No. 15-780

In the Supreme Court of the United States

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, ET AL., PETITIONERS

v.

JONODEV OSCEOLA CHAUDHURI, CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Seneca Nation Settlement Act of 1990 (SNSA), 25 U.S.C. 1774-1774h, provides that the Seneca Nation of Indians may use funds appropriated under the SNSA to acquire land in its aboriginal area or near its former reservation land in the State of New York. After a 30-day period to allow state and local governments to comment on the impact of removing such lands from the property tax rolls, and unless the Secretary of the Interior determines within 30 days thereafter that the lands should not be subject to a restriction by the United States against alienation under the Non-Intercourse Act, 25 U.S.C. 177, the lands "shall be subject to the provisions of [the Non-Intercourse Act] and shall be held in restricted fee status by the Seneca Nation." 25 U.S.C. 1774f(c). The question presented is:

Whether approximately nine acres of land in Buffalo, New York, which was acquired by the Seneca Nation in accordance with the SNSA, 25 U.S.C. 1774f(c), and which is held in restricted fee status under 25 U.S.C. 177, is Indian country subject to federal and tribal jurisdiction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 802 F.3d 267. The opinion of the court of appeals addresses three suits filed by petitioners in the district court. The order of the district court in the first suit, granting respondents' motion to dismiss in part and remanding to the National Indian Gaming Commission (NIGC) in part (Pet. App. 325a-392a), is reported at 471 F. Supp. 2d 295, as amended 2007 WL 1200473. The order of the district court in the second suit, vacating a decision of the NIGC (Pet. App. 164a-324a), is unreported but is available at 2008 WL 2746566. The order of the district court in the third suit, denying petitioners' motion for summary judgment and entering judgment in favor of respond-

ents (Pet. App. 49a-96a), is reported at 945 F. Supp. 2d 391.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2015. The petition for a writ of certiorari was filed on December 14, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Seneca Nation (the Tribe), a federally recognized Indian tribe, is one of the historic Six Nations of the Iroquois Confederacy, which at one time exercised dominion over nearly 35 million acres of land east of the Mississippi River, including most of what is now New York and Pennsylvania. Pet. App. 8a. By the end of the Revolutionary War, the Six Nations had lost most of their aboriginal lands to European settlers. *Ibid.* The aboriginal lands of the Seneca Nation centered in what is now western New York. S. Rep. No. 511, 101st Cong., 2d Sess. 4 (1990) (Senate Report). In 1794, the Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44, between the United States and the Six Nations recognized the right of the Seneca Nation to a portion of the Iroquois Confederacy's remaining lands, which included all of New York west of the Genesee River. *Ibid.*; Pet. App. 9a.

By the mid-nineteenth century, the Seneca Nation had lost most of the lands recognized in the Treaty of Canandaigua, leaving it with approximately 200,000 acres of reservation lands, including the Allegany Reservation in Cattaraugus County, New York. Pet. App. 10a. In 1875 and 1890, over the Tribe's vigorous objection, Congress renewed leases that the Tribe had entered into on the Allegany Reservation with non-

Indian farmers, railroad employees, and others. Senate Report 16. The leases, first extended for 12 years and then for 99 years, were executed with rates as low as $1 per year, with no escalation provision, and deprived the Tribe of nearly one-third of the reservation. *Id.* at 5. The City of Salamanca, New York, and the outlying villages, called "congressional villages," were founded in major part on those leases. *Ibid.*

The Seneca Nation Settlement Act of 1990 (SNSA), 25 U.S.C. 1774-1774h, was enacted to resolve disputes regarding the 99-year leases, which were scheduled to expire in 1991. Senate Report 1. The SNSA effectuated an agreement between the Tribe and the City of Salamanca and outlying villages providing for the negotiation of new leases. Pet. App. 12a; 25 U.S.C. 1774(b)(1). Congress appropriated $35 million, and the State agreed to pay $25 million, to the Tribe if it offered the new leases and relinquished all claims for rental payments under the 99-year leases. 25 U.S.C. 1774b, 1774d, and 1774e.

Recognizing that the forced 99-year leases "deprived [the Tribe] of the use of significant portions of the Allegany Reservation," a purpose of the SNSA was to allow the Tribe "to acquire lands to increase the land base of the Seneca Nation." Senate Report 5, 24. The SNSA allows the Tribe to use funds appropriated under the SNSA to acquire land located "within its aboriginal area in the State or situated within or near proximity to former reservation land." 25 U.S.C. 1774f(c). The SNSA provides that "[s]tate and local governments shall have a period of 30 days after notification by the Secretary [of the Interior (Secretary)] or the [Tribe] of acquisition of, or intent to acquire such lands to comment on the impact of the

removal of such lands from real property tax rolls of State political subdivisions." *Ibid.* After that 30-day comment period, "[u]nless the Secretary determines within 30 days * * * that such lands should not be subject to the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177), such lands shall be subject to the provisions of that Act and shall be held in restricted fee status by the [Tribe]." *Ibid.*

Section 177 is commonly known as the Non-Intercourse Act. By making lands purchased with funds appropriated under the SNSA subject to the Non-Intercourse Act at the Secretary's discretion, the SNSA makes the lands subject to a prohibition by the United States against later alienation unless approved by Congress. See *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 513 (1986).[1] By allowing the Tribe to hold the lands in "restricted fee status," the SNSA provides that the Nation will hold the acquired lands in the same manner as it holds its reservation lands. See *Huron Grp., Inc.* v. *Pataki*, 785 N.Y.S. 2d 827, 832 (N.Y. Sup. Ct. 2004) ("Because New York State was never solely Federal territory, the United States normally does not hold Indian lands in the State in trust for a Tribe; rather, such land may be held in restricted fee."); see also *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 204 n.2 (2005). In contrast to "trust" land, in which the United States holds legal title for beneficial use by Indians, "re-

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[1] The Non-Intercourse Act provides in relevant part: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. 177.

stricted fee" land is owned by Indians, subject to a restriction on alienation. Pet. App. 14a-15a. Congress's power over trust land and restricted fee land, however, "is the same." *Board of Cnty. Comm'rs of Creek Cnty.* v. *Seber*, 318 U.S. 705, 717 n.21 (1943); see *United States* v. *Bowling*, 256 U.S. 484, 487 (1921) ("As respects both [trust and restricted fee] allotments * * * the United States possesses a supervisory control over the land and may take appropriate measures to make sure that it inures to the sole use and benefit of the allottee and his heirs.").

b. In 1987, this Court held that California could not enforce its gaming laws against Indian tribes operating bingo and poker games on their reservations, when such games were not prohibited by state law. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 221. That decision left much Indian gaming unregulated by the States, but federal law did not provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. 2701(3). In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701-2721, "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). The National Indian Gaming Commission (NIGC), within the Department of the Interior (Interior), monitors gaming under IGRA. 25 U.S.C. 2704(a), 2706(b).

IGRA regulates gaming only on "Indian lands," which are defined as: "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual[,] or held

by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. 2703(4); 25 C.F.R. 502.12. Even on Indian lands as so defined, IGRA provides that gaming shall not be conducted "on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988," unless the land satisfies one of several exceptions. 25 U.S.C. 2719(a). One such exception permits gaming on lands "taken into trust as part of * * * a settlement of a land claim." 25 U.S.C. 2719(b)(1)(B).

IGRA divides gaming into three classes, each subject to different regulation. 25 U.S.C. 2703(6)-(8). Class III gaming, at issue here, includes banking card games; casino games such as roulette, craps, and keno; slot machines; horse racing; dog racing; jai alai; and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming must be: (1) authorized by a tribal ordinance that satisfies the requirements in 25 U.S.C. 2710(b) and is approved by the Chairman of the NIGC; (2) located in a State that permits such gaming; and (3) conducted in conformance with a compact between the Indian tribe and the State that is approved by the Secretary. 25 U.S.C. 2710(d)(1).

2. In August 2002, the Tribe and the State of New York executed a tribal-state compact for class III gaming. Pet. App. 341a. The compact authorizes the Tribe to conduct class III gaming at three sites—a selected site in the City of Niagara Falls, a site to be determined in the City of Buffalo, and on current Seneca Nation reservation land. *Ibid.* The compact reflects the understanding that the Niagara Falls and Buffalo sites would be purchased using SNSA funds.

Ibid. The compact went into effect after the Secretary took no action on it within a 45-day statutory period. *Id.* at 16a-17a; see 25 U.S.C. 2710(d)(8)(C) (providing that a tribal-state compact "shall be considered to have been approved by the Secretary" if the Secretary does not act within 45 days, "but only to the extent the compact is consistent with the provisions of [IGRA].").

In November 2002, the Tribe submitted a proposed class III gaming ordinance, which did not specify geographic sites where gaming would occur, to the NIGC Chairman for approval. Pet. App. 17a. The NIGC Chairman approved the ordinance, stating that it was "approved for gaming only on Indian lands, as defined in IGRA, over which the [Tribe] has jurisdiction." *Id.* at 346a.

In October 2005, the Tribe purchased approximately nine acres of land in Buffalo (the Buffalo Parcel) using SNSA funds. Pet. App. 17a. In November 2005, after the requisite 30-day period under the SNSA for comment by state and local governments had passed without comment, the Tribe submitted documentation to Interior demonstrating that it had complied with the requirements of the SNSA and explaining that it had acquired the Buffalo Parcel for class III gaming purposes. *Id.* at 18a. The Secretary took no action within the 30-day period provided in the SNSA for the Secretary to determine that lands purchased with SNSA funds should not be subject to the Non-Intercourse Act, and the Buffalo Parcel therefore assumed restricted fee status in December 2005 by operation of the SNSA. *Ibid.*; see 25 U.S.C. 1774f(c).

3. a. Petitioners are groups opposing gaming, legislators, and individual residents and owners of land in Buffalo. Pet. App. 18a. In January 2006, petitioners

filed the first of three district court actions that were resolved by the court of appeals' decision. *Ibid.* Petitioners contended, *inter alia*, that the NIGC Chairman acted arbitrarily and capriciously when he approved the gaming ordinance in 2002 without first determining that the property the Tribe intended to acquire for gaming purposes in Buffalo would qualify as "Indian lands." *Id.* at 377a. The district court concluded that the NIGC Chairman "has a duty to determine whether a tribe's proposed gaming will occur on Indian lands before affirmatively approving an ordinance." *Id.* at 381. The court vacated the NIGC Chairman's decision to approve the ordinance with respect to the Buffalo Parcel and remanded to the NIGC. *Id.* at 377a-388a. The court dismissed petitioners' claims challenging the Secretary's "Indian lands" determination because it was not a final agency action. *Id.* at 390a. Petitioners appealed the dismissal of the Secretary from the case, and that appeal was subsequently stayed.

b. The Tribe submitted an amended gaming ordinance to the NIGC that specifically identified the Buffalo Parcel. Pet. App. 19a. The NIGC Chairman approved the ordinance after concluding that the Buffalo Parcel constituted "Indian lands" for purposes of IGRA. *Ibid.* In his approval letter, the NIGC Chairman concluded that the Buffalo Parcel meets the definition of "Indian lands" in 25 U.S.C. 2703(4), and that it is exempt from the prohibition against gaming on land acquired after October 17, 1988, because it was acquired as part of the settlement of a land claim. Pet. App. 206a, 233a; see 25 U.S.C. 2719(a) and 2719(b)(1)(B).

In July 2007, petitioners filed suit challenging that decision. Pet. App. 19a-20a. The district court agreed with the NIGC Chairman that the Buffalo Parcel qualifies as "Indian lands." *Id.* at 233a-292a. The court further concluded, however, that IGRA's prohibition of gaming "on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988," 25 U.S.C. 2719(a), applied to the Buffalo Parcel and that the exception for land acquired as part of the settlement of a land claim did not apply. Pet. App. 293a-319a. The district court therefore granted petitioners' motion for summary judgment and vacated the NIGC Chairman's decision approving the ordinance. *Id.* at 323a. Both parties appealed, and the appeals were consolidated with petitioners' prior appeal and stayed. *Id.* at 20a.

c. In August 2008, new Interior Department regulations interpreting 25 U.S.C. 2719(a)—the prohibition of gaming "on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988"—took effect. Pet. App. 21a; see 25 C.F.R. 292.1-292.26. Those regulations interpret Section 2719(a) to apply only to lands held by the Secretary in trust and not to lands, like the Buffalo Parcel, held by a tribe in restricted fee. Pet. App. 20a-21a.

In October 2008, the Tribe submitted another amended gaming ordinance to the NIGC for approval. Pet. App. 21a. After asking Interior to explain its new regulations and receiving an opinion from the Solicitor of the Interior, the NIGC Chairman approved the ordinance. *Id.* at 21a-22a. The NIGC Chairman adopted Interior's position that restricted fee land is not subject to IGRA's prohibition of gaming on lands acquired after October 17, 1988. *Id.* at 22a-23a. In

March 2009, petitioners filed their third suit, which challenged that decision. *Id.* at 23a.

The district court upheld the Chairman's decision. Pet. App. 49a-96a. The court reaffirmed its earlier holding that the Buffalo Parcel constitutes "Indian lands." *Id.* at 67a-78a. The court further concluded that, under the plain text of IGRA, the prohibition against gaming on lands acquired after October 17, 1988, applies only to land held in trust by the Secretary, not to restricted fee land. *Id.* at 78a-90a. Because the Buffalo Parcel was not subject to that restriction, the court did not need to address whether the land qualified for an exception to that restriction as land acquired as part of the settlement of a land claim. *Id.* at 93a-95a. Plaintiffs appealed, and all of the appeals were consolidated. *Id.* at 24a.

4. The court of appeals affirmed the district court's judgment in the third suit and dismissed the other appeals as moot. Pet. App. 1a-48a.

a. The court of appeals first explained that "IGRA requires that any tribe seeking to conduct gaming on land must have jurisdiction over that land." Pet. App. 27a (citing 25 U.S.C. 2710(b)(2) and (d)(1)(A)). The court concluded that the Tribe does have jurisdiction over the Buffalo Parcel. *Id.* at 27a-41a. The court noted that in *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) (*Venetie*), this Court applied the statutory definition of "Indian country" in 18 U.S.C. 1151 to determine whether a tribe had jurisdiction over a parcel of land. Pet. App. 29a (citing *Venetie*, 522 U.S. at 527). Section 1511 defines "Indian country" to include Indian reservation land, Indian allotments, and "dependent Indian communities." 18 U.S.C. 1151. Because the Buffalo Parcel is neither

reservation land nor an allotment, the court considered whether it qualifies as a "dependent Indian community." Pet. App. 29a. The court explained that, as described in *Venetie*, the term "dependent Indian community" refers to a limited category of land that: (1) has been set aside by the federal government for the use of Indians as Indian land; and (2) is under federal superintendence. *Id.* at 30a (citing *Venetie*, 522 U.S. at 527); see *id.* at 30a-33a. The court concluded that the Buffalo Parcel satisfies both requirements. *Id.* at 34a-41a.

With respect to the set-aside requirement, the court explained that Congress had limited the lands that the Tribe could purchase using SNSA funds to lands within the Tribe's aboriginal area in the State or within or in near proximity to former reservation land, which "reflect[ed] its intent to enable the [tribe] to restore some of its lost land base in proximity to land historically occupied by the tribe." Pet. App. 34a (citing 25 U.S.C. 1774f(c)). The court further explained that Congress had "designated these lands for tribal use by directing that the SNSA funds used to purchase them be 'managed, invested, and used by the [Seneca] Nation to further specific objectives of the Nation and its members.'" *Ibid.* (citing 25 U.S.C. 1774d(b)(1) and 1774f(c)). Furthermore, the court continued, by creating a mechanism for lands purchased with SNSA funds to attain restricted fee status, Congress ensured that the Tribe would maintain ownership of the lands. *Ibid.* (citing 25 U.S.C. 177).

With respect to the federal-superintendence requirement, the court of appeals concluded that "Congress demonstrated its intent for the Buffalo Parcel to be subject to federal superintendence by providing for

federal control in both the process by which the Parcel attained restricted fee status and in limiting the alienability of this land once it attained restricted fee status." Pet. App. 35a. The court explained that "lands purchased using SNSA funds * * * attain[] restricted fee status only if the Secretary declines to exercise his or her power to prevent the land from" being "subject to the Non-Intercourse Act." *Ibid.* Accordingly, by allowing lands to pass into restricted fee status, the Secretary takes responsibility for ensuring that the Tribe does not dispose of the land without the government's consent. *Ibid.* By creating that process in the SNSA, "Congress demonstrated its intent to 'actively control[] the lands in question, effectively acting as a guardian for the [Seneca Nation]'—hallmarks of federal superintendence." *Id.* at 36a (quoting *Venetie*, 522 U.S. at 533).

The court of appeals further reasoned that "Congress's intent that the Buffalo Parcel be subject to the tribe's jurisdiction is * * * apparent from the similarities" between the SNSA, 25 U.S.C. 1774f(c), and Section 465 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 461-494. Pet. App. 36a. Section 465 of the IRA authorizes the Secretary to convert fee land owned by a tribe to trust status by accepting legal title to the land in the name of the United States in trust for the tribe. See *id.* at 15a-16a. The court noted that the "SNSA's restricted fee mechanism bears analogous marks of federal set-aside and federal superintendence" to the IRA and its regulations, which "demonstrate[s] congressional intent for the SNSA to have similar jurisdictional effects." *Id.* at 38a. The court recognized a "long history of courts and Congress treating lands held in trust and lands

held in restricted fee identically for jurisdictional purposes." *Id.* at 40a n.15.

b. Against this background, the court of appeals concluded that the Buffalo Parcel qualifies as "Indian lands" as defined in IGRA. Pet. App. 41a-42a. IGRA defines non-reservation "Indian lands" as "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual[,] or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. 2703(4). The parties agreed that the Buffalo Parcel is held in restricted fee, Pet. App. 41a, and the court concluded that the NIGC Chairman had properly concluded that the Tribe exercised governmental power over the parcel by "policing the land with its own Marshal's Office, fencing the land, posting signs stating that the Buffalo Parcel is subject to the Seneca Nation's jurisdiction, and enacting ordinances and resolutions applying Seneca law to th[e] land," *id.* at 42a.

c. Finally, the court of appeals rejected petitioners' argument that the Buffalo Parcel is not gaming-eligible based on IGRA's prohibition of gaming on Indian lands acquired after October 17, 1988. Pet. App. 42a-47a. The court explained that IGRA prohibits gaming "on lands acquired *by the Secretary in trust* for the benefit of an Indian tribe after [October 17, 1988]." *Id.* at 43a (quoting 25 U.S.C. 2719(a)). "The plain text" of the prohibition "therefore refers only to trust lands acquired by the Secretary, not to lands held in restricted fee by a tribe." *Ibid.* Accordingly, the court concluded that the Secretary and the NIGC Chairman did not act arbitrarily or capricious-

ly, abuse their discretion, or act in violation of law in determining that the Buffalo Parcel is eligible for class III gaming under IGRA, and in approving the Tribe's most recent gaming ordinance. *Id.* at 47a.

ARGUMENT

Petitioners contend that the court of appeals erred in concluding that the Buffalo Parcel is subject to tribal jurisdiction (Pet. 24-28); that the court of appeals should not have so held without a clear statement from Congress (Pet. 16-22) or in the face of what they assert is a serious constitutional question about Congress's authority to create Indian country (Pet. 22-24); and that the court of appeals' decision raises the prospect that any land acquired by an Indian tribe will attain Indian-country status by virtue of the Non-Intercourse Act (Pet. 32-33). Those contentions are without merit. The court of appeals correctly held that the Buffalo Parcel is subject to tribal jurisdiction, and petitioner does not contest that the parcel satisfies all other requirements to be eligible for class III gaming under IGRA. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. a. The court of appeals correctly concluded that the Tribe exercises governmental power over the Buffalo Parcel within the meaning of IGRA, 25 U.S.C. 2703(4).[2] The court properly applied the test set forth in *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1988), to determine whether the

[2] Petitioners do not challenge the court of appeals' holding that the prohibition of gaming on lands acquired after October 17, 1988, does not apply to restricted fee land. See 25 U.S.C. 2719(a).

Buffalo Parcel is "Indian country" over which the Tribe has jurisdiction by virtue of being a "dependent Indian community." Pet. App. 29a; 18 U.S.C. 1151. The Buffalo Parcel satisfies the criteria for a "dependent Indian community" because it has been set aside by the federal government for use by the Tribe, and it is under federal superintendence. See *Venetie*, 522 U.S. at 527.

Congress intended for certain lands acquired with SNSA funds to be set aside for the Tribe's use. Pet. App. 34a. Congress directed that SNSA funds be "managed, invested, and used by the Nation to further specific objectives of the Nation and its members." 15 U.S.C. 1774d(b)(1). SNSA funds used to purchase land are subject to that directive, and if land is purchased within certain areas—the Tribe's aboriginal area or within or in close proximity to former reservation land—the Secretary may decide to subject the land to a restriction on alienation. 25 U.S.C. 1774f(c). By creating a mechanism for such lands to attain restricted fee status, "Congress ensured that the tribe would maintain ownership of its * * * lands" and the SNSA therefore sets aside lands for use by the Tribe. Pet. App. 34a.

The Buffalo Parcel also became subject to federal superintendence when the Secretary decided that the land would be subject to a restriction on alienation. As the court of appeals explained (Pet. App. 35a), if the Secretary decides that SNSA lands should be held in restricted fee pursuant to 25 U.S.C. 1774f(c), "the Secretary decides to take responsibility" to prevent unfair, improvident, or improper disposition of the lands by the tribe, and to vacate any disposition made without the federal government's consent. Congress

thus demonstrated its intent to effectively act as a guardian for the Tribe, which is a "hallmark[] of federal superintendence." Pet. App. 36a.

Furthermore, the similarities between the SNSA and Section 5 of the IRA, 25 U.S.C. 465, which authorizes the Secretary to take land into trust for the benefit of Indian tribes, demonstrates Congress's intent that the Buffalo Parcel be subject to federal and tribal jurisdiction. See Pet. App. 38a-41a. The process for taking land into trust in the IRA is in some ways similar to the process for creating restricted fee land under the SNSA in that the Secretary must notify state and local governments having regulatory jurisdiction over the land of the request for the land to be taken into trust and permit 30 days for comment, see 25 C.F.R. 151.10, and the Secretary has additional time after the comment period to consider those comments and decide whether to take the land into trust, see 25 C.F.R. 151.11, 151.12. Petitioners do not dispute that trust lands are subject to tribal jurisdiction, and Congress was aware when it enacted the SNSA of the longstanding recognition by the courts, including this Court, and by Congress that trust lands and restricted fee lands have the same jurisdictional status. See Pet. App. 40a n.15.

Finally, legislative history supports the conclusion that Congress intended that land acquired pursuant to the SNSA's land-acquisition provisions would be subject to tribal jurisdiction. The congressional report describes at length the harm done to the Tribe by the forced leasing of its sovereign reservation lands, explains that the leases "deprived [the Tribe] of the use of significant portions of [its] Allegany Reservation," and declares that the purpose of the Act's land-

acquisition provision is to allow the Tribe "to acquire lands to *increase the land base* of the Seneca Nation." Senate Report 5, 24 (emphasis added).

2. a. Petitioners contend (Pet. 24-28) that the court of appeals erred in concluding that the Buffalo Parcel is a "dependent Indian community." They contend (Pet. 25-26) that Congress cannot be said to have "set aside" the Buffalo Parcel for the Tribe because the SNSA did not identify any specific land for the Tribe's use, but instead allocated funds for the Tribe to purchase land anywhere within its aboriginal area. But the fact that the SNSA did not identify a specific parcel of land that would be set aside for the Tribe cannot mean that land purchased with SNSA funds is not Indian country.

The IRA provides for the establishment of Indian country by taking land into trust for the benefit of Indian tribes without specifying particular parcels of land. 25 U.S.C. 465 ("The Secretary of the Interior is authorized * * * to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to land, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians."). Indeed, the IRA's scope is even broader than the SNSA because it does not require trust land to be located within a tribe's aboriginal area or within or near its former reservation land. Yet there is no dispute that land acquired pursuant to the IRA satisfies the set-aside requirement.

Petitioners further contend (Pet. 26-28) that the United States does not have sufficient control over the Buffalo Parcel through the restriction on alienation to

satisfy the federal-superintendence requirement. They contend (Pet. 27-28) that the degree of protection exercised by the United States over the Buffalo Parcel is comparable to the degree of protection exercised by the United States over the lands at issue in *Venetie*, which the court concluded was not a "dependent Indian community." In *Venetie*, however, Congress had revoked the tribe's reservation and "transferred reservation lands to private, state-chartered Native corporations, without any restraints on alienation or significant use restrictions," and Congress specifically stated that it intended to avoid a "lengthy wardship or trusteeship." 522 U.S. at 532-533 (quoting 43 U.S.C. 1601(b)).

The SNSA, in contrast, requires lands purchased with SNSA funds to be held by the Tribe itself and requires that the lands be used "to further specific objectives of the Nation and its members, * * * as determined by the Nation in accordance with the Constitution and laws of the Nation." 25 U.S.C. 1774d(b), 1774f(c). In that respect, the Buffalo Parcel is unlike the land in *Venetie* but is comparable to the land at issue in *United States* v. *Sandoval*, 231 U.S. 28 (1913), which was owned by the Pueblo Indians in fee simple but which had been subjected by Congress to a restriction on alienation, and which the Court held was a dependent Indian community. See *Venetie*, 522 U.S. at 528 (discussing *Sandoval*).[3]

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[3] Contrary to petitioners' contention (Pet. 28-31), the court of appeals' conclusion that the Buffalo Parcel qualifies as Indian country does not eliminate any authority the State may otherwise have over Indian country within the state. See, *e.g.*, 25 U.S.C. 232, 233.

b. Petitioners further contend (Pet. 16-22) that the SNSA could not have shifted sovereignty over the Buffalo Parcel from the State of New York to the Tribe without making its intent "unmistakably clear in the statutory language." Pet. 17. That contention is incorrect.

As an initial matter, it is worth noting that, although petitioners purportedly seek to protect the State of New York from the diminishment of its territorial sovereignty (see Pet. 22), the State does not appear to share petitioners' concerns. The State was a party to the settlement embodied in the SNSA. See 25 U.S.C. 1774b(b) and (c)(2), 1774d(c) (requiring the State to pay $25 million to the Tribe in exchange for the Tribe's relinquishment of all claims against the State). The State entered into a compact with the Tribe under IGRA that permits class III gaming on lands purchased with SNSA funds in Buffalo and Niagara Falls. See Pet. App. 341a. And the State is not a party to petitioners' suit.

Furthermore, no clear-statement rule applies here. Petitioners rely (Pet. 17-18) on cases involving statutes that purportedly abrogated States' Eleventh Amendment immunity from suit or otherwise "radically readjust[ed]" the balance of state and national authority. See *Bond* v. *United States*, 134 S. Ct. 2077, 2089 (2014) (citation and internal quotation marks omitted).[4] But Congress's creation of Indian country

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[4] Petitioners' reliance on *Hawaii* v. *Office of Hawaiian Affairs*, 556 U.S. 163 (2009), is unavailing. In that case, the Hawaii Supreme Court held that a 1993 congressional "Apology Resolution" stripped the State of Hawaii of its sovereign authority to sell lands granted to it by the United States at statehood. This Court reversed, reasoning that the resolution had used only "conciliatory or

is not an abrogation of Eleventh Amendment immunity or a radical readjustment of the balance between state and federal authority. It is a straightforward exercise of Congress's plenary authority to legislate in the field of Indian affairs. See *United States* v. *Lara*, 541 U.S. 193, 200 (2004). Petitioners identify no instance in which this Court has demanded a clear statement of intent before Congress may invoke its constitutional power over Indian affairs to subject land owned by or for the benefit of Indians to tribal jurisdiction.

In any event, Congress was "reasonably explicit," see *Bond*, 134 S. Ct. at 2089, in providing that lands acquired pursuant to the SNSA would be subject to tribal jurisdiction. See pp. 14-17, *supra*. The express application of the Non-Intercourse Act's restraint on alienation demonstrates Congress's intent that the United States exercise superintendence over the land. Petitioners do not dispute that trust lands are subject to tribal jurisdiction, nor do they dispute any of the case law holding that trust lands and restricted fee lands are treated the same for purposes of defining the bounds of Indian country. See Pet. App. 40a n.15 (citing cases). The mechanism created by Congress for SNSA lands to attain restricted-fee status thus is sufficient in itself to indicate Congress's intent for the

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precatory" terms that were not "the kind that Congress uses to create substantive rights." *Id.* at 173. The Court further refused to read the resolution's "whereas" clauses, which lack "operative effect," as having created a restriction on alienation. *Id.* at 175. As the district court explained, petitioners fail to reconcile that "conciliatory" language with the SNSA's "directive terms," which do "precisely what [petitioners] contend is required" by "express[ing] an intent to transfer sovereignty to the [Nation]." Pet. App. 70a.

land at issue to be subject to federal and tribal jurisdiction.

c. Petitioners contend (Pet. 22-24) that interpreting the SNSA to subject the acquired land to tribal jurisdiction "raises serious constitutional issues" because Congress lacks authority under the Indian Commerce Clause to establish Indian country on land previously under state jurisdiction. It is well established, however, that "the central function of the Indian Commerce Clause * * * is to provide Congress with plenary power to legislate in the field of Indian affairs." *Lara*, 541 U.S. at 200. The Court in *Venetie* expressly recognized Congress's constitutional power to create Indian country: "The federal set-aside requirement * * * reflects the fact that because Congress has plenary power over Indian affairs, see U.S. Const., Art. I, § 8, cl. 3, some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country." 522 U.S. at 531 n.6. Congress exercised that power in 1934 in the IRA, 25 U.S.C. 465, and it has exercised that authority in a host of other tribe-specific statutes. See, *e.g.*, 25 U.S.C. 1300*l*-2(a) and 1300*l*-6; 25 U.S.C. 1724(d); 25 U.S.C. 1747(a); 25 U.S.C. 1752(3) and 1754(b)(7); 25 U.S.C.1771c(a)(1)(A) and 1771d(a); 25 U.S.C. 1773c; 25 U.S.C. 1775c(a); 25 U.S.C. 1777d; 25 U.S.C. 1779d(b)(1)(A). Congress's exercise of its power to create Indian country in the SNSA is fully consistent with the Constitution, this Court's precedents, and settled congressional practice.

d. Finally, petitioners contend (Pet. 32-33) that, under the court of appeals' decision, any land acquired by a tribe will attain Indian country status by applica-

tion of the Non-Intercourse Act. That contention is misplaced. The court's decision rests on an analysis of congressional intent in enacting the SNSA. In a legal opinion binding on Interior, the Secretary has rejected the proposition that federal restrictions under the Non-Intercourse Act automatically attach to off-reservation parcels acquired by a tribe. Memorandum from David Longly Bernhardt, Solicitor, U.S. Dep't of Interior, to Sec'y, U.S. Dep't of Interior, M-37023, at 6 (Jan. 18, 2009), https://solicitor.doi.gov/opinions/M-37023.pdf. And this Court, while not directly addressing the scope of the Non-Intercourse Act, has rejected the proposition that a tribe—through the mere purchase of off-reservation land—may create or revive tribal sovereignty and jurisdiction over that land. See *Cass Cnty., Minn.* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 & n.5 (1998). The SNSA was designed to address the specific circumstances that led to its enactment, and the statute is "unique in creating a mechanism for newly acquired tribal lands to be held in restricted fee." Pet. App. 14a. Further review of the status of the Buffalo Parcel by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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