No. 13-847

In the Supreme Court of the United States

VILLAGE OF HOBART, WISCONSIN, PETITIONER

v.

ONEIDA TRIBE OF INDIANS OF WISCONSIN, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 33 U.S.C. 1323—which requires federal agencies to comply with state and local water-pollution regulations and to pay associated reasonable service charges to the same extent as nongovernmental entities—authorizes a local government to impose its stormwater assessments on lands that the United States holds in trust for an Indian tribe.

2. Whether a State retains regulatory jurisdiction over lands that the United States has taken into trust for an Indian tribe pursuant to 25 U.S.C. 465.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 732 F.3d 837. The opinion of the district court (Pet. App. 13-42) is reported at 891 F. Supp. 2d 1058. A prior opinion of the district court (Pet. App. 43-55) is reported at 787 F. Supp. 2d 882.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 2013. The petition for a writ of certiorari was filed on January 15, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1934, Congress enacted the Indian Reorganization Act (IRA) to "establish 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). In relevant part, the IRA authorizes the Secretary of the Interior to acquire lands "within or without existing reservations * * * for the purpose of providing land for Indians." 25 U.S.C. 465. Title to such lands is "taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired," and "such lands or rights shall be exempt from State and local taxation." *Ibid.*

The regulatory mechanism for the acquisition by the United States of lands in trust "takes account of the interests of others with stakes in the area's governance and well-being." *City of Sherrill* v. *Oneida Indian Nation of N.Y.*, 544 U.S. 197, 220-221 (2005). The applicable regulations specify factors that the Department of the Interior considers, in light of input from state and local governments, when deciding whether to approve a land-into-trust application submitted by a tribe or individual Indian. See, *e.g.*, 25 C.F.R. 151.4, 151.10, 151.11. Those factors include "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. 151.10(f).

b. The Federal Water Pollution Control Act Amendments of 1972, as amended (known as the Clean Water Act or CWA), 33 U.S.C. 1251 *et seq.*, establishes a National Pollutant Discharge Elimination System (NPDES) permitting program. See 33 U.S.C. 1342. The CWA prohibits the unauthorized discharge of a pollutant into waters of the United States. 33 U.S.C. 1311(a). A person proposing to discharge pollutants may avoid civil and criminal liability by obtaining a permit authorizing the discharge. See 33 U.S.C. 1311(a), 1342(a).

c. The Environmental Protection Agency (EPA) implements the NPDES permitting system for each State, except where the State receives authorization from the EPA to administer the program under state law. See 33 U.S.C. 1342(a) and (b). To administer the program, a State must attest that its laws "provide adequate authority to carry out the described program." 33 U.S.C. 1342(b); 40 C.F.R. 123.21-123.23. Because States often lack authority to regulate activities on Indian lands, 40 C.F.R. 123.1(h), a State must affirmatively request authority to administer a NPDES program on Indian lands, must demonstrate that it has adequate authority to do so, and must receive the EPA's approval. 40 C.F.R. 123.23(b).

d. In 1987, Congress directed the EPA to issue regulations requiring NPDES permits for discharges from certain municipal separate storm sewer systems (which may include such things as roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, channels, and storm drains). See Water Quality Act of 1987, Pub. L. No. 100-4, Tit. IV, § 405, 101 Stat. 69-71; 33 U.S.C. 1342(p)(3)(B); 40 C.F.R. 122.26(b)(8). Permits for municipal separate storm sewer systems "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the [EPA's] Administrator or the State determines appropriate for the control of such pollutants." 33 U.S.C. 1342(p)(3)(B)(iii). Many States authorize municipalities that own separate storm sewer systems to impose assessments to cover the costs of stormwater management. See, *e.g.*, Region III, EPA,

Funding Stormwater Programs 1, 4 (Jan. 2008), www.epa.gov/npdes/pubs/region3_factsheet_funding.pdf.

In 1987, Congress also amended the CWA to allow the EPA to treat federally recognized Indian tribes in a manner similar to States for a number of purposes, including approving tribes to administer NPDES permitting programs to manage and protect water resources on Indian reservations. 33 U.S.C. 1377(e); see 40 C.F.R. 123.31. That amendment was consistent with federal policy encouraging tribal self-government in environmental matters. See, *e.g.*, *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (Nov. 8, 1984), www.epa.gov/tp/pdf/indian-policy-84.pdf.

e. In Section 313 of the CWA, 33 U.S.C. 1323, Congress has specifically addressed the responsibility of "federal installations to comply with general measures to abate water pollution." *EPA* v. *California*, 426 U.S. 200, 211 (1976). In relevant part, Section 1323 provides as follows:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements * * * respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity *including the payment of reasonable service charges*. * * * This subsection shall apply notwithstanding any immunity of

> such agencies, officers, agents, or employees under any law or rule of law.

33 U.S.C. 1323(a) (emphasis added). In 2011, Congress amended Section 1323 to specify that the "reasonable service charges" payable by federal facilities include any stormwater assessment that is "reasonable," "non-discriminatory," and meets certain other criteria, "regardless of whether" the assessment "is denominated a tax." 33 U.S.C. 1323(c)(1).

2. Petitioner is a "small town in rural Wisconsin" that is located entirely within the boundaries of the reservation of the Oneida Tribe of Indians of Wisconsin. Pet. App. 2. This case arose as a result of petitioner's efforts to impose its stormwater ordinance and assessments on 148 parcels of land, comprising about 1400 acres, that are held in trust by the United States for the Tribe, including two parcels on which the Tribe's own stormwater retention pond is located. *Id.* at 3, 17. Each of the 148 parcels was acquired in trust by the United States before petitioner first sought to impose its ordinance and assessments on the Tribe in 2007. Stipulation of Facts, D. Ct. Doc. 50, at 2 (Jan. 23, 2012).

In February 2010, the Tribe filed this civil action against petitioner, seeking a declaration that petitioner lacks authority to impose its stormwater ordinance and collect its assessments on the lands that the United States holds in trust for the Tribe. Pet. App. 2-3; D. Ct. Doc. 1, at 1 (Feb. 19, 2010). Petitioner filed a third-party complaint challenging the Department of the Interior's decision not to pay the assessments on behalf of the Tribe. Pet. App. 15.

3. In September 2012, the district court granted the Tribe's motion for summary judgment and the United

States' motion to dismiss the third-party complaint. Pet. App. 13-42. With respect to the Tribe's motion, the court held that the assessments were impermissible taxes on the Tribe's trust property. *Id.* at 23-35. The court considered various factors in concluding that petitioner's stormwater charges are "a tax for all meaningful purposes here." *Id.* at 31. It then rejected petitioner's reliance on Section 1323. The court explained that Section 1323 "establishes the [Federal] Government's duty to comply with the substantive and procedural requirements of the CWA at federal facilities," but it "says nothing about Indian tribes or property owned by Indian tribes." *Id.* at 33-34. The court concluded that Section 1323 therefore does not provide "the kind of clear statement of intent that is required to allow local taxation of Indian trust land," *id.* at 33, which is otherwise barred by Congress's directive in 25 U.S.C. 465 that tribal trust lands "shall be exempt from State and local taxation."

With respect to the United States' motion to dismiss petitioner's third-party complaint, the district court held that the United States is not required to pay petitioner's stormwater management fees. Pet. App. 35-40. The court explained, as an initial matter, that requiring payment "would circumvent the immunity from taxation that Indian trust lands enjoy." *Id.* at 38. The court further explained that Section 1323 does not unequivocally render the federal government liable for payment of fees simply by virtue of "holding bare legal title over Indian lands." *Id.* at 39-40.

4. The court of appeals affirmed the district court's judgment in favor of the Tribe and the federal respondents. Pet. App. 1-12.

a. In discussing principles of federal Indian law, the court of appeals explained that, when the United States acquires land in trust for a tribe, "the consequence is to 'reestablish [the Indians'] sovereign authority' over that land." Pet. App. 4 (brackets in original) (quoting *City of Sherrill*, 544 U.S. at 221). The court recognized that the "question in this case" is whether Congress authorized petitioner to assess municipal fees on tribal trust lands. *Id.* at 5. The court emphasized that Section 1323(a) was "the only premise that [petitioner] advances for a right to impose on the Indian lands charges for pollution control." *Id.* at 6; see Pet. C.A. Reply Br. 1.

The court of appeals concluded that Section 1323 "does waive federal immunity from local regulation of stormwater runoff," but "it does not address the underlying authority of local governments to regulate that runoff on Indian lands." Pet. App. 7. The court found that conclusion to be consistent with the CWA more broadly, because the statute generally provides that, on Indian lands, States (and their subdivisions) do not regulate tribes, which can themselves be designated by the EPA to exercise their own regulatory authority under the CWA. *Id.* at 8. Here, the court noted, Wisconsin itself has "disclaimed authority to regulate stormwater runoff on Indian lands," which is why petitioner had sought a permit from the EPA rather than from the State. *Id.* at 9.

The court of appeals speculated that there might be an argument for "a common law graft onto the Clean Water Act," to redress the necessity of having "two separate stormwater management programs in tiny Hobart, administered by different sovereigns." Pet. App. 9-10. The court noted, however, that petitioner

did not "argue for such an exception" and did not "deny the feasibility of cooperative arrangements between it and the [T]ribe." *Id.* at 10. Accordingly, the court held that petitioner "loses its case against the [T]ribe." *Ibid.*

b. As an alternative ground for affirming the judgment in the Tribe's favor, the court of appeals also upheld the district court's determination that petitioner's assessments constitute impermissible taxes on tribal trust lands. Pet. App. 10-11. The court applied its test for distinguishing "between taxes and fees," which it understood petitioner to have "accept[ed]." *Ibid.* The court concluded that petitioner's stormwater assessments are taxes because, *inter alia*, they are "designed to generate revenue to pay for a governmental project" rather than being fees for "service[s] provided to a particular landowner." *Id.* at 11.

c. The court of appeals also affirmed the judgment in favor of the federal respondents. Pet. App. 11-12. The court held that Section 1323 is inapplicable for several reasons. It concluded that "a tax is not a reasonable service charge"; that Section 1323 "makes no reference to tribal lands"; that the federal government is merely the holder of legal title to (and not the occupant of) tribal trust lands; and that the government's "status as trustee * * * is designed to preserve tribal sovereignty, not to make the federal government pay" debts associated with tribal property. *Id.* at 12.

ARGUMENT

With respect to the first question presented, the court of appeals correctly held that the CWA's waiver of federal sovereign immunity in 33 U.S.C. 1323(a) does not authorize petitioner to impose its stormwater assessments on lands held in trust for Indian tribes.

That decision does not conflict with any decision of this Court or of another court of appeals. With respect to the second question presented, petitioner contends (Pet. 23) that 25 U.S.C. 465 "is unconstitutional" to the extent that the court of appeals' reasoning would permit lands taken into trust for tribes to be treated as "Indian Country" that is removed from state jurisdiction for purposes other than taxation. Petitioner's constitutional concerns are without merit and pertain to scenarios that are beyond the scope of the judgment in this case. In any event, this case would be a poor vehicle for addressing either of the questions presented in the petition because petitioner does not challenge the court of appeals' alternative holding that petitioner's stormwater assessments are not "reasonable service charges" within the meaning of 33 U.S.C. 1323(a). The petition should be denied.

1. With respect to the first question presented, petitioner contends (Pet. i, 11-12, 18, 33, 38) that Section 313 of the CWA, 33 U.S.C. 1323, requires the United States to pay local stormwater assessments imposed on tribal trust lands because such lands are property over which the United States has jurisdiction. The court of appeals correctly rejected that contention.

a. As its title indicates, Section 1323 applies to "Federal facilities pollution control." 33 U.S.C. 1323. Although petitioner emphasizes that Section 1323 "applies to all property over which the United States has jurisdiction," Pet. 20, it overreaches by implying that Section 1323 waives "*any* immunity . . . under *any* law or rule of law," Pet. 18; see Pet. i. Petitioner's quotation elides an important qualification in the statutory text, which does not waive "any immunity," but rather "any immunity of *such* [i.e., *federal-government*]

agencies, officers, agents, or employees." 33 U.S.C. 1323(a) (emphasis added).

Accordingly, the statute, which waives federal sovereign immunity, does not purport to waive tribal sovereign immunity. In addition, the statute requires the federal government to comply with state and local pollution-control requirements only "to the same extent as any *nongovernmental* entity." 33 U.S.C. 1323(a) (emphasis added). That language does not suggest that the federal government assumes the obligations applicable to an Indian tribe, which is not a "nongovernmental" entity. Nor does petitioner identify any legislative history indicating that Section 1323 was intended to apply to lands held in trust for tribes, as opposed to pollution associated with more classically federal facilities. See *EPA* v. *California*, 426 U.S. 200, 215-216 nn.28-29 (1976) (discussing the legislative history of Section 1323 as enacted in 1972).

Those textual anomalies indicate, at the very least, that Section 1323 does not *unambiguously* authorize municipal stormwater assessments on lands that the United States holds in trust for Indian tribes. That is sufficient to trigger the settled interpretive principle that a waiver of sovereign immunity "must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (internal citations, quotation marks, and modifications omitted); see *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012) ("For the same reason that we refuse to enforce a waiver that is not unambiguously expressed in the statute, we also construe any ambiguities in the scope of a waiver in favor of the sovereign."). Indeed, this Court has construed Section 1323 in two cases, neither

of which petitioner acknowledges. In both decisions, the Court invoked that principle of narrow construction and rejected the application of state provisions. See *U.S. Dep't of Energy* v. *Ohio*, 503 U.S. 607, 627 (1992) (holding, in light of "[t]the rule of narrow construction," that Section 1323(a) did not waive the federal government's immunity from a State's punitive, as opposed to coercive, civil fines); *EPA* v. *California*, 426 U.S. at 212-217, 227 (concluding that Section 1323 did not "subject federal facilities to state NPDES permit requirements with the requisite degree of clarity").

b. The court of appeals' conclusion that Section 1323 does not require the federal government to pay local assessments purportedly applicable to tribal trust lands is consistent with general principles of federal Indian law and with the overall structure of the CWA.

The statutorily authorized process by which the United States takes land into trust for an Indian tribe, see 25 U.S.C. 465, "provides the proper avenue for [a tribe] to reestablish sovereign authority over territory" that it previously held and lost. *City of Sherrill* v. *Oneida Indian Nation of N.Y.*, 544 U.S. 197, 221 (2005). Unless Congress has provided otherwise, state and local governments therefore generally lack authority to impose environmental, zoning, and other land-use regulations on tribal trust lands.[1] Any departure from

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[1] See, *e.g.*, *Connecticut ex rel. Blumenthal* v. *U.S. Dep't of Interior*, 228 F.3d 82, 85-86 (2d Cir. 2000) ("Land held in trust is generally not subject to (1) state or local taxation; (2) local zoning and regulatory requirements; or (3) state criminal and civil jurisdiction, unless the tribe consents to such jurisdiction.") (citations omitted), cert. denied, 532 U.S. 1007 (2001); *Chase* v. *McMasters*, 573 F.2d 1011, 1018 (8th Cir.) ("When Congress provided in [the IRA] for the legal condition in which land acquired for Indians would be held, it doubtless intended and understood that the

that established norm must be express. See, *e.g.*, 25 U.S.C. 1725(a) (providing that laws of the State of Maine are applicable to certain tribes, their members, and their lands, including "lands or natural resources held in trust by the United States" for a tribe or Indian).[2]

With respect to the question presented here, neither Section 1323's provision about federal facilities, nor the CWA more generally, suggests that Congress intended to subject tribal trust lands to state and local regulations and assessments implementing the NPDES program. Although the CWA's substantive requirements and prohibitions generally apply to Indian tribes and to Indians on their lands, see 33 U.S.C. 1311(a), 1362(4)

Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference as well as free from taxation."), cert. denied, 439 U.S. 965 (1978); *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 666 (9th Cir. 1975) (holding that county lacked jurisdiction to enforce zoning ordinances or building codes on tribal trust lands), cert. denied, 429 U.S. 1038 (1977); see also 25 C.F.R. 1.4 (prohibiting certain forms of state and local regulation of trust lands that are leased).

[2] Petitioner invokes (Pet. 18-20) a provision of the Quiet Title Act, 28 U.S.C. 2409a, which applies to "real property in which the United States claims an interest" but "does not apply to trust or restricted Indian lands." Petitioner does not explain the basis for its belief that the Quiet Title Act's reference to property in which the United States "claims an interest" would be "no more expansive" (Pet. 21) than Section 1323's reference to property over which the government has "jurisdiction." In any event, as discussed above, Section 1323(a) contains other phrases that prevent it from being a clear statement of Congress's intention to make the United States liable for local assessments on tribal trust lands, and it does not contain language that Congress has used in other statutes to authorize the assertion of state regulatory authority on such lands.

and (5); Pet. App. 8, States generally do not administer their NPDES programs on Indian lands. See p. 3, *supra*. Wisconsin in particular has "disclaimed authority to regulate stormwater runoff on Indian lands" (which is why petitioner sought a permit from the EPA rather than from the State). Pet. App. 9. The CWA also contemplates that a tribe can be treated "as a State for purposes of" various CWA provisions, including the NPDES program. 33 U.S.C. 1342, 1377(e).[3]

c. Petitioner contends (Pet. 12) that the decision below conflicts with decisions of the Ninth and Tenth Circuits. No such conflict exists.

In petitioner's view, the court of appeals based its construction of Section 1323 entirely on the fact that the statute "contains no mention of Indians." Pet. 12 (quoting Pet. App. 8).[4] The Ninth Circuit, in supposed

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[3] Petitioner suggests (Pet. 36-37, 40) that the court of appeals erroneously believed that the Tribe here has been found eligible by the EPA to administer a NPDES permit program. The court, however, made no such determination. It simply indicated, correctly, that "Indian governments * * * can be delegated regulatory authority under the [CWA]," which indicates that tribes are "not subservient to" States. Pet. App. 8. Contrary to petitioner's further suggestion (Pet. 38), Article IV, Section 3, Clause 1 of the Constitution, which addresses how new States may be formed, does not prevent Congress from directing that a tribe shall be treated as if it were a State for *statutory* purposes under the CWA. Cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (noting that Congress's description of Amtrak as a private, nongovernmental entity "is assuredly dispositive of Amtrak's status * * * for purposes of matters that are within Congress's control—for example, whether it is subject to statutes that impose obligations or confer powers on Government entities").

[4] In fact, the decision below relied on more than Section 1323's failure to mention Indians. It also discussed, *inter alia*, various provisions addressing the treatment of Indians under the CWA;

contrast, has concluded, in petitioner's paraphrase, that "silence in a federal law of general applicability" does not preclude that law from "appl[ying] equally to Indian tribes." Pet. 13 (discussing *Donovan* v. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985)).

In *Donovan*, the Ninth Circuit reasoned that "a general statute in terms applying to all persons includes Indians and their property interests." 751 F.2d at 1115 (quoting *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 116 (1970)); see *Solis* v. *Matheson*, 563 F.3d 425, 430 (9th Cir. 2009) ("Indians and their tribes are equally subject to statutes of general applicability, just as any other United States citizen."). That reasoning is inapposite here. As noted above, many provisions of the CWA do apply to Indian tribes, and the statute is not silent about such applications. See pp. 12-13, *supra*. Section 1323, however, is not a general statute, and it does not apply to all persons. It is instead a very specific provision that applies only to "each officer, agent, or employee" of "[e]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government." 33 U.S.C. 1323(a).

For the same reason, there is no conflict with the Tenth Circuit's decision in *Phillips Petroleum Co.* v. *EPA*, 803 F.2d 545 (1986), which addressed the applicability of the Safe Drinking Water Act to Indian lands given the inclusion of tribes in the Act's definition of "municipality" and other specific examples of legislative intent. *Id.* at 552-556. The Tenth Circuit's conclu-

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the fact that "the federal government is merely the holder of legal title to the 148 parcels in question, not the occupant"; and the purpose of the federal government's "status as trustee * * * of tribal lands." Pet. App. 7-9, 12.

sion in another case—*i.e.*, that the federal government's approval of a lease on Indian lands constitutes major federal action for which an environmental impact statement was required under 42 U.S.C. 4332(2)(c)—rested on the National Environmental Policy Act more broadly, its purposes, and its legislative history. See *Davis* v. *Morton*, 469 F.2d 593, 596-598 (1972). That context-specific evaluation of Congress's apparent intentions sheds no light on what the Tenth Circuit would say about the applicability of Section 1323 and state-law regulation to tribal trust lands.[5]

In the absence of any conflict in the courts of appeals about whether Section 1323(a) authorizes state and local regulation of tribal trust lands, further review of the first question presented is not warranted.

2. With respect to the second question presented, petitioner contends (Pet. 23) that 25 U.S.C. 465 "is unconstitutional" to the extent that the court of appeals' reasoning would permit lands taken into trust to

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[5] Petitioner suggests (Pet. 17) that the decision below conflicts with a district court brief that the United States filed in another case in 2011. But that brief merely recognized that States and local governments may retain some authority over tribal trust lands in certain circumstances. United States' Mem. of Law in Support of Mot. for Summ. J., at 23, *Central N.Y. Fair Bus. Ass'n* v. *Salazar*, No. 6:08-cv-0660 (N.D.N.Y. Nov. 15, 2011). In the passage quoted by petitioner, the brief cited *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 331-332 (1983), which explained that "under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and that in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members" (footnotes omitted). Neither that brief nor this Court's decision in *Mescalero Apache Tribe* addressed Section 1323 or other regulation under the CWA. Nor does petitioner present any argument based on *Mescalero Apache Tribe*.

be treated as "Indian Country" that is removed from state jurisdiction for purposes other than taxation. It is true that States are not stripped of *all* jurisdiction when the federal government takes land into trust. See, *e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353, 361 (2001); *Mescalero Apache Tribe*, 462 U.S. at 331-332. But the inferences that petitioner would draw from certain phrases in the court of appeals' opinion do not justify this Court's review.

a. In petitioner's view (Pet. 23-24), the Constitution draws a line between "[r]estoring land to an Indian tribe and making it tax exempt," which is permissible, and removing such land "from state jurisdiction" more generally, which is unconstitutional because "[s]uch a power could destroy the [S]tates." Petitioner's concern appears to be based on the court of appeals' observation that, "when the federal government acquires land in trust for Indians, the consequence is to 'reestablish [the Indians'] sovereign authority' over that land." Pet. App. 4 (quoting *City of Sherrill*, 544 U.S. at 221). In light of that statement, petitioner contends (Pet. 27) that the court of appeals "made the decision this Court did not have to reach in *City of Sherrill*," "[n]amely, whether state and local justifiable expectations can be ignored when land is placed into trust under [25 U.S.C.] 465." Contrary to petitioner's overbroad characterization of the court of appeals' holding, that court said nothing about what factors should or do play a role in determining whether land should be taken into trust. That alone should preclude this Court from granting review, as it is a court of "final review and not first view." *Holland* v. *Florida*, 560 U.S. 631, 654 (2010) (citation and internal quotation marks omitted).

b. Petitioner also expresses concern (Pet. 20-22) that the court of appeals "made several sweeping statements about tribal sovereignty" that could "embolden[]" tribes to "claim jurisdiction even over fee land" (*i.e.*, land that has not been taken into trust by the United States). Even if petitioner's predictions were well founded, this Court "reviews only judgments, not statements in opinions." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2039 (2011). The judgment below (like petitioner's own third-party complaint against the United States and the Tribe's complaint against petitioner) pertains only to lands that have in fact been taken into trust. See Pet. App. 2, 12 ("the 148 parcels in question" are tribal trust lands); D. Ct. Doc. 15, at 11 (July 12, 2010) (petitioner's allegation that "[t]he U.S. is the title holder of the land at issue"); D. Ct. Doc. 1, at 1 (Tribe's description of this action as pertaining to "the status of lands held in trust for the Tribe by the United States"). This case would therefore be an inappropriate vehicle for addressing regulatory authority over fee lands.

There is also no merit to petitioner's assertion (Pet. 22) that the decision below is "contrary to this Court's holding in *City of Sherrill*." Unlike *City of Sherrill*, this case does not involve fee lands that were simply purchased on the open market by an Indian tribe. 544 U.S. at 202. Instead, it involves former fee lands that were taken into trust by the United States, pursuant to the statutory mechanism that the Court in *City of Sherrill* described as "the proper avenue" for a tribe "seek[ing] to regain sovereign control over territory." 544 U.S. at 220-221. Emphasizing the 200-year history of the State's exercise of jurisdiction over the lands in question, the Court in *City of Sherrill* also invoked "the

doctrines of laches, acquiescence, and impossibility," stressing the disruption of longstanding practices that divestment of state regulatory authority would have entailed. *Id.* at 221. Petitioner, by contrast, first sought to impose its stormwater assessment on tribal trust lands in 2007, *after* the lands had already been taken into trust.

c. In any event, petitioner's concern (Pet. 27) that "state and local justifiable expectations can be ignored when land is placed into trust" is belied by *City of Sherrill* itself, which explained that "[t]he regulations implementing [25 U.S.C.] 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." 544 U.S. at 220-221; see generally 25 C.F.R. 151.10. Indeed, with respect to the same tribe whose trust lands are at issue in this case, the Interior Board of Indian Appeals has recognized that a decision to take land into trust for the Tribe must address, *inter alia*, petitioner's objections arising from its loss of tax revenue and from potential "land use and jurisdictional issues," including those associated with "storm water management." *Village of Hobart, Wisc.* v. *Acting Midwest Regional Director, Bureau of Indian Affairs*, 57 IBIA 4, 29-30 (2013) (vacating in relevant part decisions that would take certain parcels into trust for the Tribe, and remanding for further consideration).

d. There is also no basis for petitioner's suggestion (Pet. 23) that the implications of extending the court of appeals' reasoning beyond the context of tax exemptions would raise the constitutional concerns identified in *Hawaii* v. *Office of Hawaiian Affairs*, 556 U.S. 163 (2009). In that case, the Court held that a joint resolution of Congress did not "strip[] the State of Hawaii of

its authority to alienate its sovereign territory." *Id.* at 166. The property at issue had been granted in "absolute fee" to the State itself on its admission into the Union. *Id.* at 172. The Court stated that "grave constitutional concerns" would be raised if the congressional resolution "purported to 'cloud' Hawaii's title to its sovereign lands." *Id.* at 176. Here, by contrast, there is no suggestion that the parcels at issue were owned by the State of Wisconsin (or by petitioner) before they were taken into trust, or that the trust decision otherwise deprived the State of any ability to dispose of land it possessed in absolute fee.

Petitioner's position on the second question presented accordingly lacks merit. Nor does petitioner suggest that there is any conflict in the courts of appeals with respect to its proper resolution. Further review of that question therefore is not warranted.

3. Even if the questions presented by the petition otherwise warranted this Court's review, this case would be a particularly poor vehicle for addressing them, because petitioner does not challenge the court of appeals' alternative holding that petitioner's stormwater assessments are not "reasonable service charges" under Section 1323.

After holding that Section 1323 does not authorize petitioner to impose stormwater assessments on tribal trust lands, the court of appeals identified "another reason [petitioner] must lose." Pet. App. 10. Because 25 U.S.C. 465 provides that tribal trust lands "shall be exempt from State and local taxation," the court considered whether petitioner's assessments are properly deemed a tax or a fee. Pet. App. 10-11. In finding that "the stormwater runoff assessment is a tax rather than a fee," the court applied its standard for distinguishing

between a tax and a fee for purposes of the Tax Injunction Act—a standard the court stated petitioner had "accept[ed]." *Ibid.* Similarly with respect to the United States' own liability, in addition to finding that Section 1323 does not require the United States to "pay tribal debts," the court of appeals concluded that "a tax is not a reasonable service charge" for purposes of that provision. *Id.* at 12.

In this Court, petitioner does not contend that the court of appeals applied the wrong standard in determining that the assessments are not "reasonable service charges" for purposes of Section 1323. Petitioner does not even contend that the court misapplied the correct standard—which would, in any event, provide no justification for this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").[6] But if this Court takes as given the court of appeals' alternative holding that petitioner's assess-

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[6] Petitioner suggests (Pet. 30-31) that Congress amended Section 1323 in 2011 to clarify that "reasonable services charges" include taxes. But the petition does not discuss the criteria set forth in the description of "reasonable service charges" in 33 U.S.C. 1323(c)(1), much less apply them to the facts of this case. In any event, the brief mention of Section 1323(c)(1) in the text of the petition does not suffice to expand the questions presented to encompass whether petitioner's assessments constitute "reasonable service charges." See *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) ("[T]he fact that petitioner discussed this issue in the text of his petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the question presented for our review.") (brackets omitted) (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993) (per curiam)).

ments would not constitute reasonable service charges under Section 1323, the court of appeals' judgment would stand, even if the Court were persuaded that Section 1323 applies to tribal trust lands. That fact further counsels against granting review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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