15-1688 (L)

15-1726 (Cons.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UPSTATE CITIZENS FOR EQUALITY, INC.; David Brown Vickers; Richard Tallcot; Scott Peterman; Daniel T. Warren; Town of Vernon, New York; Town of Verona, New York; Abraham Acee; Arthur Strife

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA, individually and as trustee of federally recognized Indian nations and tribes in the State of New York; United States Department of the Interior; Sally M.R. Jewell in her official capacity; Michael L. Connor in his official capacity; and Elizabeth J. Klein in her official capacity

Defendants-Appellees

On Appeal from the U.S. District Court for the Northern District of New York, Nos. 5:08-cv-00633 and 6:08-cv-00647 (Hon. Lawrence E. Kahn)

RESPONSE BRIEF OF THE FEDERAL DEFENDANTS-APPELLEES

JOHN C. CRUDEN
Assistant Attorney General

STEVEN MISKINIS
J. DAVID GUNTER II
U.S. Department of Justice
Environment & Natural Res. Div.
Washington, DC 20026
(202) 514-3785

JENNIFER TURNER
U.S. Department of the Interior
Office of the Solicitor

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GLOSSARY

BIA	Bureau of Indian Affairs, U.S. Department of the Interior
GSA	U.S. General Services Administration
IGRA	Indian Gaming Regulatory Act
ILCA	Indian Land Consolidation Act
IRA	Indian Reorganization Act
ROD	Record of Decision
UCE	Upstate Citizens for Equality

INTRODUCTION

There are two straightforward questions before the Court in this case. First, the court must resolve a constitutional question concerning Congress's authority to acquire land for the benefit of Indian tribes. Second, the Court must consider the statutory-interpretation question of whether the Secretary of the Interior may exercise that authority to benefit the Oneida Indian Nation (the "Oneida Nation" or "Tribe"). Both of these questions are answered using established precedent and the same tools of statutory interpretation that the Court applies in other cases.

Plaintiffs' opening briefs shroud these questions in the fog of 200 years of selected historical facts and academic interpretations. The background of the Oneida lands in New York and of federal Indian policy are not irrelevant to the issues here. But Plaintiffs improperly rewrite that history in an effort to narrow the scope of broadly stated constitutional and statutory powers. Congress, which has the constitutional authority to acquire land in trust for the benefit of Indians, provided for the Secretary to do so here. The Secretary, in exercising her discretion to take land into trust for the Oneida Nation – at the Supreme Court's suggestion – relied on reasonable interpretations of that authority that this Court must uphold. The district court therefore correctly rejected Plaintiffs' challenges, and this Court should do the same.

STATEMENT OF JURISDICTION

In their Complaints, Plaintiffs pled federal questions arising under the United States Constitution, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465, and the Administrative Procedure Act, 5 U.S.C. § 706. The district court had jurisdiction over those questions under 28 U.S.C. § 1331. The district court issued final orders in each case on March 26, 2015. Plaintiffs Upstate Citizens for Equality ("UCE") filed a timely notice of appeal in No. 5:08-00633 on May 20, 2015. Plaintiffs Town of Verona, et al. ("Verona") filed a timely notice of appeal in No. 6:08-cv-00647 on May 22, 2015. This Court has appellate jurisdiction over both appeals under 28 U.S.C. § 1291. The Court, however, lacks jurisdiction over certain arguments raised by UCE alone, because UCE lacks standing. *See infra* pp. 22-24.

STATEMENT OF THE CASE AND THE ISSUES

The Indian Reorganization Act, 25 U.S.C. § 465, authorizes the Secretary of the Interior "to acquire . . . any interest in lands . . . for the purpose of providing land for Indians." The United States takes title to lands acquired under Section 465 and holds them in trust for an Indian tribe or for individual Indians.

In this case, the Court must review a decision of the Secretary taking land into trust for the Oneida Nation. On May 20, 2008, the Secretary issued a Record of Decision ("ROD") that stated her final determination to acquire approximately 13,000

acres of land owned by the Tribe and located within its reservation in central New York. *See* ROD at 6 (A-555). The Secretary amended the ROD on December 22, 2013 (A-1572).

Plaintiffs, representing local municipalities and citizens, filed separate suits raising similar arguments in the Northern District of New York. Both sets of Plaintiffs contended that the IRA is unconstitutional as applied in New York and to the Oneida Nation, and that the Secretary lacks authority to take land into trust to benefit the Tribe. In the *Upstate Citizens for Equality* case, the district court granted the United States' partial motion to dismiss on March 14, 2010, and granted summary judgment for the United States on March 26, 2015. In the *Verona* case, the court granted the United States' partial motion to dismiss and denied Verona's partial motion for summary judgment on September 29, 2009, and granted summary judgment for the United States on March 26, 2015.[1] This Court consolidated the appeals for purposes of the United States' brief and for oral argument. Of the many

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[1] This brief refers to the following opinions: In *Upstate Citizens for Equality v. Salazar*, No. 5:08-cv-0633, the district court's Memorandum Decision and Order of March 4, 2010 (A-489) ("*Upstate Citizens I*"), and the district court's Memorandum Decision and Order of March 26, 2015 (SPA-1) ("*Upstate Citizens II*"). In *Town of Verona v. Salazar*, No. 6:08-cv-0647, the district court's Memorandum Decision and Order of September 29, 2009 (SPA-27) ("*Verona I*"), and the district court's Memorandum Decision and Order of March 26, 2015 (SPA-48) ("*Verona II*").

issues the district court considered, Plaintiffs' appeals are limited to the following questions:

1. Does UCE have standing to appeal, where none of its arguments on appeal would require the Oneida Nation to cease the gaming operations that are the source of UCE's alleged harm?
2. The Supreme Court has repeatedly held that the Indian Commerce Clause of the Constitution grants Congress "plenary power" to enact statutes governing Indian affairs. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Is Section 465 of the Indian Reorganization Act, which (as applied here) authorizes the Secretary to acquire title to land owned by the Oneida Nation and to be held in trust for their benefit, a constitutionally permissible exercise of that plenary power?
3. Section 465 of the Indian Reorganization Act[2] delegates to the Secretary the authority to acquire land to be held in trust "for the purpose of providing land to Indians." 25 U.S.C. § 465. Did the Secretary permissibly exercise that authority in deciding to take land into trust for the Oneida Nation, a federally recognized Indian tribe?

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[2] This brief describes statutory provisions using section numbers as codified in the U.S. Code. For example, 25 U.S.C. § 465 was originally Section 5 of the IRA, but is described as "Section 465" here for the sake of clarity.

LEGAL BACKGROUND AND STATEMENT OF FACTS

I. THE STATUTORY SYSTEM FOR TAKING LAND INTO TRUST

A. The United States' authority to acquire land and hold it in trust

The Constitution enumerates Congress's power to "regulate Commerce . . . with the Indian Tribes." U.S. CONST. art. 1, § 8, cl. 3. From the time of ratification, this "Indian Commerce Clause" was understood to be "a broad grant of power to the federal government and a limit on state power to interfere with federal Indian policy." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.02[3] (2012) ("COHEN").[3] The "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 173 (2d Cir. 2005) (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)).

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[3] UCE calls into question whether the "Handbook of Federal Indian Law," initially authored by Felix Cohen, should be considered accurate or authoritative. *See* UCE Br. at 36-37. The Court need not find Felix Cohen to have had "superior credentials" to earlier scholars, *id.*, to find his namesake treatise helpful here. Cohen was "one of the principal drafters of the Indian Reorganization Act of 1934," the legislation at issue in this case that authorizes the Secretary to take land into trust, and his treatise describes the same "strong preference for tribal sovereignty" that the IRA itself reflects. *See* Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 321 (1997). The original Cohen treatise and its updated editions have been cited dozens of times by the Supreme Court and this Court for general principles of federal Indian law.

Congress exercised that power in enacting the Indian Reorganization Act of 1934. The IRA "fundamentally restructured the relationship between Indian tribes and the federal government, reversing the Nineteenth Century goal of assimilation and embodying 'principles of tribal self-determination and self-governance.'" *Conn. v. U.S. Dep't of Interior*, 228 F.3d 82, 85 (2d Cir. 2000) (quoting *Cty. of Yakima v. Confed. Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992)); *see also infra* pp. 56-57 (discussing the IRA as a response to the 1887 General Allotment Act or "Dawes Act"). Its "overriding purpose" is to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

Section 465 of the IRA, the authority that the Secretary exercised here, provides (in relevant part) that:

> The Secretary of the Interior is authorized, in [her] discretion, to acquire, through purchase, relinquishment, gift, exchange or assignment, any interest in lands . . . within or without existing reservations, including trust of otherwise restricted allotments . . . for the purpose of providing land for Indians.
>
> …
>
> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465. Section 465 allows the Secretary to restore or replace the lands and related economic opportunities that were lost through governmental policies that

dispossessed tribes of their ancestral lands. *See* COHEN § 15.07[1][a]; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973); *South Dakota v. U.S. Dep't of Interior,* 423 F.3d 790, 798 (8th Cir. 2005).

The Department of the Interior has promulgated formal, notice-and-comment regulations to implement and interpret Section 465. *See* 25 C.F.R. part 151; *see also Connecticut*, 228 F.3d at 85. Those regulations establish a process whereby a tribe may request that the Secretary take land into trust for its benefit. *See* 25 C.F.R. §§ 151.9. In evaluating such a request, the Secretary must provide notice to State and local governments and consider enumerated regulatory criteria. *See id.* §§ 151.10-.11. Among other factors, the Secretary may consider the tribe's need for land "to facilitate tribal self-determination, economic development, or Indian housing." *Id.* § 151.3(a)(3); *see also* ROD at 8, 34-36 (A-557, A-583-85). Taking land into trust "shields the land from involuntary loss" and "establishes it as Indian country." COHEN § 15.07[1][a].[4]

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[4] In some instances, the Secretary may take land into trust to assist a tribe in conducting gaming operations authorized by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA"). *See, e.g.*, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2202 (2012). Verona suggests that the Tribe's gaming operation at the Turning Stone casino depends on federal acquisition of trust lands *See* Verona Br. at 5-9. However, the Secretary determined that, prior to her decision, the Oneida were "lawfully conducting Class III gaming at Turning Stone under IGRA." ROD at 8-9 (A-557-58); see id. at 12 (A-561). On appeal, UCE and Verona do not challenge that determination, and the Tribe's ability to conduct gaming activities is not at issue here. IGRA is therefore irrelevant to this case.

B. The meaning of "Indians" for purposes of Section 465

Section 465 authorizes the Secretary to acquire land "for the purpose of providing land for Indians." 25 U.S.C. § 465. The IRA itself defines the term "Indian" for purposes of the Act, including Section 465, as (in relevant part) "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. The present-day Oneida Indian Nation is "a federally recognized Indian tribe and a direct descendant of the [historic] Oneida Indian Nation." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 (2005). The criteria that the Tribe must be "now under federal jurisdiction" refers to their status in 1934, when Congress enacted that language as part of the IRA. *See Carcieri v. Salazar*, 129 S. Ct. 1058, 1061 (2009). Here, the Secretary specifically found (upon remand from the district court, *see infra* p. 17) that the Tribe met that requirement. *See* Amended ROD at 2-3 (A-1574-75). Plaintiffs contend there is a "serious question" whether that determination is correct, but they admit that question is not "essential to the resolution of this case," Verona Br. at 34 n.8, and they did not pursue it below. *See* Verona Opinion at 9-10 (SPA-56-57).

Consistent with its purpose of fostering Indian self-determination, the IRA contained a provision that allowed tribes to opt out of its provisions, including Section 465, by vote at a special election. *See* 25 U.S.C. § 478. The Tribe elected to opt out of the IRA in 1936. *See* Amended ROD at 2-3 (A-1574-75). In 1983,

however, Congress spoke again in the Indian Land Consolidation Act, 25 U.S.C. § 2201 *et seq* ("ILCA"). One purpose of ILCA was to consolidate Indian lands and reduce fractional holdings, in part by increasing the Secretary's authority to acquire fractional interests in trust for a tribe. *See* COHEN § 15.07[2]. Congress promoted this interest by providing that Section 465 of the IRA "shall apply to all tribes notwithstanding the [opt-out] provisions of Section 478." 25 U.S.C. § 2202. As discussed below, *see infra* pp. 9-10, 61-65, Section 2202 fully restored the eligibility of all "Indians" that meet the IRA's definition, even if they had opted out of Section 465.

Plaintiffs, however, contend that Section 2202 only restored the eligibility of tribes that also meet a second, different definition found in ILCA. *See* UCE Br. at 6-7; Verona Br. at 34-40. That definition provides that "tribe" means "any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds land in trust." 25 U.S.C. § 2201(1). As the argument below will show, even if this definition were necessary to apply Section 465 here, the Oneida Nation would satisfy it.

Interior has interpreted these overlapping statutory provisions and definitions through formal regulations that establish who is eligible to benefit from federal acquisition of land in trust. *See* 25 C.F.R. § 151.2(b). That definition turns on whether a tribe is federally recognized, providing that the Secretary may take land into

trust for "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs." *Id.* The Secretary understood in promulgating this definition that "many Federal agencies recognize Indian groups for different purposes and for their particular programs," and chose this definition specifically to encompass all tribes that are recognized as eligible for Bureau of Indian Affairs programs. *See* "Land Acquisitions," 45 Fed. Reg. 62,034, 62,034 (Sept. 18, 1980). The Oneida Nation is federally recognized for this purpose.

II. FACTUAL BACKGROUND

A. The Oneida in New York State

This case is the latest in a long series of attempts by the Oneida Nation to regain some authority over a portion of its aboriginal homeland. The Supreme Court, in several related cases, has set out some of that history. In the 1788 Treaty of Fort Schuyler, the Oneida conveyed a "vast area" in central New York to the State, retaining a reservation of about 300,000 acres out of more than 6 million acres of its aboriginal homeland. *City of Sherrill*, 544 U.S. at 203; *see also Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 230-32 (1985) ("*Oneida II*"). In 1790, Congress sought to secure the tribe's right to those reserved lands in the Nonintercourse Act, 25 U.S.C. § 177, which bars the sale of tribal land without the consent of the federal government, and the United States recognized the Oneida Reservation in the 1794

Treaty of Canandaigua. *City of Sherrill*, 544 U.S. at 204-05. Despite this protection, New York continued to purchase Oneida land, in some cases over federal objections. *Id.* at 205. The land held by the Oneida dwindled to 5,000 acres in 1838, less than 1,000 acres in 1843, and only 32 acres in 1920. *Id.* at 206-07.

As this Court has recognized, however, the Tribe's original reservation of 300,000 acres was never disestablished. *See Oneida Indian Nation v. Madison Cty.*, 665 F.3d 408, 443-44 (2d Cir. 2011). The Supreme Court recognized that the Oneida had a federal common-law right to possess their aboriginal lands. *See Oneida II*, 470 U.S. at 236. The lower courts held that the tribe could, under some circumstances, obtain money damages for the violation of that right, but that they could not eject private landowners. *See City of Sherrill*, 544 U.S. at 209 (describing lower court proceedings after *Oneida II*).

In response to these decisions, the Oneida Nation began to acquire title to parcels of land on their reservation in open-market transactions and to operate businesses on those parcels. *Id.* at 211. Indian activities in "Indian country," as defined by 18 U.S.C. 1151, are generally not subject to state and local taxation. *See* COHEN § 8.03[1][a]; *City of Sherrill*, 544 U.S. at 212-14. The Tribe therefore asserted in the *City of Sherrill* litigation that its acquisition of title to ancient reservation land had "unified fee and aboriginal title" so that it could "now assert sovereign dominion over the parcels," exempting those parcels from taxation. 544 U.S. at 213. The Supreme

Court rejected that theory, holding that "longstanding observances and settled expectations" counseled against exempting those lands from taxation on the grounds of tribal sovereignty. *Id.* at 218. But the Court pointed to an alternate route for the Tribe to achieve the same end. It noted that lands held in trust under Section 465 are exempt from State and local taxation, and that therefore "Section 465 provides the proper avenue for [the Tribe] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." *Id.* at 220-21 (citing 25 U.S.C. § 465). The Court described the Secretary's process for taking land into trust as "sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." *Id.* at 221 (citing 25 C.F.R. part 151).

B. The Secretary's decision to take land into trust for the Oneida

In response to the Supreme Court's suggestion, the Oneida Nation requested on April 4, 2005, that the Secretary take more than 17,000 acres of land into trust for the Tribe. All of the land subject to the request was already owned by the Tribe, and contained the Nation's government, health, educational, and cultural facilities, member housing, businesses, hunting lands, and undeveloped lands, as well as the Turning Stone casino. *See* ROD at 6 (A-555).

Interior considered the Tribe's application in a thorough and open process that lasted several years. In addition to public hearings and an extended comment period, Interior prepared an Environmental Impact Statement, issued in 2008, considering

nine different alternative actions (including a no-action alternative in which the Secretary would not acquire title to any land). *Id.* at 6-10 (A-555-59). The Secretary conducted a parcel-by-parcel review of the 330 parcels that were included in the Tribe's request. *Id.* at 7 (A-556).

In May 2008, the Secretary announced her decision to accept into trust approximately 13,000 acres. The Secretary found that this decision would "help to address the Nation's current and near term needs to permanently reestablish a sovereign homeland for its members and their families, preventing alienation of the lands." *Id.* at 36 (A-585). "The Nation's ability to exercise governmental authority over the lands and its uses, and to protect it for future generations, will promote the health, welfare, and social needs of its members and their families." *Id.*

The Secretary's decision bore out the Supreme Court's observation in *Sherrill* that the regulatory process under Section 465 could be sensitive to interjurisdictional concerns related to state and local governments. *See Sherrill*, 544 U.S. at 221. The Secretary selected an alternative that took less land into trust than the Tribe proposed, in part to take into account State and local government requests "to establish a more contiguous and compact trust land grouping." *id.* at 19 (A-568). The Secretary acknowledged that acquiring land in trust "may negatively impact the ability of state and local governments to provide cohesive and consistent governance" and would incrementally increase the demand for local government services, but concluded that

those effects would not be significant. *Id.* at 21, 24 (A-570, 573). The Secretary also calculated the Nation's contributions to State and local government revenues, with an offset for uncollected property taxes and the cost of the government services the Tribe required, and determined that those contributions would be roughly comparable before and after the federal acquisition of the Tribe's land. *Id.* at 23 (A-572). Importantly, the Secretary noted that the Tribe was, for various reasons, exempt from many sales, excise, and property taxes, and so "the placement of land into trust would have the practical effect of continuing the *status quo* with regard to real property tax collections." *Id.* at 25 (A-574); *see generally id.* at 40-55 (A-589-604) (analyzing these issues in detail).

Finally, the Secretary addressed the question of the tribe's and the State's respective jurisdiction over lands taken into trust. *See generally id.* at 55-69 (A-604-18). The Secretary found that taking land into trust for the Tribe would cause "no change in the New York State criminal and civil court jurisdiction," and that State police officers would "continue to be able to make arrests" for violation of Federal, State, and local law. *Id.* at 57 (A-606); *see* 25 U.S.C. §§ 232, 233. The Secretary also reviewed such issues as whether the Tribe would continue to develop its lands with consideration for local zoning and land use, ROD at 59 (A-608), and whether the tribe's health, safety, and environmental regulations would meet State standards, *id.* at 61-63, 66-68 (A-610-12, A-615-17).

In addition to the 13,000 acres that the Secretary decided to take into trust in her challenged decision here, the Secretary accepted responsibility in late 2008 for additional land for the Oneida Nation. The General Services Administration, carrying out its statutory responsibilities to manage "excess real property" under 40 U.S.C. § 523, transferred an 18-acre parcel of land formerly used by the Department of Defense to the Secretary to be held in trust for the Tribe. The Secretary acknowledged receipt of that land on December 30, 2008, and thereafter administered it for the Oneida Nation's benefit.

III. DISTRICT COURT PROCEEDINGS

UCE and Verona, among many other parties, challenged the Secretary's land-into-trust decision in district court. The "most notable" of these actions was brought by New York and by the counties of Madison and Oneida, "where the vast bulk of land taken into trust was situated." *See* Verona Br. at 10; *see also* Verona Opinion at 4 n.3 (SPA-51) (listing cases). That case has now been dismissed as part of a historic global settlement of the Tribe's and the State's various claims against each other, resolving a half-century of litigation that has made three trips to the Supreme Court. *See New York v. Jewell*, 2014 WL 841764, *1-*2 (N.D.N.Y. March 4, 2014) (upholding the entry of the settlement in New York's challenge to the Secretary's decision to take land into trust). Verona and UCE, among other parties, now oppose both the Secretary's decision here and the State's agreement to the settlement. Their State-law

attempts to unwind that settlement have so far been unsuccessful. *See Town of Verona v. Cuomo*, ___ N.Y.S. 3d ___, 2015 WL 9101015 (N.Y. App. Div. Dec. 17, 2015) (rejecting Verona's challenge to the settlement under State law).

Early in the litigation before the district court, the court rejected UCE's arguments that Section 465 is an unconstitutional delegation of legislative authority to the Secretary, that the Secretary's decision to acquire land in trust violated IGRA, that the Secretary had unlawfully approved the Tribe's gaming compact under IGRA, and that the Secretary had a nondiscretionary duty to enforce certain provisions of IGRA. *See generally Upstate Citizens I* (A-489-519). The district court also dismissed Verona's claim that the Tribe's operation of the Turning Stone casino violates IGRA. *See Verona I* at 7-12 (SPA-33-38). Those claims are not relevant to this appeal.

The district court also addressed some of Verona's claims that are now before this Court. First, the court rejected the contention that principles of state sovereignty, expressed in the Tenth Amendment, make Section 465 unconstitutional to the extent it permits the Secretary to take land into trust in New York. "Given the Supreme Court's broad interpretation of the Indian Commerce Clause," the court held, the Secretary's decision here represented "a valid exercise of the power delegated to Congress by the Constitution." *Verona I* at 6 (SPA-32). The court found that the Enclave Clause and New York's status as one of the thirteen original colonies were irrelevant to this analysis. *Id.* at 7 (SPA-33). Next, the district court considered

Verona's statutory interpretation claims, noting that they presented "an issue of first impression." *Id.* at 17 (SPA-43). The court held that the Tribe is eligible to benefit from Section 465 of the IRA for several reasons, including the purpose of Congress in both the IRA and ILCA, *id.* at 17 (SPA-43), the ambiguous text of the statute, *id.* at 18-20 (SPA-44-46), and the principle that statutes enacted for the benefit of Indians should be interpreted in their favor, *id.* at 20 (SPA-46).

Judgment on the remaining claims in each party's case was then delayed due to the Supreme Court's 2009 decision in *Carcieri*. The Secretary's Record of Decision had not addressed *Carcieri* and did not contain any finding about whether the Oneida Nation was under federal jurisdiction in 1934. The district court remanded the ROD to the agency so that the Secretary could make that determination in the first instance. *See Verona II* at 5 (SPA-52); *Upstate Citizens II* at 6 (SPA-6). On December 22, 2013, in response to that remand, the Secretary determined that the Oneida Nation was under federal jurisdiction in 1934. *See* Amended ROD (A-1573-75). Plaintiffs challenged that determination below, *see Upstate Citizens II* at 10-11 (SPA-10-11); *Verona II* at 9-10 (SPA 56-57); but they do not pursue that argument here.

Finally, in March 2015, the district court entered summary judgment in the Secretary's favor on Plaintiffs' remaining claims. UCE raised constitutional claims similar to those the district court had already considered in *Verona I*, and the court rejected them for the same reasons. *See Upstate Citizens II* at 13-14 (SPA-13-14). Both

UCE and Verona also again challenged the Secretary's statutory authority to take land into trust, and the court found those challenges without merit. *See Upstate Citizens II* at 15-16 (SPA-15-16); *Verona II* at 10 (SPA-57). The district court referred to its opinions in *City of Oneida v. Salazar*, No. 08-cv-0648, 2009 WL 3055274 (N.D.N.Y. Sept. 21, 2009), and *State of New York v. Salazar*, No. 6:08-cv-0644, 2009 WL 3165591 (N.D.N.Y. Sept. 29, 2009), in which it had already considered substantially the same arguments against the Secretary's fee-to-trust decision. Particularly in *New York*, the district court had analyzed many of the same issues raised here, holding (*inter alia*) that the enactment of ILCA indicated that Congress intended the Oneida Nation to be eligible to benefit from the IRA's trust-acquisition authority. *See* 2009 WL 3165591 at *13-15.

The district court entered final judgment in the Secretary's favor on March 26, 2015. UCE and Verona appeal.

SUMMARY OF ARGUMENT

This appeal raises a threshold issue of standing. The harms that UCE alleges as a result of the Secretary's decision to acquire land in trust relate to the Oneida Nation's operation of the Turning Stone casino. UCE raised IGRA claims before the district court, but it does not pursue those arguments on appeal. Instead, its appeal is limited to its challenges to the Secretary's authority to acquire land in trust – authority that is not necessary for the Oneida Nation to continue gaming. As a result, UCE

lacks standing to challenge the Secretary's decision, and the Court must decline to decide those issues that UCE raises without Verona's support. This issue affects only UCE.

Both Plaintiffs together raise the broader questions at the heart of this appeal, one constitutional and one statutory.

The constitutional question is: Does the Constitution provide Congress with the power to enact Section 465, which authorizes the Secretary of the Interior to take land into trust for the benefit of Indians? The answer is yes, based on the "exceptionally great" power that the Constitution grants to Congress to manage Indian affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004). The Supreme Court has routinely given the broadest possible construction to the Indian Commerce Clause, and has explicitly recognized the government's authority to hold land in trust for Indians. *See, e.g.*, *Johnson v. M'Intosh*, 21 U.S. 543, 592 (1823); *Sherrill*, 544 U.S. at 221. UCE's argument that a narrower construction of the Indian Commerce Clause would be more consistent with the original intent behind that clause is directly contrary to binding case law. *See* UCE Br. at 34.

The Court must also reject Plaintiffs' narrower argument that Section 465 is unconstitutional as applied in New York because it conflicts with New York's sovereignty as one of the thirteen colonial States. Taking land into trust does not create a federal "enclave" or completely divest the State of sovereignty, and the record

here describes how New York will continue to have jurisdiction over the land in question. The Supremacy Clause of the Constitution, moreover, authorizes Congress to take actions that will limit State law, including a State's taxing power and zoning power over land. Under the "equal footing doctrine," that authority is the same in New York as it is in all other States. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999).

The statutory question at issue here is: Did Congress grant the Secretary the authority to take land into trust to benefit the Oneida Nation, or is the Tribe excluded from Section 465? Because the Secretary has already interpreted Section 465 to apply to all federally-recognized tribes, the Court must consider this question under the deferential standard of *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). Under that standard, neither of Plaintiffs' proposed exclusion theories is valid. First, the 1934 Indian Reorganization Act is nationwide in scope, and is not limited to the areas where the United States actually implemented the policy of allotment of Indian lands. All the areas that Congress intended to exclude are enumerated in the IRA, *see* 25 U.S.C. § 473, and the Tribe's land is not among those areas.

Second, ILCA poses no bar to the Oneida Nation's trust request here. Plaintiffs' ILCA argument is based on the theory that the United States may not take land into trust for a tribe unless it already has some other land in trust for that tribe. It is unnecessary for the Court to decide this question, because the Secretary acquired

land in trust for the Oneida Nation under a different statutory authority shortly after making her original decision here, and well before amending and reaffirming that decision in light of the district court's remand. If the Court does reach the ILCA question, however, it should find that Congress restored eligibility for Section 465 to "all tribes" in ILCA. *See* 25 U.S.C. § 2202. Plaintiffs' limiting construction of ILCA is contrary to the purpose of Section 2202, which should be interpreted to apply to the same "tribes" that meet the IRA's definition. And it is not compelled by ILCA's text, which can be read to apply to "tribes" other than those for whom the United States already holds land in trust. The legislative history, furthermore, strongly supports the conclusion that Congress intended to extend the benefits of trust status and land consolidation broadly to all tribes.

STANDARDS OF REVIEW

Plaintiffs' claims present purely legal questions of the validity of the Secretary's land-into-trust decision under the Administrative Procedure Act, the IRA, and ILCA. This Court reviews the district court's grant of summary judgment *de novo*. *See, e.g.*, *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 77 (2d Cir. 2006).

This Court applies *de novo* review to the constitutional questions that Plaintiffs raise. *See, e.g.*, *United States v. Caronia*, 703 F.3d 149, 160 (2d Cir. 2012). However, Plaintiffs' statutory claims raise questions of statutory interpretation that the Secretary has already addressed through formal regulations. Therefore, those claims are subject

to review under *Chevron*. First, the court must determine whether Congress "has directly spoken to the precise question at issue," so that if Congress has "unambiguously expressed" its intent, the court may give effect to that intent. 467 U.S. at 842-43. If Congress has not expressed a clear intent, however, the Court must uphold the interpretation of the agency charged with administering the statute, as long as that agency's action is based on a permissible construction. *Id.* at 843.

ARGUMENT

I. UCE DOES NOT HAVE STANDING TO APPEAL.

As a threshold matter, UCE lacks standing to challenge the Secretary's decision to acquire land in trust for the Oneida Nation. Standing is an "irreducible constitutional minimum" that must be established before a court may consider a party's claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). To establish standing, a plaintiff must show that it has suffered an "injury in fact" – an "invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal citations and quotation marks omitted). The plaintiff must also show that its injury is the result of the defendant's challenged conduct and that a favorable decision from the court will redress its injury. *Id.*

UCE cannot make that showing. In its complaint, UCE claimed that its standing was based on the harm to its members from the operation of "a massive

illegal casino in their community." *See* Complaint at 7 (A-292). It alleged that its organizational mission is "stopping the proliferation of illegal casino gambling and other legal abuses across New York." *Id.* at 8 (A-293). In the district court, UCE raised a number of claims under IGRA, arguing that the Turning Stone casino is operating illegally. UCE had standing to raise those claims because, if it had prevailed, the district court could have granted relief that would have reduced Plaintiffs' alleged harms from the casino's presence.

Here, in contrast, UCE has abandoned its IGRA claims, arguing only that it was illegal for the Secretary to take land into trust. The trust status of the Turning Stone casino land, however, is irrelevant to the validity of its operation under IGRA. *See* ROD at 14 (A-563) (explaining that the casino would cease operation "only if the [plaintiffs] prevailed on [their] stance regarding the lawfulness of the casino"). If the Secretary's decision were vacated, the Tribe would still hold title to the Turning Stone land, which is within the boundary of their reservation, and it has a valid gaming compact with New York. It would therefore meet IGRA's requirements for Class III gaming on "Indian lands." *See* 25 U.S.C. §§ 2703(4); 2710(d)(1). The injury that UCE claims does not arise from the land-into-trust decision itself, nor would vacating that decision redress UCE's alleged injury.

In practice, UCE's lack of standing does not greatly narrow the scope of this case because they raise many of the same issues as the Verona plaintiffs, whose

standing is not disputed here. *See Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 84 n.2 (2d Cir. 2012) (noting that where one plaintiff has standing to raise a claim, a court may consider it). The Court may not, however, consider arguments that only UCE raises. Those include UCE's arguments about the scope of the constitutional terms "regulate" and "Commerce," *see* UCE Br. at 39-44; its argument that the Oneida Nation is under the exclusive jurisdiction of New York State, *id.* at 20-21, 24; and its argument about the legitimacy of Oneida tribal leadership, *see id.* at 44-46.[5]

II. CONGRESS HAS THE CONSTITUTIONAL POWER TO TAKE LAND INTO TRUST IN NEW YORK.

A. Congress has broad power under the Indian Commerce Clause, including the power to acquire land to benefit Indians.

The United States has "the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state." *United States v. Sandoval*, 231 U.S. 28, 46 (1913). This power derives from the Indian Commerce Clause of the Constitution and from "long continued legislative and executive usage and an unbroken current of judicial

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[5] Verona argues that the Indian Commerce Clause is an insufficient basis for Section 465 because it must yield to State sovereignty in New York, *see* Verona Br. at 19-25, but Verona does not join UCE's argument that the Indian Commerce Clause itself is insufficient to authorize federal land acquisitions or give the government authority over intrastate tribes.

decisions." *Id.* at 45-46. Although the Supreme Court stated this principle more than a hundred years ago, it remains a correct statement of the scope of authority that Congress enjoys under the Indian Commerce Clause: "[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" *Lara*, 541 U.S. at 200 (citing various other cases and a treatise noting Congress's "exceptionally great powers" under this clause).

The Supreme Court has construed the Indian Commerce Clause broadly, without limiting it to matters that are commercial in nature. "If anything," the Supreme Court has said, "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996). "Congress alone has the right to determine the manner in which the country's guardianship over Indians shall be carried out," *United States v. McGowan*, 302 U.S. 535, 538 (1938), and statutes recognizing Indians' unique legal status "will not be disturbed" as long as they "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). This "plenary power" supports a wide variety of statutes that "deal with the special problems of Indians." *Id.* at 551; *see also Ramah Navajo School Bd. v. Bureau of Rev. of N.M.*, 458 U.S. 832, 839 (1982) (recognizing statutes that "provide for Indian

education"); *Antoine v. Washington*, 420 U.S. 194, 203 (1975) (describing "Congress' plenary powers to legislate on problems of Indians").

Congress's power under the Indian Commerce Clause includes the power to limit State jurisdiction over Indians and Indian land in various ways. Criminal jurisdiction over offenses committed on an Indian reservation is governed by a "complex patchwork" of laws, and "Congress has plenary authority to alter these jurisdictional guideposts." *Negonsett v. Samuels*, 507 U.S. 99, 102-03 (1993); *see also Nevada v. Hicks*, 533 U.S. 353, 366 (2001) (noting that State jurisdiction on reservations "can of course be stripped by Congress"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-43 (1980) (generally discussing the boundaries between State and tribal authority). This is true even if "there have been times" when a State's jurisdiction over a tribe "went unchallenged" and if "federal supervision over [a tribe] has not been continuous." *United States v. John*, 437 U.S. 634, 653 (1978). Moreover, "Congress – not the courts, not the states, not the Indian tribes – gets to say what land is Indian country subject to federal jurisdiction." *Citizens Against Casino Gambling in Erie County v. Chaudhuri*, 802 F.3d 267, 282 (2d Cir. 2015) (quoting *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1151 (10th Cir. 2010) (en banc)).

From the early days of the Republic, Congress's constitutional power to manage relations and commerce with Indian tribes has also been understood to include power over acquisition, sale, and ownership of Indian land. *See generally*

COHEN §§ 5.02[4], 15.03; *see also Sherrill*, 544 U.S. at 204 (describing the 1790 Indian Trade and Intercourse Act). Congress also undoubtedly has the constitutional power, "essential to its independent existence and perpetuity," to purchase and own land within State boundaries to accomplish its public purposes. *Kohl v. United States*, 91 U.S. 367, 371-72 (1875).[6]

The only case Plaintiffs cite that identifies a limit on Congress's power under the Indian Commerce Clause is *Seminole Tribe of Florida*, 517 U.S. 44. *See* UCE Br. at 42-43; Verona Br. at 19.[7] The limit that the Supreme Court found in *Seminole Tribe*, however, is not relevant here. In *Seminole Tribe*, the Court held that Congress lacked authority under the Indian Commerce Clause to abrogate state sovereign immunity that is otherwise guaranteed by the Eleventh Amendment. *See* 517 U.S. at 47, 57-58. The Court relied not upon any limit inherent in the Indian Commerce Clause itself, but rather upon the limits that the Eleventh Amendment places on the courts' Article

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[6] Although *Kohl* upheld Congress's constitutional authority to exercise the power of eminent domain within a State, it is relevant to note that the Secretary's decision here would only accept a voluntary transfer of land already held in fee by the Oneida Nation. *See* ROD at 6 (A-555).

[7] UCE also cites *United States v. John*, 437 U.S. 634, 652 (1978), as an instance in which the Court held that the Indian Commerce Clause was insufficient to confer federal jurisdiction. *See* UCE Br. at 39. The quote that UCE relies on states a position advanced by one of the parties, which the Court rejected. 437 U.S. 652-53.

III jurisdiction, holding that those limits apply even where the Constitution "vests in Congress complete law-making authority over a particular area." *Id.* at 72.[8]

In several cases, the courts of appeals have considered whether Section 465 violates the Constitution by unlawfully delegating legislative authority to the Secretary. Those courts have each found that Section 465 represents a valid delegation of Congress's legislative power to acquire land in trust. *See Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 98-99 (D.C. Cir. 2008); *South Dakota*, 423 F.3d at 797; *United States v. Roberts*, 185 F.3d 1125, 1136-37 (10th Cir. 1999). UCE relies on an Eighth Circuit case that originally reached a different conclusion, *see* UCE Br. at 41 (citing *South Dakota v. U.S. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995)), but it omits the crucial fact that the Supreme Court vacated that decision, *see Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996), and that the Eighth Circuit has since held that Section 465 is constitutional, *see South Dakota*, 423 F.3d at 797. Although only one of these

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[8] Both Plaintiffs note that Justice Thomas has recently signaled a willingness to reconsider whether the Indian Commerce Clause truly confers upon Congress, as the Court has stated many times, "plenary power" over Indian affairs. *See* UCE Br. at 43; Verona Br. at 3 (both citing *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2566-71 (2013) (Thomas, J. concurring). Relying on many of the same sources and articles that Plaintiffs cite here, Justice Thomas has questioned whether the Court's current interpretation of the scope of the Indian Commerce Clause is consistent with the original understanding of that clause. *See id.* at 2567-68. Justice Thomas acknowledges, however, that his views would require the Court to "revisit the question" of the Indian Commerce Clause. *See Lara*, 541 U.S. at 224 (Thomas, J., concurring in the judgment).

cases directly addressed the question whether Congress itself has the legislative power under the Constitution to acquire land in trust for the benefit of Indians, it is telling that so many courts considering whether that power may be delegated have first assumed it to be constitutionally legitimate.

B. UCE's historical arguments about the meaning of "commerce" disregard established case law.

UCE claims that the term "commerce" in both the Indian Commerce Clause and the Interstate Commerce Clause is not broad enough to encompass land acquisition. *See* UCE Br. at 20-23, 39-40. By relying on early cases, UCE tries to limit Congress's commerce power in a way that is completely inconsistent with nearly a century of controlling case law.

Under the Interstate Commerce Clause, Congress may enact legislation concerning activities that "have a substantial effect on interstate commerce," including "purely intrastate activity that is not itself 'commercial.'" *Gonzalez v. Raich*, 545 U.S. 1, 17-18 (2005) (discussing *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Congress may also protect "the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Lopez*, 514 U.S. at 558. The power of Congress under the Interstate Commerce Clause "extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate

commerce." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253-58 (1964) (quoting *United States v. Darby*, 312 U.S. 100, 118 (1941)). Where Congress seeks to regulate such activities, "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

The Indian Commerce Clause is similarly broad, but the Constitution contains other provisions – such as the power to make treaties with Indian tribes – that expand Congress's authority over Indian affairs. *See Lara*, 541 U.S. at 200. Although the Indian Commerce Clause is the most-often-cited basis for Indian legislation, the Supreme Court has not precisely delineated any boundary between those two sources of authority, which supports the conclusion that Congress's power over Indian affairs is even greater than its already-substantial power over interstate commerce. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 62; COHEN § 5.01[3]. This Court therefore need not assume that any limitation on the Interstate Commerce Clause applies equally to the Indian Commerce Clause.

In any event, it is unnecessary for this Court to decide whether the Indian Commerce Clause might confer broader authority than the Interstate Commerce Clause, because Section 465 easily qualifies as a regulation of "commerce" under either. Providing land to promote the self-determination and economic development of Indians manifestly has a substantial effect on both interstate commerce and

commerce with Indian tribes. Taking land into trust may also affect Indian businesses operating in interstate commerce. Acquiring land and holding it in trust for the benefit of Indians is not only a necessary and proper means to achieve that goal, but is a commercial activity in itself.

UCE expressly urges the Court to disregard "[Supreme Court] cases and decisions made in recent times" in favor of "early court cases." UCE Br. at 34-35 (referring to cases discussed at UCE Br. 20-22). UCE acknowledges that recent case law "dropped the distinctions" between various types of State jurisdiction over Indian lands in favor of a rule that "Indian matters [are] entirely under the scope of the federal government," *id.* at 35, but it considers those cases to have been "wrongly decided." *Id.* at 34. Setting aside the obvious fact that this Court is bound by the modern Supreme Court cases described above, the early cases that UCE cites do not support its conclusion.

Gibbons v. Ogden, 22 U.S. 1 (1824), *New York v. Miln*, 36 U.S. 102 (1837), and *Willson v. Blackbird Creek*, 27 U.S. 245 (1829), involved the application of what we now would call the "dormant Commerce Clause." In each case, the Supreme Court sought to define the limits of a State's ability to enact legislation that might affect interstate commerce. It held in *Gibbons* that the State law in question regulated commerce and was thus unconstitutional, while it held in *Miln* and *Willson* that the State law in question did not directly regulate commerce and thus did not offend the Interstate

Commerce Clause. None of these cases recognized a limit on *federal* power, much less a limit under the Indian Commerce Clause.

Chief Justice Marshall in *Gibbons* suggested that Congress could regulate only commerce "among the several States," and therefore not purely intrastate commerce. *Gibbons*, 22 U.S. at 195-96. He recognized, however, that this was due to the specific language of the Interstate Commerce Clause, whereas "in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States." The same is true of commerce involving Indian tribes; State boundaries are irrelevant to the relationship between the federal government and an Indian tribe. *Gibbons* therefore does not support the conclusion that "[i]f an Indian tribe is entirely within the borders of one single state, any and all commerce between that tribe and others is subject to the State's legislation, and no other." UCE Br. at 21. And that conclusion is directly contrary to longstanding precedent. *See, e.g.*, *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 690-91 (1965).

Similarly, UCE's citation to academic criticism of the scope of the Commerce Clause cannot overcome the expansive authority that Congress enjoys under that clause as it has been definitively interpreted by the courts. *See* UCE Br. at 40-42. The articles that UCE cites concerning the original meaning of the Interstate Commerce Clause attempt only to clarify the meaning that would have been attributed to the terms "commerce" and "regulate" in the late eighteenth century. *See* Randy E.

Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105-11 (2001); Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 859-73 (2002). Even in presenting their theory of the Commerce Clause's original meaning, Bork and Troy acknowledge that modern case law has "strayed from" that meaning, and that "[t]here is no possibility, today, of adhering completely to the original constitutional design." *See* Bork & Troy at 851, 883. Similarly, in exploring the original meaning of the Indian Commerce Clause, Natelson recognizes that "Congress has claimed, and the Supreme Court has conceded, a plenary power over American Indian tribes." Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 204 (2007). Even assuming that these scholars are correct on the highly-contested academic question of the Constitution's original meaning, they do not purport to describe the current state of Commerce Clause jurisprudence that this Court is bound to follow.

It is particularly noteworthy that Verona (*see* Br. at 21 n.3) cites Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015), which directly challenges Natelson's interpretation of the original scope of federal authority to manage Indian affairs. Ablavsky's thesis is that although the Indian Commerce Clause was not intended to confer plenary federal power over Indians, it *was* intended to completely preclude any State regulation of Indians in favor of "exclusive" federal

authority, "similar to the present doctrine of field preemption." *Id.* at 1019-20; *see also id.* at 1033-37, 1044-45. Ablavsky notes that this authority once derived from "a holistic interpretation of the Constitution," but that the post-Founding trend toward greater textualism has located it in the Indian Commerce Clause. *Id.* at 1024. This historical analysis severely undercuts Plaintiffs' theory of State sovereignty over Indians and supports Congress's broad constitutional authority.

C. Taking land into trust under Section 465 does not unconstitutionally diminish State sovereignty.

Plaintiffs propose that, even if the text of the Indian Commerce Clause would permit Congress to acquire land to benefit Indians, that clause must be read in conjunction with other structural features of the Constitution that limit federal power where it would encroach on State sovereignty. *See, e.g.*, Verona Br. at 20; UCE Br. at 9-14. Plaintiffs are incorrect; taking land into trust under Section 465 is consistent with federalism and State sovereignty.

1. Taking land into trust under Section 465 does not completely divest a State of sovereignty.

Plaintiffs' arguments proceed from the faulty premise that Section 465 completely divests a State of its sovereignty over land taken into trust. *See* UCE Br. at 8; Verona Br. at 18. Tribes and States each exercise some jurisdiction over lands held by the United States in trust, but they must do so subject to the Supremacy Clause of

the Constitution. As a result, Congress may assert immunity from certain State laws and regulations in order to accomplish federal purposes.

Although Indian tribes generally have regulatory authority over Indians in Indian country, their authority over non-Indians (and thus, the State's jurisdiction over those non-Indians) is a complex and fact-dependent question. *See* COHEN § 7.02. Indian reservations are considered part of State territory, and Indians' rights to govern their reservations "does not exclude all state regulatory authority on the reservation." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). Thus, States may regulate some Indian activity on reservations when "state interests outside the reservation are implicated," and can enter into a reservation to enforce State laws outside a reservation, even against Indians. *Id.* at 362-63.

After the Secretary's decision, New York has continued to exercise jurisdiction over the land acquired in trust, refuting Plaintiffs' contention that taking land into trust will extinguish New York's sovereignty. In the administrative record, the Secretary noted that New York's civil and criminal court jurisdiction would remain intact after the United States takes title to the Tribe's land, and that under 25 U.S.C. § 232, the State retains jurisdiction even over offenses committed by Indians on Indian reservations. *See* ROD at 57 (A-606). Plaintiffs claim that the Secretary's decision will establish "tribal sovereignty and jurisdiction over the land to the exclusion of the state and local governments." Verona Br. at 24 (citing ROD at 12

(A-561)). But in context, that statement does not refer to the *complete* exclusion of State jurisdiction, but only the exclusion of State jurisdiction over matters that are within tribal jurisdiction, such as the use of tribal land and the activities of Indians located there.[9] The Secretary noted that concurrent with tribal jurisdiction, State and local governments would still have authority "as otherwise provided under Federal law," ROD at 12 (A-561), such as its criminal jurisdiction under 25 U.S.C. § 232.

2. Any diminishment of New York's regulatory authority over land taken into trust is consistent with the Constitution.

Plaintiffs claim that the recognition of residual State jurisdiction under *Nevada v. Hicks* is irrelevant because, even if the State retains *some* sovereignty, it does not retain *enough* sovereignty to satisfy the Constitution. *See* Verona Br. at 23-24; UCE Br. at 10-11. Plaintiffs' principal interest here is in two particular attributes of State sovereignty, the zoning power and the tax power, that they allege the Secretary's decision will abrogate. *See* Verona Br. at 2-3. The Constitution defeats this objection in two separate but complementary ways.

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[9] The same is true of this Court's description of tribal "jurisdiction" for IGRA purposes in *Citizens Against Casino Gambling*, 802 F.3d at 279-80 (cited at Verona Br. p. 24). IGRA partially removed the jurisdiction that 25 U.S.C. § 232 grants to New York, but only with respect to state authority over gaming. *See Dalton v. Pataki*, 11 A.D. 3d 62, 66 n.8 (N.Y.A.D. 2004).

First, the Supremacy Clause, U.S. CONST., Art. VI, cl. 2, permits the United States to preempt State laws that might otherwise affect Indian affairs. *See generally* COHEN § 5.02[2]. While "inherent jurisdiction" over reservations is one aspect of State sovereignty, that jurisdiction "can of course be stripped by Congress" as part of its plenary power over Indian affairs. *Nevada,* 533 U.S. at 365 (citing *Draper v. United States*, 164 U.S. 240, 242-43 (1896); *see also* 18 U.S.C. § 1162; 25 U.S.C. § 232 (both conferring additional jurisdiction on States with respect to some areas). In the exercise of this power, Congress can enact legislation that affects State interests, even without the State's consent. *Antoine*, 420 U.S. at 203. It may also create reservations and purchase land to hold in trust even when this would extinguish some State criminal jurisdiction. *See John*, 437 U.S. at 649-50.

Second, even though "a State undoubtedly retains jurisdiction over federal lands within its territory," the Supremacy Clause and the Property Clause, U.S. CONST., Art. IV, § 3, cl. 2, together give Congress the power to "enact legislation respecting those lands." *Kleppe v. New Mexico*, 426 U.S. 529, 542-43 (1976). When Congress does so, that "federal legislation necessarily overrides conflicting state laws." *Id.* at 543; *see Mayo v. United States*, 319 U.S. 441, 445 (1943) ("[T]he activities of the Federal Government are free from regulation by any state."). This principle prevents a State from taxing the property of the United States, *see United States v. New Mexico*, 455 U.S. 720, 734 (1982), and exempts the federal government from the requirements

of local zoning regulations. *See Mount Olivet Cemetery Assoc. v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998); *see also* 25 C.F.R. § 1.4.

Section 465 is a valid exercise of power under these principles, despite diminishing the State's power over the lands acquired. The decision to take land into trust transfers title of that land to the United States. Lands held in trust for Indians are immune from taxation because to tax those lands "is to tax an instrumentality employed by the United States . . . to accomplish beneficent objects" on behalf of Indians. *United States v. Rickert*, 188 U.S. 432, 437-38 (1903).[10] The explicit provision in Section 465 that land held in trust "shall be exempt from State and local taxation," 25 U.S.C. § 465, is therefore well within Congress's power. Without specifically reaching the constitutional question presented here, the Supreme Court has repeatedly said that when a tribe purchases land, it remains subject to State and local taxes, but that when the United States takes land into trust, those taxes are preempted. *See Sherrill*, 544 U.S. at 220-21; *Cass Cty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110-14 (1998).

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[10] The same principle applies to lands held by Indians in "restricted fee," which is typical in New York. *See* UCE Br. at 7. The Supreme Court has treated trust and restricted fee land as functionally equivalent with respect to federal power. *See Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 618-19 (1943) ("The power of Congress over 'trust' and 'restricted' lands is the same.").

UCE argues that these effects of the Secretary's decision cause "legitimate worries for citizens of the State of New York," whose State government will not be accountable to them for laws and regulations that apply on tribal land. UCE Br. at 15. But the citizens of New York have accountable representatives in Congress who participate in the federal management of Indian affairs. Here, in the exercise of authority delegated by Congress, Interior has provided that the concerns of New York and its citizens should be addressed in the administrative process, *see* 25 C.F.R. §§ 151.10-.12, and through intragovernmental agreements, *see* ROD at 57-59 (A-606-08). The Secretary took careful account of the State interests that Plaintiffs seek to protect, *see* UCE Br. at 14, including the effect of her decision on local tax revenues, land use and zoning, environmental protection, and health and safety laws. *See generally* ROD at 40-68 (A-589-617). Verona challenged that analysis before the district court, which rejected their arguments, and Plaintiffs do not appeal on that issue. *See Verona II* at 10-17 (SPA-57-63). The question now before this Court is whether the federal government's widely-recognized authority over land that it acquires causes an unconstitutional violation of a State's sovereignty. Plaintiffs cannot establish any such violation.

Verona cites several cases for the proposition that "inherent attributes of [State] sovereignty" limit Congress's power under the Interstate Commerce Clause, *see* Verona Br. at 19-21, but those cases do not apply here. In some of those cases, the

Supreme Court has held that "even where the Constitution vests in Congress complete law-making authority over a particular area," that authority is still subject to the specific protection against suit that the Eleventh Amendment gives to States. *Seminole Tribe*, 517 U.S. at 72; *see Federal Maritime Comm'n v. S. Car. State Ports Auth.*, 535 U.S. 743, 760-61 (2002); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). Here, Section 465 does not threaten to hale New York into court or abrogate its immunity from suit; it only exercises Congress's complete law-making authority over Indian affairs to remove Indian-owned land from some aspects of State control. In other cases, the Supreme Court has held that Congress may not "compel the States to enact or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997); *see Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602-04 (2012); *New York v. United States*, 505 U.S. 144, 166-69 (1992). That rule is also not implicated here because Section 465 does not require the State to do anything; it provides for Congress's objectives to be satisfied through a federal administrative process that results in federal land ownership.

The system of dual sovereignty between the United States and the several States does not mean that those sovereigns are "co-equal" in every respect. Verona Br. at 19. To the contrary, the "Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citing U.S. CONST., Art. VI, cl. 2). Although federal ownership of land in trust

for Indians diminishes the State's authority to tax and control that land, that effect is consistent with Congress's constitutional power to achieve federal purposes.

3. The Enclave Clause does not limit federal power to acquire land.

The Enclave Clause of the Constitution, U.S. CONST., Art. I, § 8, cl. 17, provides that Congress may "exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." The United States does not purport to exercise "exclusive" jurisdiction over land that it takes into trust for Indians, nor is that land used for the purposes enumerated in the Enclave Clause. The government therefore does not rely on the Enclave Clause as a basis for Section 465; Congress's authority under the Indian Commerce Clause is sufficient to enact that statute. The district court correctly upheld the Secretary's decision here under the authority of the Indian Commerce Clause. *See Upstate Citizens II* at 13 (SPA-13); *Verona I* at 6 (SPA-32).

Even though the United States does not rely on the Enclave Clause here, Plaintiffs propose that it is relevant because it provides the only way "for Congress to remove a State's sovereign authority over land." Verona Br. at 22; UCE Br. at 7-15. This Court has recognized that, while the federal government has a general power "to *acquire* land within a state, either by purchase or condemnation," the Enclave Clause provides one of two ways that the United States may assert *jurisdiction* over land.

United States v. Davis, 726 F.3d 357, 363 (2d Cir. 2013) (considering federal criminal jurisdiction). But State consent under the Enclave Clause is necessary only where the United States seeks "the benefits of [the Enclave Clause]" – that is, "'exclusive' jurisdiction." *Paul v. United States*, 371 U.S. 245, 264-65 (1963). This principle, which UCE describes as a "snippet" of *United States v. Johnson*, 94 F.2d 980, 984 (1993), has a long pedigree. *See Kohl*, 91 U.S. at 374 (the consent of a State "is needed only, if at all, for the transfer of jurisdiction and of the right of *exclusive* legislation after the land shall have been acquired" (emphasis added)); *Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186, 197 (1937) (the consent of a State is necessary for the United States to "acquire[] exclusive legislative authority so as to debar the State from exercising *any* legislative authority including its taxing and police power" (emphasis added)).

Conversely, where the United States does not seek to establish exclusive jurisdiction and divest the State of jurisdiction, it may acquire land and set rules to govern it. "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands." *Kleppe*, 426 U.S. at 542. Even where the United States is an "ordinary proprietor," *Davis*, 726 F.3d at 364, the Supremacy Clause limits the application of some State laws. *See supra* pp. 37-38. "A different rule would place the public domain of the United States completely at the mercy of state legislation." *Kleppe*, 426 U.S. at 543. Section 465 falls within this rule: It does not

purport to establish exclusive federal jurisdiction over land taken into trust, but it does provide that such land is not subject to State and local tax. *See* ROD at 57 (A-606). That does not mean that Section 465 creates federal enclaves that require State consent.

Plaintiffs respond that Section 465 divests the State of so much jurisdiction that the United States can only use Section 465 if it meets the requirements of the Enclave Clause. *See* Verona Br. at 23-24. UCE, in particular, claims that where the federal acquisition of land opens the door to some tribal jurisdiction, State consent is required. UCE Br. at 8-11. They cite no law to support this kind of line-drawing, however. To the contrary, tribes everywhere have jurisdiction over tribal members on their reservations, and the Supreme Court has held that reservations are not federal enclaves. State laws, "civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian[s]." *Surplus Trading Co v. Cook*, 281 U.S. 647, 651 (1930).

This principle was upheld recently in *City of Roseville v. Norton*, 219 F. Supp. 2d 130 (D.D.C. 2002), in which the district court considered a challenge to the Secretary's decision to take land into trust for the United Auburn Indian Community. Like the Plaintiffs here, the *Roseville* plaintiffs conceded that the State would continue to have some jurisdiction but cited Matal's article about the Indian Commerce Clause to argue that the Secretary's decision "touches upon enclave concerns." *Id.* at 150.

The court rejected that argument on the grounds that "state regulation over Indian trust lands is impeded only to the extent that it conflicts with federal legislation designed to promote the welfare of Native Americans." *Id.* at 151. The court also found the Indian Commerce Clause to be an adequate, separate source of Congress's authority to take the land at issue into trust. This reasoning from an essentially identical case is persuasive, and this Court should adopt it here.

4. The Tenth Amendment does not bar Congress from enacting Section 465.

Although Plaintiffs claim in their Introductions to press a Tenth Amendment argument, *see* UCE Br. at 3-4; Verona Br. at 1-2, they mention the Tenth Amendment only briefly and in passing. *See* UCE Br. at 44; Verona Br. at 21. Because this issue is not sufficiently raised, the Court should not consider it on appeal. *See Norton v. Sam's Club*, 145 F.3d 114, 117-18 (2d Cir. 1998).

In any event, Plaintiffs' Tenth Amendment argument is plainly wrong, as the district court held. *See Verona I* at 4-6 (SPA-30-32). As discussed above, *see supra* pp. 29-31, several provisions of the Constitution grant Congress broad authority, and as Congress's "willingness to exercise power within the confines of the Constitution has grown, the authority of the States has correspondingly diminished to the extent that federal and state policies have conflicted." *New York*, 505 U.S. at 159. The Tenth Amendment means that "Congress may not simply 'commandee[r] the legislative processes of the States." *Id.* at 161 (citing *Hodel v. Va. Surface Mining & Reclamation*

Ass'n, 452 U.S. 264, 288 (1981)). But the Tenth Amendment does not restrict Congress's authority to act within the sphere of its enumerated powers under the Constitution, including through the preemption of State law. *Id.* at 156, 166-68; *see Gila River Indian Cmty v. United States*, 729 F.3d 1139, 1153-54 (9th Cir. 2013). Those enumerated powers are sufficient to support Section 465, and taking land into trust under that statute therefore does not offend the Tenth Amendment.

D. The general grant of power in the Indian Commerce Clause is not limited in the specific case of the Oneida Nation in New York.

UCE further argues that even if Congress has the authority to take land into trust in some cases, the specific history of the Oneida Nation in New York renders it unconstitutional here, because the Tribe is under New York's exclusive jurisdiction and the federal government is without power to make legislation affecting it. *See* UCE Br. at 16-18, 22-31, 32-33.[11] This argument would mean that the power granted to Congress to regulate "Commerce . . . with the Indian Tribes," U.S. CONST., Art. I, § 8, cl. 3, would vary depending on where those tribes are located. That theory directly contradicts the Supreme Court's holding in earlier Oneida litigation:

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the

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[11] Verona also claims that Section 465 would be constitutional in some circumstances, but not in the State of New York. *See* Verona Br. at 25-27. It does not support that assertion with any argument, however, referring the Court only to its statutory arguments, which do not implicate Congress's constitutional powers. *Id.*

> States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State. . . . But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.

Oneida Indian Nation of New York v. Cty. of Oneida, 414 U.S. 661, 670 (1974) ("*Oneida I*") (internal citations omitted). UCE acknowledges that its theory conflicts with *Oneida I*, but it claims that case was "wrongly decided." UCE Br. at 34; *see id.* at 36-37.

UCE's argument depends upon the incorrect proposition that the original thirteen colonial States have greater sovereignty, or the federal government has less power in their territory, than in States that were established in United States territory. That proposition contradicts the "equal footing doctrine," a constitutional principle providing that "all States are admitted to the Union with the same attributes of sovereignty (*i.e.*, on equal footing) as the original 13 States." *Minnesota*, 526 U.S. at 204 (citing *Coyle v. Smith*, 221 U.S. 559 (1911)); *see Pollard v. Hagan*, 44 U.S. 212, 223 (1845). This doctrine provides that Congress cannot "deprive a new state of any of those attributes essential to its equality in dignity and power with other states." *Coyle*, 221 U.S. at 568. By corollary, it also means that the original thirteen States cannot assert *greater* authority against the federal government than States subsequently admitted to the Union. The Constitution makes the law of the United States "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary

notwithstanding," U.S. CONST., Art. VI, § 3, cl. 2, including in the original thirteen colonial States.

This means that much of the history between New York and the Tribe that Plaintiffs raise here is irrelevant to the constitutional question before the Court. Even if UCE were correct that the Oneida Nation has no reserved land in New York, UCE Br. at 15-18, or that the Tribe ceded all of its property to New York and submitted to New York's jurisdiction in its early history, UCE Br. at 28-30, those facts would not limit Congress's power under the Indian Commerce Clause and the Supremacy Clause. There are some circumstances in which Indians in a particular State may enjoy greater rights of possession or usufructuary rights than in other States – for example, if provided by the specific terms of a treaty. *See Minnesota*, 526 U.S. at 204-05. But the constitutional issue here is one of federal power, not tribal rights, and that power does not depend on the State's prior dealings with a tribe. A State's authority over its own territory "is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers." *Id.* If Congress may constitutionally take land into trust in other States, then it may constitutionally do so in New York. The equal footing doctrine was one of the bases for the district court's decision, *see Upstate Citizens I* at 7 (SPA-33), but UCE does not address that point (much less demonstrate error) in its brief.

Instead, UCE largely seeks to re-litigate the questions of aboriginal title and the balance of sovereignty between the tribe and the State that the courts have already resolved through decades of litigation between the Oneida Nation and New York. Those court decisions have established that the Tribe retained a reservation in New York, *see Oneida Indian Nation*, 665 F.3d at 443-44; that the Tribe may assert a possessory right to tribal lands under federal law, *see Oneida I,* 414 U.S. at 677; *Oneida II*, 470 U.S. at 235-36; that the Tribe's subsequent transfer of title in that land to New York without federal approval violated the Nonintercourse Act, *see Oneida Indian Nation*, 665 F.3d at 416-17; and that the Tribe cannot reassert its aboriginal sovereignty over that land simply by reacquiring title, *see Sherrill*, 544 U.S. at 214; *see also generally Oneida Indian Nation*, 665 F.3d at 415-24. UCE contends that, if this Court were writing on a blank slate, better historical analysis would show that these cases were decided incorrectly. *See* UCE Br. at 15-17. This radical argument would upset much of the basis for federal relations with tribes in the thirteen colonial States, including the Nonintercourse Act that the first Congress enacted in 1790.

For example, UCE argues that court decisions finding an Oneida reservation in central New York are incorrect, *see* UCE Br. at 15-18; *see also* Verona Br. at 26-27, and also that the Oneidas' aboriginal title had passed to New York rather than to the United States, *see* UCE Br. at 22-23. By denying the existence of a reservation, UCE seeks to establish (contrary to *Oneida*, 665 F.3d at 443-44) that Congress lacks power

over Indian lands in New York and the other twelve colonial States, because those lands were never owned by the United States. *See id.* at 23, 32-33. But there is no need to test these propositions. Even if the Court were not bound by the case law that UCE disregards, the Indian Commerce Clause and the Supremacy Clause are wholly sufficient to empower Congress to enact Section 465 and make it applicable within New York. UCE's arguments against a federal land "hook," *id.* at 18, are irrelevant because the United States does not rely on any past ownership or pre-existing federal or tribal rights to take land into trust. The United States may constitutionally enact legislation under the Indian Commerce Clause without establishing any such factual predicates.

Similarly, UCE's discussion of how Indian title was transferred and recognized prior to the ratification of the Constitution, *see* UCE Br. at 25-28, is purely academic. Grant for the sake of argument that Great Britain's title to central New York lands passed to New York after the American Revolution, and even (contrary to *Oneida I* and *Oneida II*) that the Oneida could and did abandon any possessory right to their aboriginal territory. That does not establish that, once the Oneida Nation regained title to parcels on their reservation, it could not convey that title to the United States under the Indian Commerce Clause to be held in trust.

The academic literature that UCE cites also does not support its argument. *See* UCE Br. at 24, 30 (citing Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L.

REV. 1069 (2004)). Prakash's purpose is to show that the federal government should not be understood to have "plenary power *over all tribes*," because the Constitution authorizes the United States to have "various types of relationships with Indian nations." *Id.* at 1073-74. However, Prakash barely discusses State sovereignty over Indians. Like the quotation that UCE presents from Congressman John Forsyth, *see* UCE Br. at 29, Prakash's article supports the theory that both the federal government and States were understood in the late eighteenth and early nineteenth centuries to have varying sovereignty over the Indian tribes, which were then often viewed more as foreign nations than as the domestic dependent nations of today's jurisprudence. *See* Prakash at 1082-84. Prakash argues for limits on federal sovereignty over tribes, *see id.* at 1113-14, but in his theory, that limit is an attribute of tribal sovereignty, not State sovereignty.

This is no help to UCE because the constitutional question in this case is about federal-State relations, not federal-Oneida relations. None of the sources UCE cites, historical or academic, suggests that State sovereignty can limit the United States' constitutional power over Indian affairs. *See supra* pp. 33-34. And as described above, any such principle would be inconsistent with modern Indian jurisprudence. Although UCE cites the Articles of Confederation to suggest that New York once had exclusive legislative power over the Oneida, *see* UCE Br. at 30, the framers of the Constitution understood that the States' "assertions of authority against the federal

government" under the Articles of Confederation "undermined national Indian policy and spawned costly wars." Ablavsky at 1033-34. The Supremacy and Commerce Clauses of the Constitution remedied this situation, expanding Congress's authority (and diminishing State authority) to manage Indian affairs. *See Worcester v. Georgia*, 31 U.S. 515, 558-59 (1832).

For the foregoing reasons, Plaintiffs cannot show that Section 465 exceeds Congress's constitutional powers, that State sovereignty limits those powers, or that the Oneida Nation must be considered an exception to well-established principles of federal Indian law. The Court must therefore reject Plaintiffs' constitutional arguments and affirm the district court's judgment on these points.

III. SECTION 465 GRANTS THE SECRETARY AUTHORITY TO TAKE LAND INTO TRUST FOR THE ONEIDA NATION.

A. The coverage of Section 465 raises questions of statutory interpretation that are subject to *Chevron* review.

This brief now turns from grand principles of constitutional law to the more technical task of statutory interpretation. The question whether the Oneida Nation can benefit from Section 465's land-into-trust provision involves the interpretation of two statutes, the IRA and ILCA. The Court does not interpret those statutes on a blank slate, as Interior has interpreted Section 465 in formal notice-and-comment regulations to apply to all federally-recognized tribes. *See* 25 C.F.R. § 151.2(b). The Interior Board of Indian Appeals has followed that interpretation in administrative

adjudications, affirming the Secretary's decision to take land into trust in New York for the Saint Regis Mohawk Tribe, which had previously opted out of the IRA. *See State of New York v. BIA*, 58 I.B.I.A. 323, 331-34 (June 11, 2014). The Solicitor of the Department of the Interior has also stated it as the Department's interpretation in a formal opinion. *See* "The Meaning of 'Under Federal Jurisdiction' For Purposes of the Indian Reorganization Act" at 21 (March 12, 2014) (U.S. App. 18).

"When a court reviews an agency's construction of the statute which it administers," as Interior administers the IRA and ILCA, it does so under the standard of *Chevron*. 467 U.S. at 842. First, the court must determine whether Congress "has directly spoken to the precise question at issue," so that if Congress has "unambiguously expressed" its intent, the court may give effect to that intent. *Id.* at 842-43. The question at this step is not how Congress *would have* resolved an issue, but whether the enacting Congress *actually did* resolve that issue in a way that foreclosed the agency's authority. The court may employ the "traditional tools of statutory construction" to determine whether "Congress had an intention on the precise question." *Id.* at 844 n.9. Those tools may include the statute's "text, legislative history, structure, and purpose." *Li v. Renaud*, 654 F.3d 376, 382 (2d Cir. 2011) (quoting *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000)). The language of the statute must be read "with a view to [its] place in the overall statutory scheme," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33

(2000); taking into account "the design of the statute as a whole" and "its object and policy." *Negusie v. Holder*, 555 U.S. 511, 518-19 (2009) (quoting *Dada v. Mukasey*, 554 U.S. 1, 16 (2008)).

If Congress has not considered the precise question at issue, even if it has not explicitly delegated authority to an agency to interpret the statute, a reviewing court will consider ambiguity to constitute an implicit delegation of authority to the agency. Agency action undertaken pursuant to such a delegation is "binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Chevron*, 467 U.S. at 844).[12] The court's task, therefore, is limited to determining "whether the agency's construction is reasonable." *Li*, 654 F.3d at 382 (citing *Chevron*, 467 U.S. at 844). If it is, then the reviewing court must respect the agency's legitimate policy choices. *See New York v. FERC*, 783 F.3d 946, 954-55 (2d Cir. 2013).

Overlaid on the *Chevron* framework in this case is an additional canon of statutory construction relating to "statutory provisions involving Indians." *Connecticut*, 228 F.3d at 92. That canon requires the Court to construe statutes "liberally in favor

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[12] Here, there is an explicit delegation of authority to the executive branch to interpret both the IRA and ILCA. *See* 25 U.S.C. § 9 (delegating authority to "prescribe such regulations as [the President] may think fit for carrying into effect the various provisions of any act relating to Indian affairs").

of Indians, with ambiguous provisions interpreted to their benefit." *Id.* (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see Blatchford*, 501 U.S. at 795; *Oneida II*, 470 U.S. at 247-48. Although the courts disagree whether the Indian canon of construction trumps *Chevron* deference in the interpretation of an ambiguous statute, the Court need not consider that question here because Interior's interpretation of the IRA and ILCA points in the same direction as the Indian canon of construction. *See Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003).

The Secretary's regulations, the decisions of the Interior Board of Indian Appeals, and the Solicitor's formal opinion are all ways in which Interior has formally interpreted the IRA and ILCA, determining that all tribes (including New York tribes) are eligible to benefit from land-into-trust actions under Section 465 of the IRA. Plaintiffs contest this conclusion for two reasons. First, they claim that the IRA cannot apply to the Oneida Nation because Congress did not intend it to apply to New York and the other colonial States. *See* UCE Br. at 4-6; Verona Br. at 29-34. The "precise question at issue" in this argument pertains to the interpretation of the IRA: When Congress enacted the IRA in 1934, did it intend that statute to apply to all recognized tribes, or only to some of those tribes based on their particular histories? The argument in subsection B below demonstrates that Congress in 1934

unambiguously provided that all tribes, regardless of their location, are covered by the IRA unless they chose to opt out.

Second, Plaintiffs contend that because the Oneida Nation chose to opt out of the provisions of the IRA by tribal vote in 1936, *see supra* p. 8, it is eligible to benefit from Section 465 only if it is also eligible for benefits under ILCA, which restored "[t]he provisions of section 465" to "all tribes notwithstanding the [opt-out] provisions of section 478 of this title." 25 U.S.C. § 2202. Plaintiffs argue that Section 2202 restored the Tribe's rights only if it meets the definition of "tribe" in the IRA *and also* the definition of "tribe" in ILCA, and that the Tribe fails the latter requirement. *See* UCE Br. at 6-7; Verona Br. at 34-41. The "precise question at issue" in this argument pertains to the interpretation of ILCA: Did Congress intend ILCA to restore the benefits of Section 465 of the IRA to all tribes that had previously opted out, or only to a subset of those tribes? The argument in subsection C below demonstrates that this question is irrelevant to this case because the Oneida meet the statutory criteria even under Plaintiffs' theory. But in any event, Congress did intend to make all tribes, including the Oneida, eligible for Section 465 land-into-trust decisions.

To summarize, Plaintiffs cannot prevail here by arguing that their statutory interpretation or their command of history is superior to Interior's. They must demonstrate either: (1) that Congress, in the IRA, unambiguously intended to exclude

New York Indians from its coverage; or (2) that Congress, in ILCA, unambiguously chose not to restore Section 465 eligibility to the Oneida. Plaintiffs cannot meet this high burden.

B. The IRA applies to Indians located in New York.

Congress passed the IRA in 1934 to address the disastrous loss of Indian land under previous federal and State policies. The 1887 General Allotment Act, or "Dawes Act," attempted to promote the nineteenth-century policy of assimilation by making "allotments" of tribal land to individual Indians to be held in trust by the federal government for 25 years. After that time, fee title would pass to the individual Indian owner and become alienable. Under this policy, by 1934, more than two-thirds of allotted land had passed into non-Indian ownership, leaving Indians and tribes landless and destitute. *See generally* COHEN § 16.03[2][a]-[b].[13]

Plaintiffs are correct that one of the primary purposes of the IRA was to repudiate the Dawes Act and its policy of allotment. *See* Verona Br. at 29-32; *see also* COHEN § 16.03[2][c]. But Congress did not unambiguously indicate its intent to limit the IRA to Indians that had lost their land specifically and only under the Dawes Act. Some of the provisions that Congress enacted referred to allotment, *see, e.g.*, 25 U.S.C.

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[13] Contrary to UCE's assertion, *see* UCE Br. at 4, the Dawes Act applied nationwide except to the Seneca Nation and other enumerated groups. 25 U.S.C. § 339.

§§ 461, 462, while others were more generally applicable. For example, 25 U.S.C. § 464 prohibited the sale or transfer of *any* restricted Indian land without the approval of the Secretary. Similarly, Section 465 authorized the Secretary to acquire all types of interest in property "within or without existing reservations" that had been affected by allotment 25 U.S.C. § 465. Furthermore, many provisions of the IRA had nothing to do with land ownership at all. *See also* 25 U.S.C. § 469 (providing funds for the organization of Indian corporations, without limitation); *id.* § 471 (providing for Indian vocational education); *id.* § 472 (establishing a civil-service preference for "qualified Indians," without limitation); *id.* § 476 (providing that "[a]ny Indian tribe shall have the right to organize for its common welfare"). As noted below, *see infra* pp. 59-60, Congress intended all Indians to benefit from the IRA, and it cannot be interpreted to apply only to Indians whose lands had been allotted under the Dawes Act.

Two specific sections of the IRA are particularly instructive here. First, where Congress sought to exclude a geographic area or tribe from the coverage of the IRA, it explicitly said so in a provision that defined the IRA's applicability. *See* 25 U.S.C. § 473. That provision excludes U.S. Territories, colonies, and insular possessions from the provisions of the IRA, but not any particular States. It also excludes enumerated Indian tribes, but not the Oneida Nation. Second, Congress defined "tribe" for purposes of the IRA to include "any Indian tribe, organized band, pueblo,

or the Indians residing on one reservation." 25 U.S.C. § 479. The reference to "pueblos" is salient in this context, because the IRA explicitly includes them as "tribes" even though their land was not allotted under the Dawes Act. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 253 n.28 (1985). If Congress had intended to include only those tribes whose lands had been allotted, it would have drafted these provisions differently.

Even if this statutory text were not enough to defeat Plaintiffs' argument, the purpose of the IRA supports interpreting that Act to apply to all Indians. Verona argues that, "[t]o the extent that the IRA's purpose was to remediate losses caused by the allotment policy," it should be interpreted to apply only to Indians whose lands were lost through allotments. Verona Br. at 32. But Congress's purpose in the IRA was more expansive. The IRA was part of a wide-ranging New Deal program to restructure the relationship between the federal government and tribes. *See* Verona Br. at 30 (describing a "paradigm shift" in federal Indian policy); *Annual Report of the Secretary of the Interior* at 79-82 (1934).[14] Section 465's trust-acquisition authority served in part to restore land lost to Indians under the Dawes Act, but its purpose served the broader objectives of promoting Indian economic development, cultural and religious

[14] Available at https://archive.org/details/annualreportofse34unit (last accessed January 21, 2016).

liberty, education, and democracy. *See* 2 FRANCIS P. PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 944-45 (1984); *see generally id.* at 940-968.

President Roosevelt supported the IRA because it "embodies the basic and broad principles of the administration for a new standard of dealing between the Federal Government and its Indian wards," extending to them "the fundamental rights of political liberty and local self-government and the opportunities of education and economic assistance that they require." *See* S. Rep. No. 73-1080, at 3 (1934). The Senate Committee on Indian Affairs similarly described the IRA's broad purposes, which included an end to the alienation of Indian lands, the acquisition of land for landless Indians, and provisions to "stabilize the tribal organization of Indian tribes" and to permit them to form business corporations and obtain credit. *See id.* at 1-2 (1934). The Committee Report refers to the need to reverse the negative effects of allotment in describing Sections 1 through 4 of the bill (codified at 25 U.S.C. §§ 461-464), but not Section 5 (codified at 25 U.S.C. § 465) or other sections.

The statements of John Collier, the Commissioner of Indian Affairs, in the congressional record also do not support Plaintiffs' theory of an unstated limit on the scope of the IRA. *See* UCE Br. at 6. UCE emphasizes language in an early version of the IRA that would have exempted all New York Indians from the IRA because they "do not want" the IRA. *See Hearing Before the Committee on Indian Affairs, House of*

Representatives, on H.R. 7902, 73d Cong. at 133 (Feb. 27, 1934). But that language was removed from the bill before it was enacted. The final version of the IRA instead gave all tribes the opportunity to opt out of the IRA's provisions. *See id.* at 198 (discussion concerning "Section 21"). The Congressional Record contains an exchange that speaks even more directly to this question, in which Senator Wheeler (one of the IRA's sponsors) confirmed that if New York Indians "choose to take advantage of the provisions" of the IRA, "they are at liberty to do so." 78 Cong. Rec. 11,124 (1934). Consistent with the general policy trend toward tribal self-government and self-determination in the IRA, Congress chose not to limit the scope of the IRA except in specific, enumerated ways, otherwise leaving each tribe to decide whether the statute should apply to it. And both Interior and the Oneida Nation contemporaneously understood these provisions to apply in New York – the Tribe held an election in 1936 and chose to exercise the opt-out right that Congress provided.

This legislative context severely undermines Plaintiffs' argument that because Congress in 1934 wanted to assist Indians to had lost their land under the Dawes Act allotments, the IRA must be construed to accomplish *only* that purpose and no other. In New York, the Oneida Nation did not lose its land through a federal allotment policy, but the State-driven process of piecemeal sales had much the same effect on tribal land ownership. *See Sherrill*, 544 U.S. at 203-07. While the effect of the

allotment policy under the Dawes Act was foremost in the minds of the drafters and sponsors of the IRA, there is no reason to believe – and the record certainly does not unambiguously demonstrate – that Congress wanted the IRA to assist only Indians who had lost their lands to Dawes Act allotments and to exclude Indians who had lost their land through prior allotments or other practices.

C. The Oneida Nation are eligible to benefit from land-into-trust decisions under Section 465 because ILCA restored that eligibility.

Verona next argues that, even if the IRA originally applied to the Oneida Nation in New York, Congress never restored the land-into-trust eligibility that the Tribe chose in 1936 to forfeit. Congress restored Section 465's applicability to all tribes with the passage of ILCA in 1983, which makes Section 465 of the IRA apply to "all tribes," including those that opted out of the IRA. *See* 25 U.S.C. § 2201, 2202. In Verona's view, that restoration did not apply to the Oneida, because the Section 2201 definition of "tribe" encompasses only an "Indian tribe . . . for which . . . the United States holds lands in trust." *See* Verona Br. at 34-41. The Court need not consider this argument, because the Oneida Nation met that criteria when the Secretary reaffirmed her decision in 2013 to take the Tribe's land into trust. But if the Court does find it necessary to determine whether ILCA's definition of "tribe" controls the restoration of eligibility for land-into-trust decisions that Congress sought to accomplish in Section 2202, it must reject Verona's arguments. Congress did not

intend to limit ILCA's application or to establish additional criteria that a tribe must meet before it can request that the Secretary take land into trust for its benefit.

1. Under Verona's own theory of ILCA, the Secretary had authority to take land into trust for the Oneida Nation.

In Verona's view, the Secretary's land-into-trust decision here was invalid because (1) ILCA applies only to tribes for whom the United States holds land in trust, and (2) the United States did not hold land in trust for the Oneida at the time of the Secretary's decision. Verona's brief concentrates entirely on the first step of this argument and completely ignores the second. This omission is fatal to its appeal: The United States now holds land in trust for the Oneida Nation under the authority of a different statute than the IRA, and did so at the time of the Secretary's Amended ROD in 2013. As a result, there was adequate statutory authority for the Secretary's decision here and for the district court's grant of summary judgment on that basis – even under Verona's interpretation of ILCA. The Court may therefore affirm the district court's judgment without deciding whether Verona's interpretation is correct.[15]

The General Services Administration must "transfer to the Secretary of the Interior, without compensation, excess real property located within the reservation"

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[15] Although this was not the basis for the district court's decision, it is a separate and sufficient ground for this Court to affirm the district court's judgment. *See, e.g. Olsen v. Pratt & Whitney Aircraft*, 136 F.3d 273, 275 (2d Cir. 1998).

of any federally recognized tribe. 40 U.S.C. § 523. On May 28, 2002, GSA issued a letter identifying an 18-acre parcel of "excess real property" at the former United States Air Force Space Command Complex in Verona. *See* GSA Letter at 1 (U.S. App. 1). GSA's letter "hereby transfers the property to the BIA to be held in trust by the Department of the Interior, for the benefit and use of the Oneidas." *Id.* After this point, the transfer of the property was no more than a ministerial act required by statute. However, Interior did not "acknowledge[] receipt of administrative custody and accountability" for that property until December 30, 2008, after the Secretary's decision. *See* BIA Letter at 1 (U.S. App. 3).

Although this transfer was not complete until December 2008, it is still relevant here. The district court remanded the entire Record of Decision to the agency in September 2012, ordering further administrative proceedings (related to the Supreme Court's *Carcieri* decision) and providing for further district-court review after Interior had issued an amended ROD. *See* Remand Order at 44-45 (A-797-98). The Secretary reaffirmed her decision to take approximately 13,000 acres of the Oneida Nation's land into trust on December 23, 2013, almost five years after Interior began administering the 18-acre parcel in trust for the Oneida Nation. *See* Amended ROD (A-1572). Under Verona's own interpretation of ILCA, therefore, the Oneida Nation qualified as a "tribe" for purposes of Section 2201 at that time. As a result, Section

2202 restored the Oneida Nation's rights under Section 465, and the Secretary had authority to take land into trust for the Oneida Nation's benefit.

Even if this Court were (incorrectly) to apply its review only to the superseded 2008 ROD, there would be no need to remand the Secretary's decision to the agency for reconsideration because any such remand would be futile. The Administrative Procedure Act, which provides the basis for this Court's review of the Secretary's decision, requires that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. Under that rule, the court "will not disturb [the agency's action] if we can determine that the outcome of the administrative proceedings will be the same absent [the agency's] error." *Green Island Power Authority v. FERC*, 577 F.3d 148, 165 (2d Cir. 2009); *cf. Watson v. Geren*, 587 F.3d 156, 160-61 (2d Cir. 2009) (Raggi, J., dissenting from the denial of rehearing en banc) (noting that this Court will "*affirm* agency decisions where we could confidently conclude that the agency would reach the same result in the absence of the identified error" (emphasis in original)).

The rule of prejudicial error applies here. Even assuming it was necessary to satisfy the condition that Verona reads into Section 2201 before the Oneida Nation could be enjoy the restoration of Section 465 eligibility that Congress granted in Section 2202, the GSA transfer of the 18-acre parcel to Interior met that alleged requirement. In light of this, a remand to ensure the Secretary's authority under Section 465 would be pointless. The rationale that the Secretary provided in the

ROD for her original decision is unchanged, and the Secretary would be likely to reach the same decision on essentially the same administrative record. This is sufficient to affirm the district court's judgment.

2. ILCA restored eligibility for Section 465 to "all tribes," regardless of whether the United States already held land in trust for them.

If the Court does find it necessary to reach Verona's arguments about the proper interpretation of ILCA, it must reject them. Interior's interpretation of the IRA, as altered by ILCA, is that all federally-recognized tribes are eligible to benefit from land acquired in trust. *See* 25 C.F.R. § 151.2(b). In order to prevail on its theory under the *Chevron* standard, therefore, Verona must show two things: (1) that Congress unambiguously intended Section 2202's restoration of IRA eligibility to depend upon the definition of "tribe" in Section 2201 of ILCA, regardless of the fact that the IRA itself depends on a different definition of "tribe," and (2) that the definition of "tribe" in Section 2201 is unambiguously more limited than the IRA's definition, excluding tribes that have no land held in trust by the United States. Verona cannot show either of these things.

a. The scope of Section 465 is not defined by Section 2201 of ILCA.

The first question the Court would confront if it reaches this argument is whether ILCA's definition of "tribe" in Section 2201 is even necessary to decide the scope of Section 2202. Section 2202 of ILCA makes Section 465 of the IRA apply to "all tribes," including those that opted out of the IRA. It is true that Section 2201

contains a definition of "tribe" that applies "[f]or the purpose of this chapter." *See* 25 U.S.C. §§ 2201(1), 2202. But the automatic application of the Section 2201 definition of "tribe" to Section 2202 leads to an anomalous result: A different definition of "tribe" would apply to Section 465 depending on whether a tribe had always been subject to the IRA, in which case the tribe must meet only the IRA's definition, or whether it had previously opted out, in which case it would have to meet both the IRA definition *and* the ILCA definition. The better interpretation, which the Secretary has adopted, is that Section 2202 restored eligibility for all tribes to benefit from land-into-trust decisions if they would have been eligible when the IRA was enacted in 1934, regardless of any past opt-out election.

When deciding between these two interpretations of Section 2202, the Court must "read the words in their context and with a view to their place in the overall statutory scheme." *ACLU v. Clapper*, 804 F.3d 617, 623 (2d Cir. 2015) (quoting *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)). In an "unusual case," the statutory context can show that "statutory definitions do not have compulsory application." *In re Air Cargo Shipping Servs. Antitrust Litigation*, 697 F.3d 154, 159 (2d Cir. 2012) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206-07 (2009)).

The interaction of ILCA and the IRA presents such an "unusual case" because, unlike the other provisions of ILCA, the effect of Section 2202 relates to and depends completely upon statutory provisions outside of ILCA that operate using a separate

definition of "tribe." It provides that the "provisions of section 465 of this title shall apply to all tribes." 25 U.S.C. § 2202. Section 465, in turn, uses the IRA definition of "tribe" found in Section 479, which includes "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* § 479. Furthermore, Congress in ILCA provided that Section 465 should apply to "all tribes *notwithstanding* the provisions of Section 478" that had allowed them to opt out. *Id.* § 2202 (emphasis added). That suggests that Congress wanted a tribe's past decision to opt out of the IRA to be completely irrelevant to the applicability of Section 465, not to impose a further definitional hurdle. In context, therefore, it is at least reasonable to understand Section 2202 to apply to the same "tribes" as the two provisions of the IRA that it modifies.

The legislative history of ILCA supports this interpretation. ILCA grew out of an attempt to help the Devils Lake Sioux, whose reservation had been fragmented under the allotment policy. Congress noted that although "[m]any other tribes are able to use the Indian Reorganization Act to solve such problems," the Devils Lake Sioux had opted out of the IRA in 1934. *See* H.R. Rep. No. 97-908 (1982), at 5. Interior recommended to Congress that it go beyond the Devils Lake Sioux to address more generally the problem of land consolidation for tribes that had opted out of the IRA. Because Section 465 did not provide authority for land consolidation for tribes that had opted out, Interior noted that "a number of tribes have requested

and received special legislative authority to carry out land consolidation programs." *Id.* at 13. Interior proposed Section 2202 to eliminate the need for tribe-by-tribe legislative fixes by providing "a single comprehensive law governing land consolidations" that would apply to "all the tribes served by the Secretary." *Id.* That provision "would merely extend the land acquisition authority of the IRA to the reservations of tribes who rejected the Act in elections held in the mid-1930s." *Id.* at 14. The House Committee approved that provision and fully endorsed Interior's logic. Under the final bill, "Section [465] of the IRA would automatically be applicable to *any tribe, reservation or area excluded from such Act*, including tribes that have previously voted to reject the 1934 Act." *Id.* at 7 (emphasis added). All of these discussions of the Indians to be covered by Section 2202 referred to the IRA; none of them referred to the definition of "tribe" in a separate section of the same bill.

Congress continued to express this understanding of ILCA in subsequent statutes. "Subsequent legislative history is not entitled to the same weight as contemporaneous legislative history, but it may provide 'some guidance' as to the legislative intent for a prior congressional act." *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329, 345 n.8 (2d Cir. 2011) (citing *Davis v. United Air Lines*, 662 F.2d 120, 123-24 (2d Cir. 1981)). Two particular statements provide such guidance here. First, in a 1988 amendment to the IRA, Congress extended Section 465 to include the Yakima Indian Nation. *See* Pub. L. No. 100-518, §§ 213-14, 102

Stat. 2938, 2941 (1988). Congress noted that Section 2202 of ILCA extended Section 465 "*to all tribes* regardless of whether they were organized pursuant to the IRA," and that additional legislation was necessary only due to Yakima-specific factors. S. Rep. No. 100-577, at 28 (1988) (emphasis added). Second, in a 1990 statute making "miscellaneous amendments to Indian laws," Congress extended two other provisions of the IRA to "all Indian tribes." Pub. L. No. 101-301, § 3, 104 Stat. 206, 207 (1990) (codified at 25 U.S.C. § 478-1). This statute did not include a separate provision defining "tribes," but the Senate Committee described it as "consistent with" Section 2202 of ILCA, specifically its extension of Section 465 of the IRA "to *all tribes*." S. Rep. 101-226, at 3, 10-11 (1990). One purpose of this Act was to reconcile the "administratively burdensome" disparate treatment of tribes that had opted out of the IRA, *id.* at 10, once again showing Congress's interest in making federal Indian policy more consistent across tribes with respect to land consolidation.

The statutory context here, including contemporaneous and subsequent legislative history, accordingly establishes that Congress believed and intended that Section 2202 of ILCA would extend Section 465 of the IRA to all "tribes" as defined in the IRA. Even if Congress's intent on this question were not fully clear, these statements at least show that the Secretary's regulatory interpretation of the scope of Section 465 is reasonable. Applying Section 2202 to all tribes that had previously opted out of the IRA effectuates Congress's intent in ILCA and is consistent with

Congress's subsequent understanding. The Secretary's regulations also make federal recognition the only requirement for Section 465 eligibility, treating all recognized tribes equally for purposes of Section 465. This interpretation avoids the need for the kind of tribe-specific distinctions and repeated legislative fixes that Congress was trying to eliminate in ILCA. It is therefore unnecessary to resort to Section 2201's definition of "tribe" to determine what Congress meant in Section 2202.

b. Even if the Section 2202 is limited by Section 2201, that section can be read to apply to "any Indian tribe," without qualification.

To the extent that Section 2201 is relevant here at all, it must be interpreted in a way that is consistent with Congress's plain intent to make ILCA's land-consolidation provisions more widely available and to avoid the need for tribe-specific legislative fixes. Verona interprets Section 2201, and therefore Section 2202, to apply only to tribes "for which . . . the United States holds lands in trust." Verona Br. at 35 (quoting 25 U.S.C. § 2201). This interpretation undermines Congress's intent by imposing an additional requirement on tribes that would seek in ILCA the restoration of their rights under Section 465. The Secretary's interpretation, in contrast, accomplishes Congress's purpose by interpreting ILCA to apply to "any Indian tribe," and separately, any "community for which, or for the members of which, the United States holds land in trust." 25 U.S.C. § 2201(1). Under *Chevron*, Verona's interpretation can prevail over the Secretary's own interpretation only if it is unambiguously required – that is, if there is no other permissible interpretation of

Congress's intent. As the district court correctly held, however, Section 2201 is not unambiguous, and the Secretary's interpretation reflects at least a permissible interpretation of its ambiguity. *See Verona I* at 16-20 (SPA-42-46).

The district court determined that the Secretary's broader interpretation of ILCA is permissible based on the "rule of the last antecedent," under which "a limiting clause or phrase" in statutory language "should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Verona I* at 18 (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)); *see also FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389-90 (1959). Applying that rule is especially appropriate where there is no comma separating the modifier from the last antecedent. *See Enron Creditors*, 651 F.3d at 335-36; *United States v. Kerley*, 416 F.3d 176, 179-80 (2d Cir. 2005). Here, the phrase "for which . . . the United States holds lands in trust" immediately follows the noun "community," without a comma, and modifies only that noun. 25 U.S.C. § 2201(1). Under the last-antecedent rule, the phrase "for which . . . the United States holds land in trust" does not limit the other terms in the definition, including "tribe." *Id.* The Oneida Nation would therefore had been eligible to benefit from land-into-trust decisions under Section 2202 even if the United States had not held any land in trust for it at the time of the Secretary's amended decision.

The Supreme Court has acknowledged that the rule of the last antecedent "is not an absolute and can assuredly be overcome by other indicia of meaning," but that

it is "'quite sensible as a matter of grammar.'" *Barnhart*, 540 U.S. at 26 (quoting *Nobleman v. Am. Sav. Bank*, 508 U.S. 324, 330 (1993)). If the court is interpreting a statute *de novo*, then it may choose the "more reasonable" interpretation even if that interpretation conflicts with the rule of the last antecedent. *Nobleman*, 508 U.S. at 331; *see also Mandel Bros.*, 359 U.S. at 389 (applying the rule *de novo* to construe a statute that is "not unambiguous"). This Court, however, does not interpret Section 2201 *de novo*, but must decide only whether Interior's interpretation of ILCA is foreclosed by the unambiguous text of the statute. In *Barnhart*, the Supreme Court held that an agency interpretation that is consistent with the rule of the last antecedent is at least a "reasonable construction" that "must therefore be given effect" under *Chevron*. 540 U.S. at 26; *see also United States v. Lockhart*, 749 F.3d 148, 152-53 (2d Cir. 2014) (finding that competing canons of statutory interpretation, including the last-antecedent rule, rendered a statute ambiguous), *certiorari granted*, 135 S. Ct. 2350 (2015).

Verona offers several reasons why, in its view, Section 2201 is unambiguously contrary to the rule of the last antecedent. First, it argues that the legislative history of Section 2201 shows that Congress intended ILCA to apply only to "any tribe for whom the United States holds land in trust." Verona Br. at 36 (quoting H. Rep. No. 97-908, at 11). The quote that Verona uses comes not from any members of Congress, but from a one-sentence description of the bill that the Congressional Budget Office sent to the House Committee. This third-party description of ILCA

carries less weight than the more detailed statements of the bill's sponsors and the House Committee, which stated that its provisions would be "applicable to all tribes," or of Section 2202's authors at Interior, who sought legislation that would "include all the tribes served by the Secretary of the Interior." H. Rep. No. 97-908, at 9, 13. Those unusually clear statements provide a strong reason to construe ILCA as applicable to "any Indian tribe," 25 U.S.C. § 2201(1), a result that is permissible under the rule of the last antecedent.

Second, Verona argues that applying the last-antecedent rule to read Section 2201 broadly would produce "absurd results" that contradict "the rule of common sense," Verona Br. at 40, because there is "no apparent reason" that Congress would place a limiting condition on an Indian "community" without applying it similarly to "any Indian tribe, band, group, [or] pueblo." *See* Verona Br. at 36. This is incorrect. Under Section 465, the United States may hold land in trust not only for recognized tribes but also for individual Indians. *See* 25 U.S.C. §§ 465, 479. Congress therefore extended ILCA's land-consolidation provisions beyond recognized tribes, bands, and pueblos, to other Indians, regardless of name, that have a different kind of relationship with the federal government (based on their status as a trust beneficiary). The statutory term "community" operates as a catch-all in this interpretation, confirming that Congress wanted Section 465 to apply to all Indians that were ever eligible to benefit from the acquisition of land in trust.

Finally, Verona argues that Interior does not always apply the rule of the last antecedent when it interprets definitions of "tribe." *See* Verona Br. at 38-39. This is true, but the courts considering the last-antecedent rule have never said that it must be inflexibly applied in all cases. Rather, it is a default rule that may be varied in application based on "other indicia of meaning." *Barnhart*, 540 U.S. at 26. In the two statutes that Verona cites, for example, the modifying condition relates to whether a group of Indians seeking federal tribal benefits has been recognized by the federal government. It makes sense to apply that modifying condition to all items in the list, because federal recognition is a logical prerequisite to federal benefits regardless of whether an entity is called a "tribe," "band," "nation," or "pueblo." Here, having land held in trust by the United States is *not* necessarily a logical prerequisite for a tribe to enjoy the land-consolidation benefits of ILCA, some of which grant additional tribal authority specifically over non-trust lands.

This is particularly evident in ILCA's provisions addressing "restricted fee" lands. The title to "restricted fee" lands is held by a tribe or an individual Indian (rather than the United States), but cannot be alienated without the United States' approval. *See Citizens Against Casino Gambling*, 802 F.2d at 274. Several of ILCA's provisions authorize tribes to take action with respect to restricted-fee lands. *See* 25 U.S.C. § 2203 (providing that "any tribe" may adopt a land consolidation plan providing for the sale or exchange of land in order to eliminate fraction interests in

"restricted lands"); *id.* § 2204 (providing that "any Indian tribe" may purchase "any tract of trust or restricted land"). Under Verona's reading of Section 2201, a tribe that held land in restricted fee would be eligible to take advantage of these provisions only if that tribe *also* had land held in trust by the United States – an entirely unrelated requirement. That would be true even if the tribe was located in an area, such as New York, in which tribal land is held mostly or entirely in restricted fee rather than in trust. *See* UCE Br. at 7. Verona's interpretation would also mean some tribes, even those holding restricted-fee lands, would be excluded from ILCA's authorization to "adopt a tribal probate code to govern descent or distribution of trust *or restricted lands*." 25 U.S.C. § 2205 (emphasis added).

Congress has the same power over restricted-fee lands that it has over trust lands and the terms are often used interchangeably. *See Oklahoma Tax Comm'n*, 319 U.S. at 618. There is no reason that Congress would have made ILCA's restricted-fee and probate-code provisions available to tribes whose land was held in trust by the United States, but not to tribes that held their land in restricted fee. Interpreting Section 2201 according to the last-antecedent rule, on the other hand, makes ILCA applicable to "all Indian tribes" and avoids any such disparity.

ILCA is not a perfectly-drafted statute, but that is all the more reason to defer to the Secretary's discretion to interpret its ambiguous provisions. A broad construction of ILCA, and Section 2202 in particular, conforms to the intent of

Congress in passing ILCA and promotes ILCA's purposes by making its land-consolidation provisions more widely available. Congress acted to address Indians' land-consolidation needs all at once in a statute that applies to "all Indian tribes." 25 U.S.C. § 2201(1). *See supra* pp. 67-68. There is no reason to believe that Congress would have required a separate, tribe-specific legislative fix for the Oneida Nation simply because its tribal lands had largely been alienated (largely illegally) prior to the Dawes Act. The rule of the last antecedent was a textual basis for the district court to uphold the Secretary's broad construction, but that decision was firmly supported by the broader statutory context. *See Verona I* at 17-18 (SPA-43-44).

Finally, as the district court found, *see Verona I* at 20-21 (SPA-46-47), the Indian canon of construction provides an additional reason to construe ILCA to include as many tribes as the statutory text will allow. If Section 2201 is subject to "two possible constructions," the Court must interpret it "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Yakima*, 502 U.S. at 269 (quoting *Montana*, 471 U.S. at 766). That principle here supports deference to the Secretary's interpretation, which would extend the benefits of Section 2202 and ILCA's other provisions to more tribes.

D. The legitimacy of particular Oneida Nation leaders is not before the Court.

UCE last claims that this Court should vacate the Secretary's decision to take land into trust for the Oneida Nation because, at the time the Tribe made its request,

it was led by Ray Halbritter, an individual that UCE does not believe to be the Tribe's legitimate representative. *See* UCE Br. at 44-46. Setting aside the problem that UCE does not have standing to raise this issue, *see supra* pp. 22-24, it also does not connect this belief with any legal theory and admits that the district court was "legally correct" not to reach it on the merits. *Id.* at 45. UCE is right – this is not an appropriate issue for the court to consider.

"The issue of Oneida leadership, which involves questions of tribal law, is not properly resolved by a federal court." *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 712 (2d Cir. 1998). In order for this Court to consider that issue, UCE would have to show that it is a proper plaintiff to raise an internal issue of tribal leadership (which it has not done), it would have to challenge a discrete agency decision recognizing Halbritter as the Tribe's representative, and it would have to exhaust its administrative remedies for review of that agency decision. *See id.*

An Interior official's decision to recognize an individual or group as the authorized representative of a tribe may be subject to administrative appeal before the Interior Board of Indian Appeals. *See, e.g.*, *Newtok Traditional Council v. Acting Alaska Regional Director*, 61 I.B.I.A. 167, 170 (2015); *Gottschalk v. Juneau Area Director*, 30 I.B.I.A. 210, 214-15 (1997). UCE does not attempt to show that it has exhausted that remedy. For purposes of the decision that Plaintiffs challenge here, the Secretary considered the Oneida Nation, a federally-recognized tribe, to have validly submitted

"a written request for approval" of the acquisition of land in trust, and she acted on that request. 25 C.F.R. § 151.9; ROD at 6 (A-555).

CONCLUSION

Congress has the constitutional power to acquire land in trust for the benefit of Indians. Furthermore, the authority that Congress delegated to the Secretary in the IRA is adequate to permit her to take land into trust to benefit the Oneida Nation. For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

/s/ J. David Gunter II
STEVEN MISKINIS
J. DAVID GUNTER II
U.S. Department of Justice
Environment & Natural Res. Div.
Washington, DC 20026
(202) 514-3785

JENNIFER TURNER
U.S. Department of the Interior
Office of the Solicitor

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CERTIFICATES

I certify that this brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) and (C).

This brief contains 20,005 words, excluding the portion exempted by Federal Rule of Appellate Procedure 32(a)(7)(b)(iii), and therefore conforms to the word limit set in the Court's order of August 13, 2015, granting the United States' motion of August 7, 2015. It has been prepared in a 14-point Garamond font that meets the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6).

I certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on January 22, 2016, and filed a version with a corrected cover on February 4, 2016. All participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ J. David Gunter II