ORAL ARGUMENT NOT YET SCHEDULED

No. 09-5324

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID PATCHAK

Plaintiff – Appellant,

v.

KENNETH LEE SALAZAR, in his official capacity as Secretary of the United States Department of the Interior; LARRY ECHO HAWK, in his official capacity as Assistant Secretary of the United States Department of the Interior, Bureau of Indian Affairs,

Defendants – Appellees,

and

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Intervenor Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 1:08-CV-01331-RJL, HON. RICHARD J. LEON

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 Indian tribes and Alaskan Native villages. NCAI has no parent corporations, and no publicly held corporation owns ten percent or more of stock in NCAI.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND AMICI

Except for the National Congress of American Indians, proposed *amicus* before this Court, all parties, intervenors, and *amici* that have appeared to date before the district court and in this Court are listed in the Brief for Appellant David Patchak.

B. RULINGS UNDER REVIEW

The rulings under review appear in the Brief for Appellant David Patchak.

C. RELATED CASES

This case has not previously been before this Court or any other court. This Court has previously decided *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008), which involved the same trust acquisition and the same administrative decision as are at issue here.

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OTHER AUTHORITIES

GLOSSARY

TERM	ABBREVIATION
Appellant Patchak's Opening Brief	Opening Br.
Federal Acknowledgement Process	FAP
Grand Traverse Band of Ottawa and Chippewa Indians	GTB
Indian Reorganization Act of 1934	IRA
Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians	Band
Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians' Answer Brief	Band's Answer Br.
National Congress of American Indians	NCAI

INTRODUCTION AND STATEMENT OF INTEREST

The National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 Tribes and Alaskan Native villages. Since 1944, NCAI has advised tribal, federal, and state governments on a range of Indian issues, including the implementation of the Indian Reorganization Act of 1934 ("IRA") and the trust-acquisition authority principally at issue here. NCAI's members represent a cross-section of tribal governments. Great variations exist among them, including with respect to their land bases, economies, and histories. All of the member tribes, however, share a strong and common interest in opposing the attack made by Appellant Patchak on the authority of the Secretary of the Interior to acquire land in trust for the benefit of tribes that, pursuant to any proper construction of the term, were under federal jurisdiction in 1934.

NCAI fully agrees with the United States and the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Band") that the district court's decision should be affirmed on prudential standing grounds, and that the Quiet Title Act independently operates to bar Patchak's suit. In the event, however, that this Court takes up Patchak's invitation to address the merits of his lawsuit, NCAI submits this brief in order to elaborate upon the plain meaning of the term "under Federal

jurisdiction" as that term was understood in 1934, and upon the proper application of that term to tribes such as the Band.

STATUTES AND REGULATIONS

The relevant statutes and regulations are set forth in the Addendum.

SUMMARY OF ARGUMENT

The IRA provides that the Secretary of the Interior may take land into trust for "Indians," including for members of "any recognized Indian tribe" that is "now under Federal jurisdiction." 25 U.S.C. §§ 465, 479. In *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009), the Supreme Court held that the term "now" in the latter clause restricts the Secretary's authority to tribes that were under federal jurisdiction as of the date of the IRA's enactment. Because no argument was made in the case that the Narragansett Tribe, which was the trust beneficiary, was "under Federal jurisdiction" as of 1934, the Court did not elaborate on the meaning of that phrase. The Court did underscore, however, the cardinal canon of construction that where statutory language enjoyed a plain meaning at the time of its enactment, that plain meaning should govern its interpretation today.

In 1934, jurisdiction was commonly understood (as it still is) to refer to the power or authority of a sovereign entity. *United States v. Rodgers*, 466 U.S. 475, 479 (1984); WEBSTER'S NEW INTERNATIONAL DICTIONARY 1347 (2d ed. 1934). It was further widely understood, as again remains the case today, that under the

Constitution Congress enjoys plenary power over the Indian tribes found within the Nation's borders. *United States v. Lara*, 541 U.S. 193, 200-01 (2004); 14 RULING CASE LAW § 30, at 135 (1929 ed.). Consequently, those tribes were understood to fall under federal jurisdiction, subject to three important limitations on Congress's plenary power: (1) that power extended only to Indian communities, and not to groups arbitrarily denominated as Indians by the federal government, *United States v. Sandoval*, 231 U.S. 28, 47 (1913); (2) that power applied only to groups that had maintained their tribal relations, *United States v. Nice*, 241 U.S. 591, 600 (1916); and (3) that power could be terminated, but only by Congress itself and then only by express language, *Sandoval*, 231 U.S. at 46.

Patchak's contrary interpretation, that the term "under Federal jurisdiction" should be equated with "federally recognized tribes," Opening Br. at 23, cannot be squared with the plain language and structure of the IRA or with the overriding purposes of the statute. The IRA speaks of recognition and federal jurisdiction as two distinct concepts. *See* 25 U.S.C. § 479. Patchak, however, would conflate the two, in direct violation of basic rules of statutory interpretation. *See Carcieri*, 129 S.Ct. at 1066; *id.* at 1070 (Breyer, J., concurring). Patchak's theory, moreover, runs directly counter to *United States v. John*, 437 U.S. 634, 652-53 (1978), where the Supreme Court emphatically held that federal jurisdiction over a tribe is not dependent on continued executive branch recognition of that tribe. And his theory

would ill serve the fundamental purposes of the IRA, as recently described by this Court in *Michigan Gambling Opposition v. Kempthorne* ("*MichGO*"), 525 F.3d 23, 31 (D.C. Cir. 2008), and would lead instead to absurd results.

It is undisputed that the Band entered into a series of treaties with the United States in the eighteenth and nineteenth centuries. Moreover, when it was formally restored to federal recognition through the Federal Acknowledgment Process, the Band established that it had maintained continuous tribal relations since that time, and that Congress had never terminated federal jurisdiction over it. Accordingly, the Band clearly remained under federal jurisdiction in 1934, and the Secretary properly exercised his powers under the IRA with respect to it.

ARGUMENT

I. The Majority Opinion in *Carcieri* Does Not Address the Meaning of "Under Federal Jurisdiction" in the IRA but Does Identify the Necessary Tools for Interpreting that Term

The *Carcieri* litigation arose out of an application by the Narragansett Tribe to have land taken into trust on its behalf by the United States. *Carcieri*, 129 S.Ct. at 1062. The Secretary had approved the request under the powers granted him by Section 5 of the IRA, 25 U.S.C. § 465, which provides the Secretary the authority "to acquire . . . any interest in lands . . . for the purpose of providing land for Indians." *Carcieri*, 129 S.Ct. at 1062. Section 19 of the IRA, in turn, defines "the term 'Indian' as used in this Act . . . [to] include all persons of Indian descent who

are members of any recognized Indian tribe now under Federal jurisdiction . . . ." 25 U.S.C. § 479.[1]

The Governor of Rhode Island and others challenged the trust acquisition as exceeding the Secretary's statutory authority. After the First Circuit rejected their argument, the Supreme Court granted certiorari in order "to interpret the statutory phrase 'now under Federal jurisdiction' in § 479." 129 S.Ct. at 1061. It did not address the meaning of a "recognized Indian tribe" as that term is used in the statute.

The Court separated its inquiry into two parts: it first examined the meaning of the term "now," and it then turned to the phrase "under Federal jurisdiction." The manner in which the Court addressed each aspect of the inquiry highlights the tools this Court should use to resolve the present case in the event that it reaches the merits of Patchak's arguments.

A. This Court Should Apply the Unambiguous Terms of the IRA

In determining the meaning of "now," the Supreme Court began and ended its inquiry by asking "whether the statutory text is plain and unambiguous." *Id.* at

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[1] Section 19 further defines "Indian" to include "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." 25 U.S.C. § 479. Neither of these categories is at issue in this case.

1063. In order to answer that question, the Court looked first to see whether there existed an "ordinary meaning of the word 'now,' as understood when the IRA was enacted." *Id.* at 1064.

The Court accordingly examined dictionaries published contemporaneously with the IRA, including WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934), which defined "now" to mean "[a]t the present time." *See Carcieri*, 129 S.Ct. at 1064. The Court next noted that the definitions in these dictionaries were "consistent with interpretations given to the word 'now' by [the] Court, both before and after passage of the IRA, with respect to its use in other statutes." *Id.* The Court further found that the dictionary and case law interpretation of "now" was consistent with "the natural reading of the word within the context of the IRA." *Id.* Because these various tools of statutory interpretation uniformly suggested that "now" plainly would have been understood in 1934 to refer to the date of the IRA's enactment, the Court held "that the term 'now under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Id.* at 1068.[2]

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[2] In reaching this conclusion, the Court nowhere suggested that this temporal limitation applies to the phrase "recognized Indian tribe" as it appears in section 479 (nor, as noted above, did the Court address the substantive meaning of that term). "The statute, after all, imposes no time limit upon recognition. *See* 25 U.S.C. § 479 ('The term "Indian" . . . shall include all persons of Indian descent

B. The *Carcieri* Court Did Not Address the Meaning of "Under Federal Jurisdiction"

Having determined the plain meaning of "now," the Court turned to the concept of being "under Federal jurisdiction." However, the Court did not define the latter term. Instead, it observed that "[n]one of the parties or *amici*, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934." *Id.* It emphasized that the petition for certiorari asserted that the Tribe was not under federal jurisdiction in 1934 and that "[t]he respondents' brief in opposition declined to contest this assertion." *Id.* "[T]hat alone," the Court declared, "is reason to accept this as fact for purposes of our decision in this case." *Id.* Accordingly, while the Court stated that "the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted," *id.* at 1061, it neither elaborated on that statement nor engaged in any substantive discussion as to what it meant to be under federal jurisdiction in 1934.

Several of the separate opinions highlight the majority opinion's silence regarding the concept of federal jurisdiction. Justice Breyer concurred in the majority opinion's interpretation of the term "now" but wrote separately to flesh out the meaning of federal jurisdiction. *Id.* at 1069 (Breyer, J., concurring).

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who are members of *any recognized* Indian tribe now under Federal jurisdiction . . .' (emphasis added))." *Id.* at 1070 (Breyer, J., concurring).

Justices Souter and Ginsberg further observed that "[t]he very notion of jurisdiction as a distinct statutory condition was ignored in this litigation." *Id.* at 1071 (Souter, J., concurring in part and dissenting in part). The proper construction of the term "under Federal jurisdiction" hence remains an open question for this Court should it decide to address the substance of Patchak's arguments.

II. A Tribe Was "Under Federal Jurisdiction" in 1934 If It Was Subject to Congress's Constitutional Authority Over Indian Tribes

While the Supreme Court did not engage in a substantive analysis of what the IRA Congress intended by the term "under Federal jurisdiction," it did provide clear guidance as to the path the inquiry should take. That path leads inexorably to the conclusion that a tribe was under federal jurisdiction in 1934 if it remained subject to Congress's plenary authority—rooted in the Constitution—over Indian tribes.

1. The basic premise driving *Carcieri*'s analysis of the IRA's language is that where "the statutory text is plain and unambiguous . . . [it must be applied] according to its terms." *Carcieri*, 129 S.Ct. at 1063-64. In such circumstances,

> [a] court should always turn first to one, cardinal canon before all others . . . courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last.

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (stating that the clear meaning of the text "is the end of the matter").

Patchak makes no attempt to employ the tools of textual interpretation identified by the *Carcieri* Court to determine whether the concept of federal jurisdiction had a plain meaning in 1934. Instead, he baldly asserts that "'[u]nder federal jurisdiction' is most sensibly defined as federally recognized," Opening Br. at 23, and that "even if 'under federal jurisdiction' in 1934 means something less than federal recognition, at a bare minimum it must require some formal relationship with the federal government in 1934." *Id.* at 24. However, the instruments of statutory construction utilized by the *Carcieri* Court (and relied on by the Supreme Court and this Court in countless other decisions) lead to a very different conclusion.

The first step the *Carcieri* Court took in determining that "now" had a plain meaning in 1934 was to look at contemporary dictionaries. *Carcieri*, 129 S.Ct at 1064; *see also District of Columbia v. Heller*, 128 S.Ct. 2783, 2791 (2008) (using contemporary dictionaries to interpret the term "arms" in the Second Amendment); *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 874 (1999) (utilizing contemporary dictionaries to determine the meaning of the term "coal" in statutes passed in 1909 and 1910); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995)

(using contemporary dictionaries to define meaning of terms in the Securities Acts). The Court principally relied on WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934). *Carcieri*, 129 S.Ct. at 1064. That same dictionary, like others from the time period, establishes that "jurisdiction" also had a commonly understood meaning as it was used in the IRA.

After providing an initial construction specific to the judiciary, Webster's defined "jurisdiction" in the following manner:

> Jurisdiction –
>
> > 2. *Authority of a sovereign power to govern or legislate; power or right to exercise authority; control.*
> >
> > . . . .
> >
> > *Syn. - JURISDICTION, AUTHORITY are often interchangeable . . . .*

WEBSTER'S NEW INTERNATIONAL DICTIONARY 1347 (2d ed. 1934) (emphasis added). Other dictionaries from the time likewise defined "jurisdiction" to refer to the power or authority of a sovereign entity. *See, e.g.*, THE NEW CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 888 (1927) (defining "jurisdiction" in part as "power or authority in general"). And that definition remains constant to this day. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1227 (2002) (defining "jurisdiction" in part as "2: authority of a sovereign power to govern or legislate: power or right to exercise authority . . . SYN see POWER").

The *Carcieri* Court next examined judicial decisions interpreting "now." *Carcieri*, 129 S.Ct. at 1064; *see also Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 489 (D.C. Cir. 2007) (looking to dictionaries and prior case law defining the term "other"). Here, the Supreme Court has already construed the ordinary meaning of "jurisdiction" in 1934, and it has done so in a manner fully consistent with its dictionary definition. In *United States v. Rodgers*, the Court interpreted the term as it appears in amendments to the federal criminal code that were enacted *on the same day* as the IRA. 466 U.S. at 478 (discussing Act of June 18, 1934, 48 Stat. 996). The Court, noting that the statute before it (like the IRA) did not define "jurisdiction," looked to dictionary definitions to discern its ordinary meaning and had little difficulty concluding that the term meant authority or power:

> "Jurisdiction" is not defined in the statute. We therefore start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. . . . The most natural, nontechnical reading of the statutory language is that it covers all matters confided to the authority of an agency or department. Thus, Webster's Third New International Dictionary 1227 (1976) broadly defines "jurisdiction" as, among other things, "the limits or territory within which any particular power may be exercised: sphere of authority." A department or agency has jurisdiction, in this sense, when it has the power to exercise authority in a particular situation.

Id. at 479 (internal citation and quotation marks omitted). The *Rodgers* Court's definition of "jurisdiction," focusing as it does on the term as passed by the same Congress that passed the IRA (and on the same day), is entitled to dispositive weight here.

In 1934, then, "jurisdiction" was commonly understood as referring to the "power" or "authority" of a sovereign entity. Accordingly, to be "under Federal jurisdiction" meant to be subject to the power or authority of the federal government—to paraphrase the *Rodgers* Court, the federal government had "jurisdiction, in this sense, when it [had] the power to exercise authority in a particular situation." *Id.*

2. It has been a bedrock principle of federal Indian law since the Constitution's Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, was substituted for the ambiguous provisions of the Articles of Confederation that Congress enjoys plenary authority over the Indian tribes found within this country's borders. "The courts have recognized that Congress has 'plenary and exclusive authority' over Indian affairs." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.02[1], at 398 (2005 ed.).

As the Supreme Court recently reaffirmed in *United States v. Lara*, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" 541 U.S. at 200 (citations omitted). *Lara* explained that Congress's plenary authority over the tribes is grounded in various constitutional provisions, including the Indian Commerce Clause and the Treaty Clause, U.S. CONST. art. II, § 2, cl. 2, as well as in "the Constitution's adoption of preconstitutional powers necessarily

inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'" *Lara*, 541 U.S. at 200-01 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936)). Congress has expressed this same understanding regarding the breadth and source of its powers over Indian affairs. *See, e.g.*, 25 U.S.C. § 1901 ("[T]hrough [the Indian Commerce Clause] and other constitutional authority, Congress has plenary power over Indian affairs"); 25 U.S.C. § 4101 ("[T]he Constitution of the United States invests the Congress with plenary power over the field of Indian affairs.").

The principle that Indian tribes are subject to the plenary and exclusive authority of Congress had been firmly established by the time of the IRA. Under the heading "Government of Indians—Federal Jurisdiction," the 1929 edition of a widely read treatise from that era stated that "plenary authority has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." 14 RULING CASE LAW § 30, at 135 (1929 ed.) (citing, *e.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Tiger v. W. Inv. Co.*, 221 U.S. 286 (1911)).

In sum, "jurisdiction" was well understood in 1934 to mean "the power to exercise authority in a particular situation," *Rodgers*, 466 U.S. at 479, and Congress was well understood to possess plenary and exclusive jurisdiction over Indian tribes. That Congress indeed understood this plenary power to constitute

jurisdiction over the tribes follows not only from the common understanding of the term at the time, but also from contemporaneous language used by Congress to describe its various other powers under the Commerce Clause as jurisdictional. For example, the Federal Anti-Racketeering Act of 1934 was enacted (again on the same day as the IRA) in exercise of Congress's Commerce Clause powers. The Act explicitly equated those powers with jurisdiction, defining the term "trade or commerce" to encompass "all . . . trade or commerce over which the United States has *constitutional jurisdiction*." Act of June 18, 1934, ch. 569, 48 Stat. 979, 979 (emphasis added). Similarly, in amending the Federal Power Act, 16 U.S.C. § 791 *et seq*., in 1935, Congress made reference to "bodies of water over which *Congress has jurisdiction* under its authority to regulate commerce." *Id.* at § 797 (amended Aug. 26, 1935, c. 687, Title II, § 202, 49 Stat. 839) (emphasis added); *see also, e.g.*, 14 RULING CASE LAW § 34, at 138-39 (1929 ed.) (referring to Congress's powers with respect to Indian tribes as "*federal jurisdiction over the Indians*") (emphasis added).

3. Although Congress's jurisdiction over tribes was well understood at the time of the IRA to constitute a plenary and exclusive power, it was not understood to be a power without limitation. Federal authority over Indian tribes existed only when three conditions were met: first, Congress's power extended only to Indian communities, and not to groups arbitrarily denominated as Indians by the federal

government; second, Congress's power applied only to groups that had maintained their tribal relations, not to tribes that had existed at one time, but no longer existed in any form; and third, Congress's plenary power could be terminated, but only by Congress itself and then only by express language. These conditions continue to define the parameters of federal jurisdiction over Indian tribes today.

a. The first condition served to guard against the federal government's usurpation of power within our federalist system by arbitrarily declaring any group of individuals to be an Indian tribe. As the Supreme Court put it in the seminal case of *United States v. Sandoval*, "it is not meant . . . that Congress may bring a community or body of people within the range of [its plenary] power by arbitrarily calling them an Indian tribe." 231 U.S. at 46. But where a rational or non-arbitrary basis existed for viewing a group as a "distinctly Indian communit[y]," federal jurisdiction lay over that group. *Id.*

b. At the time of the IRA's enactment it was likewise well understood that federal jurisdiction endured only for so long as a tribe maintained "tribal relations." By 1934 there existed countless examples of tribes that, by virtue of forces including disease, dispossession and assimilation, had ceased to exist as tribal communities. As the Supreme Court had made clear, federal power did not endure in the face of the complete dissolution of tribal community bonds. *See, e.g.*, *Brader v. James*, 246 U.S. 88, 96 (1918) ("While the tribal relation existed the

national guardianship continued. . . ."); *Nice*, 241 U.S. at 600 ("The Constitution invest[s] Congress with power [over Indian tribes] . . . *during the continuance of the tribal relation*. . . .") (emphasis added).[3]

At the same time, the question whether "tribal relations" were maintained turned on the continued existence of a tribal community. As a historical matter, federal officials not infrequently made incorrect assertions that a particular tribe had ceased tribal relations because of a desire not to provide services or to otherwise interact with the tribe any further, or out of genuine confusion regarding the tribe's status. But federal malfeasance, confusion, or error could not operate, by themselves, to bring an end to federal jurisdiction. As Justice Breyer put it in *Carcieri*, "a tribe may have been 'under federal jurisdiction' in 1934 even though

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[3] As addressed in further detail below, the Federal Acknowledgment Process ("FAP"), a method by which the Department of the Interior presently accords formal federal recognition to tribes, includes the requirement that a petitioning group demonstrate that it has maintained a "substantially continuous tribal existence." *See* 25 C.F.R. §§ 83.3, 83.7(b). The Department has denied formal federal acknowledgment to numerous petitioners under the FAP for failure to meet that requirement. The Chinook Indian Tribe/Chinook Nation is one example. *See* 67 Fed. Reg. 46,204-01 (July 12, 2002). The Tribe demonstrated to Interior "unambiguous federal acknowledgment" by treaty negotiations with the United States as late as the 1850s. *Id*. at 46,205. But the Department did not restore recognition to the Chinook because it found as a factual matter that the Tribe had failed to demonstrate historical continuity. *See id*. at 46,205-06; *see also, e.g.*, 66 Fed. Reg. 49,966-01 (Oct. 1, 2001) (denying federal acknowledgment of Duwamish Tribal Organization for failure to meet tribal continuity requirements); 71 Fed. Reg. 57,995-01 (Oct. 2, 2006) (denying federal acknowledgment of Burt Lake Band of Ottawa and Chippewa Indians for same reason).

the federal government did not believe so at the time." 129 S.Ct. at 1069 (Breyer, J., concurring).[4]

c. It further was firmly established by 1934 that in the exercise of its plenary power Congress, but only Congress, could terminate federal jurisdiction over a tribe. As the *Sandoval* Court declared in 1913:

> "'[I]t may be taken as the settled doctrine of this court that *Congress*, in pursuance of the long-established policy of the government, *has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease*.' . . . [I]n respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States *are to be determined by Congress*. . . ."

231 U.S. at 46 (quoting *Tiger*, 221 U.S. at 315) (emphasis added). The Court again emphasized this "well-settled" doctrine in 1917. *See United States v. Waller*, 243 U.S. 452, 459 (1917) ("[C]ertain matters . . . are well-settled by the previous decisions of this court. The tribal Indians are wards of the government, and as such under its guardianship. *It rests with Congress to determine the time and extent of emancipation.*") (emphasis added); *see also Nice*, 241 U.S. at 598 ("Of course . . . the tribal relation may be dissolved and the national guardianship

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[4] In addition, a tribe could be divided into separate bands or communities by internal agreement or by act of the federal government. *See* III CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 724-25 (1913). Such changes did not by themselves remove the bands or communities from federal jurisdiction. *See Tully v. United States*, 32 Ct. Cl. 1, 5 (1896); KAPPLER, *supra*, at 724-25.

brought to an end; but *it rests with Congress to determine when and how this shall be done* . . . .") (emphasis added); 14 RULING CASE LAW § 34, at 138 (1929 ed.) (discussing the same under the heading "Termination of Federal Jurisdiction").

It likewise was accepted doctrine that Congress's intention to terminate federal jurisdiction over a tribe could not be inferred, but had to be stated in explicit terms, and that any conditions imposed by Congress on termination had to be complied with before termination was in fact accomplished.[5] Thus, the courts repeatedly held that Congressional actions such as the granting of citizenship to tribal members, or the provision that tribal land would be held in fee simple, could not be equated with the express Congressional intent necessary to relinquish federal jurisdiction over a tribe. *See, e.g., Bd. of Comm'rs of Creek County v. Seber*, 318 U.S. 705, 718 (1943) ("[I]t is settled that the grant of citizenship to the Indians is not inconsistent with their status as wards whose property is subject to the plenary control of the federal government.") (internal citations omitted);

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[5] The California Rancheria Act of 1957, for example, slated forty-one California Tribes for termination. *Duncan v. Andrus*, 517 F. Supp. 1, 3 (N.D. Cal. 1977). The Act, however, provided that the Secretary had to take various actions before termination would become effective. *Id.* Thirty-eight of the forty-one Tribes have been restored to full federal recognition by the federal courts after the courts concluded that the Tribes had never legally been terminated because the conditions precedent to termination had not been satisfied. *See, e.g., id.*. at 6; *Smith v. United States*, 515 F. Supp. 56, 60 (N.D. Cal. 1978). In many cases, the courts also awarded the Tribes money damages for the Secretary's breach of the fiduciary duties owed the Tribes. *See, e.g.*, *Smith*, 515 F. Supp. at 60.

Waller, 243 U.S. at 459 (same); *Sandoval*, 231 U.S. at 48 (same); 14 RULING CASE LAW § 34, at 139 (1929 ed.) ("[T]he mere grant of citizenship does not in itself terminate federal jurisdiction over the Indians, nor does the fact that a tribe, as in the case of the Pueblos, holds its lands by a fee simple title.") (footnotes omitted).

At the time of the IRA's passage, then, it was well-established that Congress enjoyed plenary authority—and hence that federal jurisdiction obtained—over any Indian tribe where three conditions were satisfied: (1) the group in question was in fact an Indian community; (2) the group had maintained tribal relations; and (3) Congress had not acted explicitly to terminate federal jurisdiction over the tribe.

4. Patchak offers an alternative interpretation of the IRA, one that is unmoored from its plain language and from the overriding purposes of the statute. He argues, with scant elaboration, that the term "under Federal jurisdiction" should be equated with "federally recognized tribes," Opening Br. at 23, or at the very least with tribes with "some formal relationship"—that he nowhere defines—"with the federal government in 1934." Opening Br. at 24. His arguments cannot be squared with the plain language and structure of Section 479 or with the overriding purposes of the IRA.

As noted above, Section 479 provides that the term "Indian" shall include "members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. This language speaks of recognition and federal jurisdiction as two

distinct concepts. Patchak, however, would conflate the two, in direct contravention of basic rules of statutory interpretation. 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007) ("[C]ourts do not construe different terms within a statute to embody the same meaning."). As the Supreme Court put it in *Carcieri*, "'[courts] are obliged to give effect, if possible, to every word Congress used.'" 129 S.Ct. at 1066 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Accordingly, the *Carcieri* Court nowhere equated the concepts of recognition and jurisdiction, and, as discussed above, in his concurrence Justice Breyer expressly distinguished between the two: "The statute, after all, imposes no time limit upon recognition." *Id.* at 1070 (Breyer, J., concurring).

Indeed, it follows directly from the well-established principles of federal Indian law canvassed in prior sections of this brief that official recognition of a tribe by the executive branch, and federal jurisdiction over that tribe, are not synonymous concepts. The history of this country is replete with examples of tribes that were brought under federal jurisdiction by an assertion of federal authority but subsequently had their formal recognition terminated by the executive branch. Unless Congress itself acted to terminate federal jurisdiction over such tribes (or unless they lost their tribal character), that jurisdiction

remained intact, for as discussed, it remains Congress's prerogative to determine whether and when to end federal jurisdiction over any particular tribal group.

Patchak's argument would require the overruling of Supreme Court precedent that is directly on point. In *United States v. John*, a unanimous Supreme Court emphatically held that federal jurisdiction over a tribe is not dependent on continued executive branch recognition of that tribe. 437 U.S. at 652-53. There, the State of Mississippi argued that because "the Federal Government long ago abandoned its supervisory authority [over the Mississippi Choctaws]," and because of "the *long lapse in the federal recognition of a tribal organization in Mississippi*, the power given Congress '[t]o regulate Commerce . . . with the Indian Tribes,' U.S. CONST. Art. 1, § 8, cl. 3, cannot provide a basis *for federal jurisdiction*." 437 U.S. at 652 (footnote omitted and emphasis added). The Court rejected this argument in no uncertain terms:

> [W]e do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them.

Id. at 652-53.

The federal courts of appeals have likewise demonstrated a clear understanding that federal recognition and federal jurisdiction are two distinct concepts. For example, in an important chapter in the historic *United States v.*

Washington litigation, the Ninth Circuit held that even though, at the time of its decision, two of the tribes involved in the litigation were "not recognized as organized tribes by the federal government," 520 F.2d 676, 692-93 (9th Cir. 1975), they maintained the treaty fishing rights reserved to them by the Treaty of Point Elliott—as such, they were not subject to the jurisdiction of the State of Washington in the exercise of those rights but remained under the protection of the federal government. The Ninth Circuit had little difficulty in reaching this conclusion because "rights under [a] treaty may be lost only by unequivocal action of Congress," and because "[e]vidence supported the court's findings that members of the two tribes are descendants of treaty signatories and have maintained tribal organizations." *Id.* at 693.

5. Patchak's interpretation would ill serve the fundamental purposes of the IRA and would lead instead to absurd results. This Court recently described the guiding principle behind Section 5 as the "provi[sion of] lands sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from . . . prior [federal policy]." *MichGO*, 525 F.3d at 31 (citations omitted) (second set of brackets in original). "Th[e statutory] context underscores section 5's role as part of a broad effort to promote economic development among American Indians, *with a special emphasis on preventing and recouping losses of land caused by previous federal policies*." *Id.* (emphasis added).

The tribes that often suffered the greatest loss of land and other deprivations as the result of prior federal policies were those from whom the executive branch wrongly withdrew federal recognition in the pre-IRA period. A stark example is provided by the Grand Traverse Band of Ottawa and Chippewa Indians ("GTB"), a Michigan tribe discussed by Justice Breyer in his concurring opinion in *Carcieri*. *See* 129 S.Ct. at 1070. The United States first engaged with GTB as a tribe no later than 1795. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for the W. Dist. of Michigan*, 369 F.3d 960, 961 (6th Cir. 2004). GTB entered into subsequent treaties with the United States in 1815, 1836, and 1855 and "maintained a government-to-government relationship with the United States from 1795 until 1872 . . . ." *Id.*

In 1872, however, the Secretary of the Interior ceased treating GTB as a federally recognized tribe. As the Sixth Circuit has held, the Secretary's action was based on a severely flawed reading of the Treaty of 1855, *id.* at 961 n.2, and ushered in a period of more than a century during which "the executive branch of the government *illegally* acted as if the Band's recognition had been terminated, as evidenced by its refusal to carry out any trust obligations." *Id*. at 968 (emphasis in original).[6]

[6] The Band makes reference to this history in its Answer Brief to this Court. *Id.* at 49 n.18. The Secretary's 1872 withdrawal of federal recognition from GTB was

The Secretary's termination of GTB's federal recognition had dire consequences for GTB. "Because the Department of Interior refused to recognize the Band as a political entity, the Band experienced increasing poverty, loss of land base and depletion of the resources of its community." *Id.* at 969 (internal quotation marks and citation omitted). Indeed, GTB possessed not a single acre of land when the Department restored it to federal recognition through the FAP in 1980.

Under Patchak's theory, the Secretary could not use Section 5 of the IRA to restore to GTB even a fraction of the land base lost as a result of the United States' own malfeasance. Patchak would rely on the wrongful withdrawal of federal recognition, which withdrawal contributed mightily to the dispossession of GTB's lands, as the basis for denying the Secretary any ability to redress that dispossession. While the irony of such a position is apparently lost on Patchak, it should not be lost on this Court. Patchak's theory simply cannot be squared with a statute intended to "'ameliorat[e] the damage resulting from . . . prior [federal policy].'" *MichGO,* 525 F.3d at 31 (brackets in original) (citations omitted).

By contrast, a plain language interpretation of the IRA leads to a far more sensible, and historically accurate, result. As the Department found in 1980, GTB

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distinct from the events of 1870 concerning the Band that the parties discuss in their briefs.

sustained its cohesiveness and identity as an Indian tribe during the difficult years following the Secretary's withdrawal of federal recognition. *See* 45 Fed. Reg. 19,321, 19,321 (Mar. 25, 1980). Congress, moreover, has never sought to terminate federal jurisdiction over the Tribe. Accordingly, as Justice Breyer stated in his *Carcieri* concurrence, GTB serves as a prime example of a tribe whose "later recognition reflects earlier 'Federal jurisdiction,'" 129 S.Ct. at 1070 (Breyer, J., concurring), and there exists no sound reason to deny the benefits of the IRA to it and other federally recognized tribes with respect to which Congress has never terminated federal jurisdiction.[7]

6. Even if there were any ambiguity about the meaning of the term "under Federal jurisdiction" as it appears in section 479, or about whether it should be conflated with the concept of recognition—and there is none—that ambiguity should be resolved against Patchak. "The Supreme Court has on numerous occasions noted that ambiguities in federal statutes are to be read liberally in favor

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[7] Justice Breyer's conclusion accords with historical findings made by Congress in 1994, in which Congress declared that GTB and two of its sister tribes (restored to federal recognition by Congress through the 1994 legislation) "filed for reorganization of their existing tribal governments in 1935 under the [IRA]. Federal agents who visited the Bands, including Commissioner of Indian Affairs, John Collier, *attested to the continued social and political existence of the Bands and concluded that the Bands were eligible for reorganization.*" 25 U.S.C. § 1300(k)(5) (emphasis added).

of the Indians." *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003) (citing *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). This "Indian canon of statutory construction requires the court to resolve any doubt in favor of the [tribe]" in question. *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 471 (D.C. Cir. 2007). Indeed, this canon enjoys sufficient strength in this Circuit that it trumps the doctrine of *Chevron* deference: "[E]ven where the ambiguous statute is one entrusted to an agency, [the court] give[s] the agency's interpretation 'careful consideration' but '[it does] not defer to it.'" *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 n. 8 (D.C. Cir. 1988)). "This departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but 'from principles of equitable obligations and normative rules of behavior,' applicable to the trust relationship between the United States and the Native American people." *Id.* (quoting *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991)).

7. Like GTB, the Band was signatory to a series of eighteenth and nineteenth century treaties with the United States that reasonably identified it as an Indian tribe. As with GTB, Congress has never acted to terminate federal

jurisdiction over the Band. And as with GTB, the Band maintained its tribal cohesion and was ultimately restored to federal recognition through the FAP. Band Answer Br. at 48-51. It comfortably fits, then, within the plain language meaning of a "recognized Indian tribe now under Federal jurisdiction," and as such is fully entitled to the benefits of the IRA.

8. Indeed, any Tribe that has successfully navigated the FAP (and there have only been sixteen of them, BUREAU OF INDIAN AFFAIRS, STATUS SUMMARY OF ACKNOWLEDGMENT CASES (AS OF SEPTEMBER 22, 2008) 1, 4, *available at* http://www.bia.gov/idc/groups/public/documents/text/idc-001217.pdf (last visited May 16, 2010)), presumptively satisfies the requirements for federal jurisdiction. The Interior Department promulgated the FAP regulations in 1978 in order to establish formal criteria for extending federal recognition to tribes and to replace the more informal, ad hoc process that had previously governed recognition decisions. *See* 43 Fed. Reg. 39,361, 39,361 (Sept. 5, 1978); GOVERNMENT ACCOUNTABILITY OFFICE, GAO-02-49, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 3-4 (2001), *available at* http://www.gao.gov/new.items/d0249.pdf (last visited May 16, 2010).

Under the FAP regulations, a tribe must meet seven mandatory criteria in order to receive federal recognition. 25 C.F.R. § 83.7. Those criteria include identification as a tribe since 1900, and continued tribal relations and political

authority over members since historic times. *Id.* In addition, the tribe must show that it has not been "the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship." 25 C.F.R. 83.7(g).[8] A tribe that satisfies these criteria will have demonstrated that an ample basis existed for its identification as an Indian tribe and that it has maintained tribal relations since historic times. *See* 25 C.F.R. § 83.3 (regulations are "intended to apply to groups that can establish a *substantially continuous tribal existence* and which have functioned as autonomous entities *throughout history until the present*.") (emphasis added). And it will further have demonstrated that Congress never acted to terminate federal jurisdiction over it.

The Match-E-Be-Nash-She-Wish Band, then, plainly falls within the ambit of the IRA.

CONCLUSION

For the foregoing reasons, *Amicus* NCAI respectfully suggests that, if this Court reaches the merits of Patchak's arguments, it should affirm the judgment of the district court because the Band was "under Federal jurisdiction" in 1934.

[8] If a tribe has been previously recognized by the federal government, it must instead satisfy the criteria under 25 C.F.R. § 83.8, which requires substantially similar information.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for *Amicus Curiae* National Congress of American Indians certifies that, in accordance Federal Rule of Appellate Procedure 32(a)(7)(B) - (C), and D.C. Circuit Rule 32(a)(2), this brief complies with the type-volume limitation, typeface requirements, and type style requirements because:

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DATED: May 17, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2010, I caused to be electronically filed the foregoing document with the D.C. Circuit Clerk of the Court, using its CM/ECF system. The electronic filing prompted automatic service to counsel of record in this case who have obtained CM/ECF passwords:

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