitioner misconstrues the import of treaties in evaluating whether a tribe was under federal

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about whether members of the Band were "Indians" within the meaning of Section 5129.

jurisdiction. A ratified treaty with a tribe demonstrates formal federal recognition of the tribe at the time of the treaty; depending on the treaty's terms, it may also show the existence of enduring treaty obligations or may acknowledge the status of aboriginal lands. But federal jurisdiction over an Indian tribe does not depend upon the tribe's acquiescence or agreement or its being a party to a treaty. As Chief Justice Marshall explained nearly two centuries ago, Indian tribes enjoy a relationship with the United States that "resembles that of a ward to his guardian," because Indians "occupy a territory to which we assert a title independent of their will." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Even unsuccessful treaty negotiations can therefore indicate that the United States has recognized a tribe as a political entity, capable of entering into a treaty, and can support a finding that federal jurisdiction has been exercised over the tribe.

b. In arguing for a reservation-residency requirement, petitioner relies heavily (Pet. 18-21) on the legislative history of the IRA, which petitioner again takes out of context. For instance, petitioner focuses (Pet. 20) on comments made during a Senate committee hearing about the Catawba Tribe of South Carolina, a tribe that had no federal reservation at the time. Chairman Wheeler opined that the tribe would not be eligible for benefits under the Senate bill unless they were "half-blood." Pet. App. 224. But as petitioner acknowledges (Pet. 20), Senator O'Mahoney disputed that assertion, noting that there was "no limitation of blood" in the bill's first definition of Indian, Pet. App. 225, and thus no reason to treat the Catawba Indians differently from "those who are on the reservation[s]," so long as they

"are living as Catawba Indians" (*i.e.*, as members of a tribe), *id.* at 226.

Petitioner also relies (Pet. 20) on another exchange in which Chairman Wheeler expressed concerns about potential federal protection for "those Indians" who "are no more Indians than you or I." Pet. App. 226. In response, Senator O'Mahoney suggested that the Chairman's concern might be "handled by some separate provision excluding from the benefits of the act certain types," rather than by changing the IRA's "general definition" of Indian. *Ibid.* At that point, Commissioner of Indian Affairs Collier, a principal author of the IRA, see *Carcieri*, 555 U.S. at 390 n.5, offered the following comment:

> 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.

Pet. App. 226. Senator Thomas then asked the Chairman to ask the Commissioner to "submit * * * briefs on the various points we have raised," at which point the hearing ended. *Id.* at 227. There is no record of any discussion or subsequent briefing on the Commissioner's proposed amendment before it became law.

Contrary to petitioner's assertion (Pet. 20), this exchange does not show that Chairman Wheeler "disagreed" with Senator O'Mahoney's view that the IRA should include the Catawba Indians or similarly situated non-reservation tribes. Chairman Wheeler made a different point: that persons who were living on reserved land, yet "no more Indians than you or I," should be excluded from the IRA. Pet. App. 226; see *ibid.*

("Their lands ought to be turned over to them in severalty."). Likewise, Senator O'Mahoney did not suggest (Pet. 20) modifying the definitions of "Indian" and "tribe" to address the issue of non-reservation Indians. Instead, he proposed a "separate provision" to address the concern raised by Chairman Wheeler, which did not involve non-reservation Indians. Pet. App. 226. Finally, while Commissioner Collier offered an amendment to the Senate bill's first definition of Indian (regarding tribal membership) to limit that definition to members of recognized Indian tribes "now under Federal jurisdiction," the record does not indicate which Senator's "thought" he was attempting to "meet." *Ibid.*

In sum, as the D.C. Circuit observed, this history "at most" demonstrates "Congressional intent to limit" the first definition of Indian (relating to tribal affiliation) by requiring "some 'jurisdictional' connection to the government." *Grand Ronde*, 830 F.3d at 561. But the history does not clarify "what that jurisdictional connection might be." *Ibid.* And petitioner cites no post-enactment authority for construing "under Federal jurisdiction" to refer to reservation tribes only. Indeed, in 1943, not long after the IRA's enactment, the Interior Department permitted the Catawba Tribe to organize under the IRA, and the Department took land into trust for the Tribe. See Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, § 2(a)(4)(C), 107 Stat. 1118 (recounting tribal history).

c. Petitioner is similarly incorrect in arguing (Pet. 21-24) that "under Federal jurisdiction" would have been understood in 1934 as referring to reservation tribes only. Petitioner relies on language in cases involving federal criminal jurisdiction over Indian offenses within Indian country. Pet. 22 (citing *United*

States v. *Kagama*, 118 U.S. 375 (1886); *United States* v. *Sandoval*, 231 U.S. 28 (1913); and *In re Blackbird*, 109 F. 139, 143 (W.D. Wisc. 1901)). But that argument conflates special territorial jurisdiction over federal *lands* set aside for Indians with federal jurisdiction over Indians generally. As this Court recognized decades before the IRA's enactment, "[a]s long as * * * Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms they shall deal"—even as to dealings "outside" of Indian country. *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 195 (1876).

Petitioner also errs in relying (Pet. 22-23) on a 1925 opinion of the Comptroller General, an official with no direct role in Indian affairs. The opinion addressed whether specified congressional appropriations for "Indians" could be used for certain "old and indigent" persons of apparent "Shoshone and Pa[i]ute" blood who did "not belong to any named tribe" and who had "never belonged to or resided upon a reservation." Pet. App. 210-211. In determining that such persons were not intended beneficiaries of the subject appropriations, the Comptroller General did not purport to address the extent of federal jurisdiction over Indians or tribes generally. In any event, members of the Ione Band are differently situated vis-à-vis the federal government from persons of Indian descent who "do not belong to any named tribe." *Id.* at 211.

Petitioner is similarly incorrect to argue (Pet. 23) that a 1933 letter from the Superintendent of the Sacramento Agency of the Office of Indian Affairs demonstrates an absence of federal jurisdiction over the Ione

Band or its members. The letter in fact shows the opposite: It states that the Interior Department had purchased "rancherias" for similarly situated landless California Indians, and it expresses the Department's hope of finding funding to do the same for the Band. Pet. App. 214-215. No such efforts would have been contemplated for persons not under federal Indian jurisdiction.

Ultimately, petitioner's assertion (Pet. 23) that the phrase "'under Federal jurisdiction'" was "well-understood" at the time of the IRA's enactment simply disregards contemporaneous evidence showing that Interior Department officials were confused from the outset by phrase's meaning. Assistant Solicitor of the Interior Felix Cohen—who would go on to author the leading treatise on Indian law, see *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 226 (2012)—described the Senate bill as having added the term "'now under Federal jurisdiction', *whatever that may mean.*" *Grand Ronde*, 830 F.3d at 564 (citation omitted). And other Department officials correctly predicted that the amended text was "likely to provoke interminable questions of interpretation." *Ibid.* (citation omitted). On that record, the D.C. Circuit "easily conclude[d]" that the phrase "'under Federal jurisdiction'" was ambiguous. *Ibid.*[4]

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[4] Petitioner notes (Pet. 18) that in *Carcieri*, this Court said that "Congress left no gap in [Section 5129] for the agency to fill." 555 U.S. at 391. But the Court made that statement in response to the argument that Section 5129's three definitions were merely illustrative rather than exclusive. See *ibid.* The Court did not suggest that the three definitions themselves were wholly free of ambiguity. See *Grand Ronde*, 830 F.3d at 560.

d. Petitioner ultimately rests on policy complaints about the Interior Department's two-part test for determining whether a tribe was "under Federal jurisdiction" in 1934, arguing that the test is too broad and gives the Department "virtually unlimited authority." Pet. 37; see Pet. 24-26; Pet. Reply Br. 3-10. But the two-part test, which is set out in a 2014 M-Opinion, provides significant guidance for and imposes meaningful constraints on the Department's authority. See p. 9 n.2, *supra*. Petitioner repeatedly observes (Pet. 25-26; Pet. Reply Br. 5) that then-Acting Deputy Secretary of the Interior James Cason raised issues about the M-Opinion in testimony to Congress. But Mr. Cason did not suggest that the Department's test is inconsistent with the IRA or otherwise invalid, much less opine about its application to the Ione Band. Given the Department's discretion to modify its test or apply it narrowly, any concerns about the 2014 M-Opinion do not provide grounds for granting review, especially in the absence of a circuit split.

3. The Interior Department reasonably determined that the Plymouth Parcels, when taken into trust for the Ione Band, are gaming-eligible under the IGRA's restored-lands exception, which applies to trust acquisitions that constitute "the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. 2719(b)(1)(B)(iii). After a period during which the federal government disavowed its obligations toward the tribe, the Band was restored to status as a recognized tribe in 1994, when the Assistant Secretary "reaffirm[ed]" the Commissioner's 1972 determination and directed that the Band be included on the list of federally recognized tribes. Gov't C.A. Supp. E.R. 458. In 2006, an Associate Solicitor concluded that, once in trust, the Plymouth Parcels would be gaming-eligible under

the restored-lands exception, a decision upon which the Interior Department relied in its 2012 record of decision. See pp. 7-10, *supra*.

a. Petitioner does not argue that the Interior Department's 2012 decision violated the text or purposes of the IGRA. Instead, petitioner advances an argument (Pet. 30-35) that the decision violates the Department's *own* understanding of congressional intent. Petitioner notes that the regulations promulgated by the Department to implement the IGRA normally allow restored-tribe status only when the requesting tribe has been restored to federal recognition (a) by statute; (b) through the Part 83 process; or (c) by a federal court decision. 25 C.F.R. 292.10. But here, petitioner observes, the Ione Band was not recognized through the Part 83 process. Its restored-tribe status thus was not based on Section 292.10, but instead was based on a separate grandfather provision that applies when the Department, "before the effective date of the[] regulations," had already "issued a written opinion" affirming "the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment." 25 C.F.R. 292.26(b). Petitioner argues (Pet. 35) that the grandfather provision improperly allows Department officials "to ignore congressional intent, and to ignore their own rules."

Petitioner's argument is based on a mistaken premise. In adopting the grandfather provision in its 2008 regulations, and in applying it to the Ione Band, the Interior Department did not simultaneously espouse different, conflicting interpretations of the IGRA; nor did the Department ignore its own regulations. Instead, the Department simply chose to apply new restrictions on gaming-eligibility prospectively, thereby protecting the reliance interests of tribes that had been advised by

the Department—prior to promulgation of the 2008 regulations—that trust land acquired for their benefit would be gaming-eligible under the IGRA. Here, for instance, the Band had been informed that it was a "restored tribe" by the 2006 Associate Solicitor's opinion, which applied the law as it existed at the time of the Band's application. Pet. App. 174-176. By applying the grandfather provision, the 2012 decision respected the Band's reasonable reliance on the 2006 opinion. Notably, the result would have been the same had the Department simply waited to promulgate the new regulations until after the Department's land-into-trust decision for the Band had been finalized.

Nothing about the Interior Department's choice to apply the gaming-eligibility restrictions prospectively is inconsistent with the Department's view of the IGRA. To the contrary, the restored-lands exception is one of several statutory exceptions designed to ensure that tribes without a land base on the date of the IGRA's enactment would not be "disadvantaged" relative to established tribes. *City of Roseville* v. *Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003), cert. denied, 541 U.S. 974 (2004). The Ione Band lacked lands at the time of the IGRA's passage (in 1988) in significant part because the Band's pre-IGRA recognition, despite the Band's persistent efforts, was not administratively reaffirmed by the Department until 1994. Pet. App. 10, 175. Those circumstances put the Band within the general class of tribes that Congress sought to protect through the restored-lands exception. See *City of Roseville*, 348 F.3d at 1030. Nor could the Department's decision to apply the grandfather provision to the Band have been inconsistent with the Department's own implementing regulations, given that the provision was itself part of those regulations.

b. Petitioner contends that the decision below conflicts with decisions in which courts have invalidated agency actions that are based on two or more inconsistent statutory interpretations. Pet. 35 (citing *United States Dep't of the Treasury* v. *Federal Labor Relations Auth.*, 739 F.3d 13, 21 (D.C. Cir. 2014); and *Port of Seattle* v. *FERC*, 499 F.3d 1016, 1034 (9th Cir. 2007), cert. denied, 558 U.S. 1136 (2010)). The premise of that assertion is incorrect for the reasons just described. Nor is petitioner correct (Pet. 35) that the decision below "conflicts with the established rule that agencies must abide by their own regulations." The Department applied its regulations, of which the grandfather provision is a part.

Similarly without merit is petitioner's argument that the decision below conflicts with decisions in which courts have applied a multi-factor test to determine whether an agency, in an administrative adjudication, has appropriately chosen to apply a new rule retroactively. See Pet. 32-34 (discussing *NRDC, Inc.* v. *Thomas*, 838 F.2d 1224 (D.C. Cir.) (*Thomas*), cert. denied, 488 U.S. 888, and 488 U.S. 901 (1988); *Retail, Wholesale & Dep't Store Union* v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972); and *Garfias-Rodriguez* v. *Holder*, 702 F.3d 504 (9th Cir. 2012)). The test applied in those cases is designed to restrain "the inequity of enforcing a new rule against persons that justifiably made investment decisions in reliance on a past rule or practice." *Thomas*, 838 F.2d at 1244. Yet petitioner has identified no such retroactive application of a new rule in this case. Indeed, the grandfather provision applied by the Department is itself designed to serve the same reliance interests as the multi-factor test that petitioner advocates. In any event, the court below expressly held that, "even assuming that the principles of *Thomas* [*i.e.*, the multi-factor test]

apply, Interior's decision to grandfather in the Ione Band under 25 C.F.R. § 292.26(b) was permissible." Pet. App. 40. No circuit conflict exists.

c. Finally, the question whether the Interior Department permissibly adopted the grandfather provision is of limited and diminishing importance, because the provision applies only where the Department, "before the effective date of [the 2008] regulations," had already "issued a written opinion" affirming "the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment." 25 C.F.R. 292.26(b). Petitioner does not identify any other land-into-trust decision in which the grandfather provision has been applied. And the likelihood that the provision will be applied again in the future will only diminish as the "effective date of [the 2008] regulations" recedes further into the past.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JEFFREY H. WOOD
Acting Assistant Attorney General
JOHN L. SMELTZER
Attorney

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