No. 08-554

In the Supreme Court of the United States

MICHIGAN GAMBLING OPPOSITION, PETITIONER

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, is an unconstitutional delegation of legislative authority to the Secretary of the Interior.

2. Whether the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, authorizes the Secretary of the Interior to take land into trust on behalf of an Indian tribe that was not a recognized Indian tribe under federal jurisdiction on June 18, 1934, the date on which that statute was enacted.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 525 F.3d 23. The opinion of the district court (Pet. App. 36-84) is reported at 477 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2008. A petition for rehearing was denied on July 25, 2008 (Pet. App. 85-86). The petition for a writ of certiorari was filed on October 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the Indian Reorganization Act (IRA), 25 U.S.C. 461 *et seq.*, Congress authorized the Secretary of the

Interior (Secretary) to acquire "any interest in lands, water rights, or surface rights to lands, within or without existing reservations, * * * for the purpose of providing land for Indians." 25 U.S.C. 465. The Department of the Interior exercises that authority in accordance with regulations found at 25 C.F.R. Pt. 151. In 2005, the Assistant Secretary for Indian Affairs approved the application of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Band) to have the Department of the Interior acquire 147 acres of land in Michigan in trust for the Band's benefit. Pet. App. 2.

Petitioner filed suit alleging that the Secretary's decision violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, and that Section 5 of the IRA, 25 U.S.C. 465, is unconstitutional. Pet. App. 6-7. The district court rejected petitioner's claims, *id.* at 36-84, and the court of appeals affirmed, *id.* at 1-35.

1. The Band descends from a band of Pottawatomi Indians, led by Chief Match-E-Be-Nash-She-Wish, who resided near present-day Kalamazoo, Michigan. Pet. App. 3. Under the terms of the 1821 Treaty of Chicago, signed by Chief Match-E-Be-Nash-She-Wish, the Band secured a three-square-mile tract of land at Kalamazoo. C.A. App. 1790, 1795. But the Band became landless in the middle of the Nineteenth Century. Pet. App. 3.

As part of its efforts to avoid being forcibly removed west of the Mississippi, the Band placed itself under the protection of a church mission in central Michigan. Pet. App. 3. In 1894, the mission land was divided into parcels and deeded to descendants of the original Band, but within a few years most of that land was lost through tax foreclosures. *Ibid.*; C.A. App. 1746-1747. Despite the

loss of the land, a majority of the Band's members remained in the vicinity of the church mission. Pet. App. 3.

In 1998, the Band secured federal acknowledgment pursuant to the Department of the Interior's regulations (25 C.F.R. Pt. 83). See 63 Fed. Reg. 56,936 (1998); *In re Acknowledgment of Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 33 I.B.I.A. 291 (1999). In 2001, the Band submitted an application to the Secretary to acquire 147 acres of land in trust for the Band pursuant to the Secretary's authority in Section 5 of the IRA, 25 U.S.C. 465. Pet. App. 40. That property, known as the Bradley property, is located in an area of Michigan to which the Band has long historical, geographical, and cultural ties. *Id.* at 4; C.A. App. 1611. The Band applied for the land to be acquired in trust so that it could conduct gaming on the property to generate revenue necessary to promote tribal economic development, self-sufficiency, and a strong tribal government capable of providing its members with sorely needed social and educational programs. Pet. App. 4; C.A. App. 1742; see also *id.* at 1614. In 2005, the Assistant Secretary issued a decision to take the land into trust. Pet. App. 2.

2. Petitioner filed this lawsuit, asserting four claims challenging the Secretary's decision to take the land into trust: a NEPA claim, two IGRA claims, and a claim that the IRA provision granting the Secretary authority to acquire land in trust was an unconstitutional delegation of legislative authority. Pet. App. 6-7.

The district court rejected each of petitioner's claims. Pet. App. 36-84. The court held that the Secretary's approval of the Band's application to have the land taken in trust complied with NEPA and IGRA. *Id.*

at 44-75. The court also rejected petitioner's nondelegation claim. *Id.* at 79-83.

3. Petitioner appealed, raising only the NEPA and nondelegation claims, Pet. App. 2-3, and abandoning the IGRA claims, *id.* at 7. More than four months after the court of appeals heard oral argument, and over two and a half years after petitioner had filed its complaint initiating this suit, petitioner moved in the court of appeals to supplement the issues on appeal so that it could raise for the first time the question "[w]hether the Indian Reorganization Act of 1934 empowers the Secretary to take land into trust for the [Band], when the Band was not recognized and under federal jurisdiction in 1934." 07-5092 Mot. of Pl.-Appellant to Supp. Issues for Review 6 (D.C. Cir. filed Mar. 7, 2008). Petitioner filed that motion shortly after this Court, in a different case, granted review of a similar question and did not grant review of the nondelegation question. *Carcieri* v. *Kempthorne*, 128 S. Ct. 1443 (2008) (No. 07-524) (argued Nov. 3, 2008). The court of appeals denied petitioner's motion to supplement the issues on appeal. 07-5092 Order (D.C. Cir. Mar. 19, 2008).

The court of appeals subsequently affirmed the district court's judgment. Pet. App. 1-35. As relevant here, the court rejected petitioner's claim that Section 5 of the IRA is an unconstitutional delegation of legislative authority to the Secretary. *Id.* at 12-20. The court explained that the delegation in Section 5 is "no broader than other statutes" that this Court has upheld in the face of nondelegation challenges. *Id.* at 14. The court held that "the statute provides an intelligible principle": the Secretary is "to exercise his powers in order to further economic development and self-governance among the Tribes." *Id.* at 15.

Judge Brown dissented in part. Pet. App. 20-35. She would have held that Section 5 is an unconstitutional delegation of legislative authority. *Ibid*.

4. Petitioner sought rehearing en banc on the nondelegation claim as well as the claim that it had belatedly attempted to raise concerning the Band's status in 1934. The court of appeals ordered a response only on the nondelegation issue. 07-5092 Order (D.C. Cir. May 20, 2008). The court denied rehearing en banc, with three judges noting that they would have granted en banc review. Pet. App. 85-86.[1]

ARGUMENT

1. Petitioner argues (Pet. 14-28) that this Court should grant certiorari to consider whether Section 5 of the IRA, 25 U.S.C. 465, is an unconstitutional delegation of Congress's legislative power. The Court has repeatedly denied certiorari in other cases raising that question, and it again declined review earlier this year. See *Carcieri* v. *Kempthorne*, 128 S. Ct. 1443 (2008) (limiting grant of certiorari to "Questions 1 and 2 presented by the petition"). The result here should be the same.

a. Petitioner's claim (Pet. 19) that there is a "[c]ircuit [c]onflict" is incorrect. Each of the courts of appeals that has considered a constitutional challenge to Section 5 on nondelegation grounds—whether before or

[1] In the district court, petitioner obtained a stay of the Secretary's trust acquisition based on its NEPA and IGRA claims. Petitioner did not assert its nondelegation claim as a basis for a stay. C.A. App. 368 n.2. On petitioner's motion, and over the opposition of the federal respondents and the Band, the court of appeals stayed its mandate pending disposition of this petition for certiorari, thereby maintaining the district court's stay. Pet. App. 87-88. The Chief Justice denied the Band's application to vacate the court of appeals' stay of its mandate. *Id.* at 89.

after this Court's decision in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001)—has upheld the statute's constitutionality. *Carcieri* v. *Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (en banc), cert. granted on other grounds, 128 S. Ct. 1443 (2008); *South Dakota* v. *United States Dep't of the Interior*, 423 F.3d 790, 797 (8th Cir. 2005), cert. denied, 549 U.S. 813 (2006); *Shivwits Band of Paiute Indians* v. *Utah*, 428 F.3d 966, 972-974 (10th Cir. 2005), cert. denied, 549 U.S. 809 (2006); *United States* v. *Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000). Although petitioner relies (Pet. 4, 19-21) on the Eighth Circuit's decision in *South Dakota* v. *United States Department of the Interior*, 69 F.3d 878 (1995), that decision was vacated and remanded by this Court, 519 U.S. 919 (1996). A decision that has been vacated by this Court has no "precedential effect," *O'Connor* v. *Donaldson*, 422 U.S. 563, 578 n.12 (1975), and thus cannot establish a circuit conflict. Moreover, it is well settled in the Eighth Circuit that Section 5 of the IRA does not violate the nondelegation doctrine. *South Dakota* v. *United States Dep't of the Interior*, 487 F.3d 548, 551 (8th Cir. 2007); *South Dakota*, 423 F.3d at 797. There is thus no conflict for this Court to resolve.[2]

b. Nor is the issue one otherwise warranting the Court's review despite the unanimity of the courts of appeals in sustaining Section 5. The statutory provision that petitioner seeks to have invalidated was enacted more than 70 years ago, and since that time it has be-

[2] Petitioner also claims (Pet. 21) that the supposed "conflict" includes the Eleventh Circuit's decision in *Florida Department of Business Regulation* v. *United States Department of the Interior*, 768 F.2d 1248 (1985), cert. denied, 475 U.S. 1011 (1986). But, as petitioner concedes (Pet. 21), that decision did not "resolv[e] a nondelegation challenge."

come embedded in the practical, day-to-day administration of Indian affairs. For seven decades, Section 5 of the IRA has provided the primary mechanism for the federal government to restore and replace tribal lands. Congress has, moreover, often revisited and amended the IRA, even after the Secretary's promulgation of land-acquisition regulations, without expressing any disagreement with the Secretary's understanding of the statutory policies that are to guide his determinations.[3]

Similarly, this Court has considered Section 5 on numerous occasions and has explained that, along with its implementing regulations, it "provides the proper avenue" for a tribe "to reestablish sovereign authority over [lost] territory." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 220-221 (2005); see also *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) (noting that, in Section 5, Congress granted the Secretary "authority to place land in trust, to be held by the Federal Government for the benefit of the Indians," and "explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt"); *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 155-159 (1973).

At root, petitioner's argument represents a disagreement with longstanding principles embodied in the IRA and numerous other statutes that govern Indian lands

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[3] See Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709; Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b)-(c), 104 Stat. 207; Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, § 101, 102 Stat. 2938; see also Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* (extending the reach of Section 465).

and Indian self-determination. Against that background, Congress made an explicit policy determination in Section 5 of the IRA to allow the Secretary to take into trust land "within or without existing reservations" and that "such lands or rights shall be exempt from State and local taxation." 25 U.S.C. 465.[4]

c. The court of appeals' decision is, moreover, correct. It is well settled that "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991). It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)); accord *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)) (Congress

[4] Petitioner contends (Pet. 25, 28) that the power to exempt lands from State jurisdiction raises special concerns. But petitioner ignores the fact that the regulations promulgated by the Secretary to implement Section 5 address the very concerns petitioner raises about effects on state sovereignty. See *City of Sherrill*, 544 U.S. at 220-221 ("The regulations implementing [Section 5] are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory."). The regulations direct the Bureau of Indian Affairs, when deciding whether to approve a request that it accept land into trust, to consider any "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. 151.10(f). Similarly, when the land to be acquired is held in unrestricted fee status, the BIA must consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," 25 C.F.R. 151.10(e), as well as whether the BIA "is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status," 25 C.F.R. 151.10(g).

must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.").

Petitioner criticizes (Pet. 16-18) the court of appeals for relying on "statutory background and context." But this Court has repeatedly made clear that a statute's "purpose," "factual background," and "context," are properly considered in determining whether a statute establishes intelligible principles. *American Power & Light Co.*, 329 U.S. at 104; see *Lichter* v. *United States*, 334 U.S. 742, 785 (1948) (same); *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933) ("context"); *Fahey* v. *Mallonee*, 332 U.S. 245, 253 (1947) ("the background of custom").

Section 5 of the IRA itself contains several express indications of Congress's policy. It states that the purpose of the Secretary's land-acquisition authority is "providing land for Indians." 25 U.S.C. 465. It provides a limited amount of federal funds to be used for the purpose and expressly forbids the use of those funds to acquire land for Navajo Indians outside of their established reservation boundaries. *Ibid.* Finally, it specifies that lands taken into trust "shall be exempt from State and local taxation." *Ibid.*

Further statutory principles for implementing Section 5 are furnished by the purposes and structure of the IRA as a whole. As this Court has previously explained, Congress enacted the IRA to promote Indian self-government and economic self-sufficiency. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 152-154 ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R. Rep. No.

1804, 73d Cong., 2d Sess. 6 (1934)); accord *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (the IRA reflects Congress's "overriding goal of encouraging 'tribal self-sufficiency and economic development'") (quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980)); *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). In service of that goal, Congress identified "conserv[ing] and develop[ing] Indian lands and resources" as one of the purposes of the IRA. Ch. 576, Pmbl., 48 Stat. 984. Congress was concerned, for example, with reversing the "disastrous" consequences of the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, which had eroded the land base of the affected tribes and weakened tribal organizations. *Hagen* v. *Utah*, 510 U.S. 399, 425 & n.5 (1994).

Accordingly, the IRA expressly repudiates the allotment policy, 25 U.S.C. 461, and contains several provisions designed to preserve, restore, consolidate, and expand the land base of tribes, as appropriate to further the IRA's overriding goals of tribal self-government and economic development. 25 U.S.C. 462, 463(a), 464, 465. Other provisions of the IRA likewise reflect Congress's policy of promoting the economic development and self-governance of Indian tribes. 25 U.S.C. 469, 470, 471, 472, 476, 477.

The Secretary's authority under Section 5 to acquire land in trust for Indian tribes and the protection of that property against taxation is intended to further the larger statutory purposes, for example, by ensuring that tribal lands are not lost by condemnation, alienation, encroachment, or tax defaults. See generally *City of Sherrill*, 544 U.S. at 220-221(recognizing that Section 5 serves as Congress's "mechanism for the acquisition of lands for tribal communities that takes account of the

interests of others with stakes in the area's governance and well-being" and "provides the proper avenue for * * * reestablish[ing] sovereign authority over territory" formerly held by an Indian tribe).

Moreover, as the court of appeals correctly observed, the IRA's legislative history "underscores its purpose of addressing economic and social challenges facing American Indians by promoting economic development." Pet. App. 17 (citing H.R. Rep. No. 1804, *supra*, at 6); S. Rep. No. 1080, 73d Cong., 2d Sess. 1-2 (1934); cf. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 152-154 (quoting same House Report); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 335 n.17 (same).

The purposes of the IRA as reflected in its text, structure, context, and history provide the intelligible principles that guide the Secretary in the exercise of his authority under Section 5. The Secretary may acquire land "for the purpose of providing land for Indians," within the intent of Section 5, when the acquisition would advance tribal economic development, assist tribal self-governance, and restore the ancestral tribal land base. Indeed, this Court has often identified those policies as the congressional purposes that guide the Secretary's application of the IRA. See *Mancari*, 417 U.S. at 542 ("The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 152; see also *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 168 (1980) (Brennan, J., concurring in part and dissenting in part) (noting that the IRA reflects both the "policy of encouraging tribal self-government" and the

"complementary interest in stimulating Indian economic and commercial development").

2. Petitioner's belated effort to raise the question pending before this Court in *Carcieri* should be rejected. Petitioner waived that claim. It did not raise that claim at any point in the administrative proceedings or before the district court (see Pet. 29), and petitioner did not attempt to raise it in the court of appeals until months after the completion of briefing and oral argument. The court of appeals plainly did not abuse its discretion in denying petitioner's motion to add that issue on appeal (see page 4, *supra*), and the court of appeals' ruling on that procedural issue does not warrant review by this Court. Indeed, petitioner does not contend otherwise. Moreover, this Court generally does not itself consider an issue that was neither timely raised nor passed on by the lower courts. See, *e.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument because it "was inadequately preserved in the prior proceedings"); see also *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 280-281 (1993). There is no reason to depart from that rule here.[5]

Nor is there any reason to hold the petition pending this Court's decision in *Carcieri*. The *Carcieri* petitioners contend that, when tribal membership is the basis for status as an "Indian" under the IRA, the Secretary can take land into trust only for members of tribes that "were federally recognized and under federal jurisdiction in 1934." See, *e.g.*, Pet. Carcieri Br. at 13-14, *Carcieri*, *supra* (No. 07-526). Even assuming that that is

[5] Contrary to petitioner's contention (Pet. 29-33), there is no basis to excuse its failure to properly preserve the claim. By the time petitioner filed its complaint in this suit in 2005, the petitioners in *Carcieri* had been litigating their claim for almost five years.

the sole basis on which the Band could be covered by the IRA, the record here (which is not developed on this waived claim) suggests that the Band had a government-to-government relationship with the United States well before 1934, as evidenced by a number of treaties that the Band had entered into with the United States. 62 Fed. Reg. 38,113 (1997). And, as of 1934, the Bureau of Indian Affairs apparently continued to monitor and provide some services to members of the Band. See C.A. App. 1786, 1844-1845. Moreover, the Secretary has acknowledged the Band's status through the federal acknowledgment process, which noted the Band's existence as a "continuous community since the latest date of unambiguous previous Federal acknowledgment, 1870." 63 Fed. Reg. at 56,936; see 62 Fed. Reg. at 38,113.[6]

At a minimum, it is not the case that allowing petitioner to belatedly raise the *Carcieri* issue "will cause no inefficiency or delay." Pet. 34. If this Court were to set aside the Secretary's action in *Carcieri*, any remand in this case in light of the Court's disposition of *Carcieri* would in turn require a remand to the Department of the Interior to reopen the record to develop petitioner's belated claim on the merits. The Department would need to explore the law and facts about federal recognition of

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[6] Contrary to petitioner's suggestion (Pet. 7), the Secretary did not determine that the Band's federal recognition ceased in 1870. As stated in the Assistant Secretary's final determination of acknowledgment, 1870 was the date of the Band's final annuity payment under the 1855 Treaty of Detroit, 63 Fed. Reg. at 56,936, and that date was used solely to allow the Band to proceed under 25 C.F.R. 83.8 as it modifies the criteria of 25 C.F.R. 83.7(a)-(g). But the Assistant Secretary made no finding that federal recognition ceased in 1870. See 63 Fed. Reg. at 56,936; 62 Fed. Reg. at 38,113.

and jurisdiction over the Band, including *inter alia*, any treaties, statutes, administrative activities, or the like that involved federal oversight of the Band or its property in 1934.

In any event, as noted above, the court of appeals already has twice rejected petitioner's attempt to belatedly raise the question presented in *Carcieri*, first by refusing to allow petitioner to supplement the issues on appeal after oral argument, see 07-5092 Order (D.C. Cir. Mar. 19, 2008), and then by calling for a response to petitioner's en banc petition solely on the nondelegation claim and not on the claim raised in *Carcieri*, see 07-5092 Order (D.C. Cir. May 20, 2008). There is no reason to believe that the court of appeals would reconsider that finding of waiver if the case were remanded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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