No. 09-1032

In the Supreme Court of the United States

STATE OF CONNECTICUT,
EX REL. RICHARD BLUMENTHAL,
ATTORNEY GENERAL OF CONNECTICUT, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In 1983, Congress enacted the Connecticut Indian Land Claims Settlement Act (Settlement Act), 25 U.S.C. 1751 *et seq.* The Settlement Act provided for federal recognition of the Mashantucket Pequot Indian Tribe (Tribe). In addition, in exchange for extinguishing the Tribe's claim of aboriginal title to hundreds of acres of land, the Act established a fund for the purchase of certain lands by the Tribe. The Act identified boundaries within which any lands acquired by the Tribe with those settlement funds would be held in trust by the Secretary of the Interior and become part of the Tribe's reservation. The question presented is as follows:

Whether the Settlement Act precludes the Secretary of the Interior from exercising her general authority pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, and regulations issued thereunder, to take lands into trust for the benefit of the Tribe with respect to lands that were not acquired by the Tribe with settlement funds and that lie outside the boundaries of the reservation established by the Settlement Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 228 F.3d 82. The opinion of the district court (Pet. App. 23a-47a) is reported at 26 F. Supp. 2d 397.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2000. The petition for a writ of certiorari was filed on December 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to 1983, the State of Connecticut recognized the Mashantucket Pequot Tribe (Tribe) as the sole successor to the aboriginal Western Pequot Tribe, which formerly occupied portions of western Connecticut. The Tribe had an existing, State-recognized reservation of approximately 200 acres near the Towns of Ledyard, Preston, and North Stonington, Connecticut. In 1976, the Tribe filed a federal lawsuit against certain private land owners, claiming that in 1855 Connecticut had transferred nearly 800 acres of the Tribe's land without congressional approval, in violation of the Trade and Intercourse Act, now codified at 25 U.S.C. 177. The lawsuit clouded title to hundreds of acres of land in Connecticut. The State intervened as a third-party defendant. The parties subsequently negotiated a settlement, which was later ratified by Congress in the Connecticut Indian Land Claims Settlement Act of 1983 (Settlement Act), 25 U.S.C. 1751 *et seq.* Pet. App. 5a.

The Settlement Act extinguished the Tribe's claim of aboriginal title to hundreds of acres of land. 25 U.S.C. 1753. In exchange, the Act provided for federal recognition of the Tribe, 25 U.S.C. 1758; established a settlement fund to enable the Tribe to acquire certain additional lands, 25 U.S.C. 1754; and identified boundaries within which any lands acquired by the Tribe with settlement funds would be held in trust by the Secretary of the Interior and become part of the Tribe's reservation, 25 U.S.C. 1752(3). The Act defined the Tribe's reservation to include the 200-acre reservation previously recognized by the State, as well as "any settlement lands taken in trust by the United States for the Tribe." 25 U.S.C. 1752(7). The Act defined the "settlement lands" to include certain lands provided by

the State to implement the settlement, as well as about 800 acres of "private settlement lands" that were identified on a map filed with the State. 25 U.S.C. 1752(3) and (4).

Section 1754 of the Act, entitled "Mashantucket Pequot Settlement Fund," created a $900,000 settlement fund. Under subsection (b) of that provision, entitled "Expenditure of Fund; private settlement lands; economic development plan; acquisition of land and natural resources," the bulk of that fund was made available immediately to acquire the "private settlement lands." 25 U.S.C. 1754(b)(2). Unexpended portions of the fund could be used to finance an "economic development plan," which could include the acquisition of property other than the private settlement lands. 25 U.S.C. 1754(b)(3). Subsection 1754(b) further provided that:

> (7) Lands or natural resources *acquired under this subsection* which are located within the settlement lands shall be held in trust by the United States for the benefit of the Tribe.
>
> (8) Land or natural resources *acquired under this subsection* which are located outside of the settlement lands shall be held in fee by the Mashantucket Pequot Tribe, and the United States shall have no further trust responsibility with respect to such land and natural resources. Such land and natural resources shall not be subject to any restriction against alienation under the laws of the United States.

25 U.S.C. 1754(b)(7) and (8) (emphasis added).

The Settlement Act states that "all laws and regulations of the United States of general application to Indians * * * which are not inconsistent with any

specific provision of this subchapter shall be applicable to the Tribe." 25 U.S.C. 1758(a).[1]

2. In January 1993, the Tribe asked the Secretary of the Interior to take certain lands into trust for the Tribe. The lands were located outside the reservation delineated by the Settlement Act and (except as discussed below) were acquired by the Tribe without the use of settlement funds.

Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. 465, grants the Secretary broad authority to take lands into trust on behalf of Indian Tribes and individual Indians. See Pet. App. 27a n.5 (quoting Section 5). The Secretary's determination whether to take lands into trust pursuant to Section 5 is limited by regulations issued by the Department of the Interior. 25 C.F.R. Pt. 151. Among other things, those regulations obligate the Secretary to consider: (1) the Indians' need for additional land; (2) the purposes for which the land will be used; (3) the impact on the State and its political subdivisions resulting from removal of the land from State tax rolls; and (4) the jurisdictional problems and potential conflicts that may arise from taking the land into trust. 25 C.F.R. 151.10. Off-reservation,

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[1] At the time the Settlement Act was enacted, "the Tribe was impoverished, with no obvious future source of revenue in sight." Pet. App. 3a. In 1990, the Tribe obtained approval to conduct Class III gaming activities on its reservation, pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701. The Tribe operates a casino on its reservation, which has proved to be economically successful, generating new wealth for the Tribe as well as economic opportunities for the surrounding non-tribal communities. Pet. App. 3a, 46a n.24. The Tribe pays approximately "$400,000 per year in property taxes to the Town of Ledyard" with respect to the operation of the casino, and it employs numerous non-Indian members of the community. *Ibid.*

noncontiguous lands may be taken into trust by the Secretary in keeping with those criteria, but only following notice to, and an opportunity to comment by, state and local governments. The regulations specifically contemplate an opportunity for judicial review of trust determinations. See 25 C.F.R. 151.12.[2]

The Tribe initially sought to transfer into trust six parcels of land owned by it in fee, totaling about 245 acres. The land is located outside the reservation area defined in the Settlement Act and within the Towns of Ledyard, North Stonington, and Preston. Most of that land is undeveloped, and the Tribe proposed to retain it as a "green buffer" around the reservation that was established by the Settlement Act. The only proposed alteration to the land was the paving of an existing 4.5 acre gravel parking lot. The Tribe subsequently withdrew its application with respect to an 82-acre tract of land that had been purchased with settlement funds. The revised application sought to have five lots, comprising about 165 acres, taken into trust by the Secretary. It is undisputed that none of that land was purchased with settlement funds.

In May 1995, the Secretary, after considering the regulatory criteria governing Section 5 determinations, granted the Tribe's application to take the land into trust. Pet. App. 2a.

3. Following the Secretary's action, petitioners filed this action pursuant to the Administrative Procedure

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[2] Land that is taken into trust by the Secretary ordinarily is considered to be "Indian country" within 18 U.S.C. 1151. In addition, Indian trust lands generally are exempted from state or local taxation, local zoning and regulatory requirements, and state criminal and civil jurisdiction over certain matters involving Indians on those lands. Pet. App. 4a.

Act, 5 U.S.C. 702, seeking to enjoin the Secretary from taking the land into trust on the ground, *inter alia*, that she was precluded from doing so under the terms of the Settlement Act.[3] The Secretary deferred taking the lands into trust pending the outcome of this litigation.

On cross-motions for summary judgment, the district court granted summary judgment for petitioners. Pet. App. 23a-47a. The court observed that, while "Congress has enacted numerous [Indian land claim] settlement acts," "[t]his appears to be the first case in which a state has opposed a trust acquisition by the Secretary on the ground that the acquisition is barred by a federal statute approving an Indian land claims settlement." *Id.* at 26a. On the merits, the court framed the parties' disagreement over the interpretation of the Settlement Act as follows:

> The parties' dispute centers on the meaning of the phrase "acquired under this subsection" in § 1754(b)(8). [Petitioners] suggest, in effect, that the phrase means "acquired by or for the Mashantucket Pequot Tribe." Thus construed, the phrase renders § 1754(b)(8) a prohibition against the Secretary's accepting into trust any land located outside the settlement lands. [Respondents] contend that § 1754(b) of the statute, the section in which subsection (8) appears, pertains to the use of the Settlement Fund and, accordingly, that the phrase

[3] Petitioners also claimed, *inter alia*, that Section 5 of the IRA amounts to an unconstitutional delegation of legislative authority to the Executive Branch, and that the Secretary's decision to take the land at issue into trust violated the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*, and was otherwise arbitrary and capricious. See Pet. App. 24a n.1.

> "acquired under this subsection" means "purchased with money from the Settlement Fund." Construed in this manner, the provision's acknowledged prohibition on the Secretary's § 465 authority is not triggered in this case because the land at issue was not purchased with Settlement Fund money.

Pet. App. 32a-33a.

The district court determined that Section 1754(b)(8) and, in particular, the phrase "acquired under this subsection" is ambiguous. Pet. App. 33a. The court then considered "other indicia of statutory meaning," beginning with the legislative history, and concluded that "[petitioners'] interpretation of the statute is correct." *Id.* at 34a. In so holding, the court declined to accord any deference to the Department of the Interior's interpretation of the Settlement Act, or to invoke the canon of construction that ambiguities contained within statutes passed for the benefit of Indians should be construed in favor of the Indians. *Id.* at 42a-46a. The court permanently enjoined the Secretary from taking the land into trust. *Id.* at 47a.

4. The court of appeals reversed. Pet. App. 1a-22a. The court held that the Settlement Act does not categorically preclude the Secretary from taking the lands at issue into trust and, in particular, that Section 1754(b)(8) "applies only to land purchased with settlement funds." *Id.* at 9a.

The court began with the language of the statute. "Reading § 1754 as a whole," the court found "that the phrase 'acquired under this subsection' in § (b)(8) is determinative of the statute's reach." Pet. App. 9a. The court explained that, given that Section 1754 is entitled "Mashantucket Pequot Settlement Fund," and that the heading of subsection (b) of that section refers

specifically to the "Expenditure of Fund," the reference in Section 1754(b)(8) to "'acquired under this subsection' is logically read to mean 'acquired with settlement funds.'" *Id.* at 9a-10a. Petitioners' contrary interpretation, the court reasoned, simply "renders the phrase 'acquired under this subsection' superfluous." *Id.* at 9a.[4]

The court explained its construction of Section 1754(b) as follows:

> [L]and acquired by the Tribe with settlement funds are either automatically taken into trust under § (b)(7) if they are within the boundaries of the settlement lands, or may not be taken into trust if outside those boundaries. The statute is silent with regard to lands, like the contested 165 acres here, not purchased with settlement funds. As to such lands, whether or not they are within settlement land boundaries, the Settlement Act does not apply. The Tribe may apply to the Secretary to take them into trust under the 1934 IRA, and the Secretary's decision will be governed by the considerations outlined in the relevant regulations. Nothing in § (b)(7) supplants the Secretary's power under the IRA to take into trust lands acquired without the use of settlement funds.

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[4] The court rejected petitioners' argument that this construction in turn rendered Section 1754(b)(5) superfluous, explaining that petitioners had "miscontrue[d] the meaning of [that provision]." Pet. App. 11a. "Section (b)(5) pertains to trust responsibilities over the settlement funds and provides for the automatic stripping of trust responsibilities '[a]s the fund . . . is disbursed.'" *Id.* at 11a-12a (quoting subsection (b)(5)). Subsection (b)(5), however, "is silent as to the status of lands purchased with settlement funds"; instead, the court explained, that issue is dealt with by subsections (b)(7) and (b)(8) of Section 1754. *Id.* at 12a.

Pet. App. 10a.

Although the court found "little, if any, ambiguity" (Pet. App. 12a) as to the meaning of Section 1754(b)(8), it nevertheless considered other evidence of Congress's intent. Considering the statute as a whole and its purpose, the court explained that nothing in the statute "indicates that Congress intended to establish the outermost boundaries of the Tribe's sovereign territory." *Id.* at 13a. By contrast, the Maine Indian Claims Settlement Act (Maine Settlement Act), 25 U.S.C. 1721 *et seq.*—upon which all agree the Mashantucket Pequot Settlement Act was modeled—broadly circumscribed the authority of the United States to acquire lands in trust for the affected tribes "[e]xcept for the provisions of this subchapter," and thus "supplant[ed] the Secretary's authority to take land into trust under the 1934 IRA beyond that expressly contemplated by the Maine Settlement Act." Pet. App. 14a (quoting Maine Settlement Act). "The absence of an analogous provision in the Settlement Act at issue in this case confirms that the Settlement Act was not meant to eliminate the Secretary's power under the IRA to take land purchased without settlement funds into trust for the benefit of the Tribe." *Ibid.*

The court also considered the legislative history of the Settlement Act, but concluded that it offered "only ambiguity, contradiction, and silence." Pet. App. 16a. At the same time, the court concluded that its interpretation was supported by the canon that statutes passed on behalf of Indians should be construed in favor of the Indians. *Id.* at 17a-18a. In the court's view, the relatively favorable economic situation enjoyed by the Tribe today "does not strip the Indian canon of its force," particularly since the Tribe was impoverished at the time the Settlement Act was enacted. *Id.* at 18a-

19a (citing *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753 (1985)). In addition, the court concluded that "the deference we generally owe to an agency's interpretation of an ambiguous statute supports our view of this appeal." *Id.* at 19a. As the court explained, even though a subordinate employee of the Department of the Interior had taken differing positions on the scope of the Settlement Act, the agency's views were still entitled to consideration, because the agency had "provided a reasoned analysis in support of its new determination that § (b)(8) refers only to land purchased with money from the settlement fund." *Id.* at 21a (citing *Rust* v. *Sullivan*, 500 U.S. 173, 186-187 (1991)).

Finally, the court observed that, to the extent that petitioners were objecting to the Secretary's exercise of her authority to take land into trust pursuant to the IRA "because the Mashantucket Pequots now have the purchasing power to make substantial real estate acquisitions," petitioners' arguments would be better addressed to Congress than to the courts. Pet. App. 22a. "Other federally recognized Indian tribes are not saddled with a geographical limit to the land that can be taken into trust by the Secretary." *Id.* at 21a. And, as the court put it, "we see no reason to fashion a rule [in this case] that limits the Tribe from seeking authorization, after administrative proceedings, to have land placed into trust with the Secretary simply because * * * [of] the Tribe's recent economic good fortune." *Id.* at 21a-22a.

5. The court of appeals remanded the case for further proceedings. Pet. App. 22a. On remand, petitioners will be permitted to press their arguments that Section 5 of the IRA is an impermissible delegation of legislative power, and that the Secretary's decision to

take the land at issue in this case into trust pursuant to Section 5 was arbitrary and capricious. See note 3, *supra*; Gov't C.A. Br. 38-39.

ARGUMENT

The court of appeals correctly and unanimously rejected petitioners' contentions that the Settlement Act precludes the Secretary from taking the lands at issue in this case into trust on behalf of the Tribe pursuant to her general authority under Section 5 of the IRA. The court's ruling does not conflict with any decision of this Court or any other court of appeals, and the interlocutory posture of this case strongly counsels against further review here.

1. Petitioners renew (Pet. 13-21) their argument that the Settlement Act prevents the Secretary from taking the lands at issue into trust pursuant to Section 5 of the IRA, even though the lands were not purchased with settlement funds. That contention was properly rejected by the court of appeals.

Given its plain meaning, the phrase "acquired under this subsection" in Section 1754(b)(8) of the Settlement Act limits the trust prohibition to lands acquired through the particular means identified in Section 1754(b)—*i.e.*, the expenditure of the settlement fund. See 25 U.S.C. 1754(b)(1) ("The Secretary is authorized and directed to expend, at the request of the Tribe, the Fund together with any and all income accruing to such Fund in accordance with this subsection."). As the court of appeals explained, that conclusion is supported by the headings used in Section 1754, the language of other provisions of Section 1754, and the statute as a whole. See Pet. App. 9a-11a. Petitioners' contrary construction all but renders the key phrase "acquired under this subsection" superfluous. *Id.* at 9a.

The design of Section 1754(b)(8) is clear. Section 1754 establishes a fund with which the Tribe could purchase "private settlement lands" that could be added to its reservation. 25 U.S.C. 1752(3). Congress anticipated that there might be a surplus in the fund after purchasing those lands, and it provided that remaining funds could be used to fund an "economic development plan," which could be used to acquire additional property. 25 U.S.C. 1754(b)(2). Section 1754(b)(8) directs that the Secretary shall not take any additional property so acquired—*i.e.*, under Section 1754(b), with settlement funds—into trust. Section 1754(b)(8) simply does not address the status of lands acquired with resources *other than* those provided by the settlement fund.

By contrast, the Maine Settlement Act, which the parties agree was the model for the Settlement Act under which this case arises (see Pet. App. 13a), does contain an express prohibition on the exercise of the Secretary's general Section 5 authority to take non-settlement lands into trust for the Indian Tribes covered by that Act. See 25 U.S.C. 1724(e). "[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987) (citations omitted). And, as the court of appeals concluded, the disparate provisions of the Maine Settlement Act and the Mashantucket Pequot Settlement Act in this case furnish "strong" evidence that, in enacting the Mashantucket Pequot Settlement Act, Congress did not intend, *sub silentio*, to circumscribe the Secretary's Section 5 authority to take land into trust with respect to lands acquired by the Tribe without using settlement funds. Pet. App. 13a.

Petitioners' reliance (Pet. 14-15) on the Indian Land Consolidation Act (ILCA), 25 U.S.C. 2202 *et seq.*, is misplaced. The ILCA specifically provides that "nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state[s]." 25 U.S.C. 2202. In that regard, the ILCA operates in the same fashion as the savings clause of the Settlement Act at issue in this case, which provides that all federal Indian laws of general applicability are applicable to the Mashantucket Pequot Tribe, except as specifically provided by the Settlement Act. 25 U.S.C. 1758(a). Petitioners identify nothing in the ILCA that operates by itself to preclude the lands at issue in this case from being taken into trust by the Secretary under the IRA, or that specifically bears on the construction of Section 1754(b) of the Settlement Act. In any event, petitioners' reliance on the separate ILCA simply underscores that their interpretation lacks footing in the terms of the Settlement Act itself.[5]

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[5] Petitioners are correct (Pet. 14) that certain provisions of the IRA are inconsistent with certain other "specific provisions" of the Settlement Act—provisions not at issue here. For example, the Settlement Act precludes the Secretary from taking into trust pursuant to Section 5 of the IRA any lands outside the settlement lands if they are purchased with settlement funds. Similarly, the Department has concluded that it cannot add lands to the reservation, pursuant to Section 7 of the IRA, given the finite definition of the newly formed reservation in the Settlement Act. 25 U.S.C. 1752(7). Those specific provisions of the IRA are therefore displaced to the extent they are inconsistent with the Settlement Act. Since taking lands into trust does not automatically add lands to a reservation, however, petitioners are incorrect in asserting (Pet. 15) that, because the Secretary's authority under Section 7 of the

Petitioners' resort (Pet. 17-18) to legislative history is also unavailing. As the court of appeals explained, nothing in the legislative history compels a different conclusion from the one that follows from the statutory text. Pet. App. 15a-17a. Indeed, if anything, the legislative history simply confirms that Section 1754(b) "establishes the terms under which the settlement fund is to be administered," H.R. Rep. No. 43, 98th Cong., 1st Sess. 7 (1983), which is consistent with the court of appeals' conclusion that the key phrase—"acquired under this subsection"—in Section 1754(b)(8) means acquired with settlement funds. The other aspects of the legislative history relied upon by petitioners do not confirm their interpretation of the statute, but instead at most introduce "only ambiguity, contradiction, and silence." Pet. App. 16a.

The court of appeals' interpretation does not render Section 1754(b)(5) superfluous. See Pet. 16-17. Section 1754(b)(5) relieves the United States of its trust responsibility over settlement funds or property acquired with such funds as monies are disbursed from the settlement fund. Subsection (b)(5) does not address the distinct question of the legal status of lands that are *not* acquired with settlement funds. The purpose of subsection (b)(8), by contrast, is to establish the legal status of lands that *are* purchased with settlement funds but are located *outside* the statutorily-defined settlement lands. The legislative history makes clear that the two provisions have distinct purposes, explaining that subsection (b)(5) is addressed to the United States' responsibility with regard to specific funds that

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IRA is displaced, her authority under Section 5 of the IRA to take lands into trust is also displaced.

have been disbursed under the Settlement Act. Pet. App. 11a-12a.[6]

Petitioners point to a difference in language used in subsections (b)(7) and (b)(8) ("acquired under this subsection") and in subsection (b)(5) ("purchased with these sums"), and argue (Pet. 16) that Congress would not have used both phrases to mean acquired with settlement funds. The phrase "purchased with these sums," however, makes sense in the context of subsection (b)(5). As written in subsection (b)(5), "purchased with these sums" does not refer to the settlement fund, but rather to "sums paid" from the "Fund or any portion thereof [as] disbursed by the Secretary in accordance with this section [1754]." 25 U.S.C. 1754(b)(5). Because subsection (b)(5) is more specific regarding the Secretary's responsibility with respect to "portion[s] * * * disbursed" and "sums paid" from the settlement fund, it makes sense that Congress did not use the more general "acquired under this subsection" phrase found in subsections (b)(7) and (b)(8). Conversely, because subsections (b)(7) and (b)(8) are addressed primarily to the status of lands, and not the disbursement of settlement funds, it makes sense that Congress did not use the "sums paid" formulation employed in subsection (b)(5).

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[6] The committee reports explain:

> Section [1754](b)(5) provides that as portions of the settlement fund are disbursed to the proper tribal officials, the United States shall have no further responsibility for the use of those funds disbursed. The United States, of course, retains a responsibility for those monies that remain in the settlement fund.

S. Rep. No. 222, 98th Cong., 1st Sess. 14 (1983); H.R. Rep. No. 43, *supra*, at 8.

Finally, the court of appeals correctly rejected the contention that the Settlement Act was "a comprehensive statute intended to settle once-and-for-all the extent of the Mashantucket Pequot's sovereignty." Pet. App. 13a. The Settlement Act resolved specific aboriginal land claims in a specific suit, and was explicitly intended to "remove all clouds on titles resulting from such Indian land claims." 25 U.S.C. 1751(c). Petitioners err (Pet. 20-21) in attempting to broaden the enactment in an effort to prevent this Tribe from receiving the benefit of laws generally applicable to all other Indian Tribes. That there may be some uncertainty as to what lands may ultimately become Indian trust lands is true for all States in which Indian Tribes own (or may acquire) property that may be taken into trust pursuant to the IRA. The uncertainty is not unique to the Settlement Act at issue in this case, and is not a result of the court of appeals' interpretation of that Act.

2. Petitioners argue (Pet. 21-28) that the court of appeals improperly invoked the canon of construction that ambiguities contained within statutes or treaties passed for the benefit of Indians should be resolved in favor of Indians. That contention is without merit. This Court often invokes that canon in interpreting federal enactments pertaining to Indian Tribes and has recently observed that the canon is "deeply rooted in this Court's Indian jurisprudence." *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992).[7] In addition, as the

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[7] See, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 411 (1994); *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247 (1985); see also *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g*,

court of appeals recognized, the Court has invoked the canon "where Indians were at no legal disadvantage." Pet. App. 18a-19a (discussing *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 758, 766 (1985)). Congress legislates against the backdrop of the settled Indian canon of construction.

In any event, the court of appeals' discussion of the Indian canon of construction does not warrant review. That is particularly true in light of the fact that that discussion was not necessary to the court's conclusion that the Settlement Act does not preclude the Secretary from taking into trust lands that are not purchased with settlement funds. The court based its holding first and foremost on its reading of the statutory provisions at issue, see Pet. App. 9a-12a; it simply added that, to the extent that there was any ambiguity in the statute, its interpretation found "additional support in the unique canon of construction governing statutory provisions involving Indians." *Id.* at 17a.

Petitioners contend that the Indian canon of construction is outdated, and suggest that "[c]larification of the rule is particularly important in the era following enactment of the Indian Gaming Regulatory Act [IGRA] when many tribes, like the Mashantucket Pequots, have attained great wealth and benefit through the assistance of non-Indian business interests." Pet. 28. The lower court case law does not support that conclusion. But, in any event, this case would be a poor vehicle in which to consider that argument in

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467 U.S. 138, 149 (1984); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Choctaw Nation* v. *United States*, 318 U.S. 423, 431-433 (1943); *Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78, 89 (1918); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912).

light of the fact that the Settlement Act at issue was passed five years *before* IGRA. Similarly, while petitioners highlight the recent economic success enjoyed by the Tribe in this case, it is undisputed that, at the time of the enactment of the Mashantucket Pequot Settlement Act, "the Tribe was impoverished, with no obvious future source of revenue in sight." Pet. App. 3a. Thus, as the court of appeals explained below, even accepting petitioners' argument "that the Indian canon of construction applies with less force to statutes or treaties negotiated with a wealthy, powerful, and well-represented Indian tribe," that principle "has no application" with respect to the Settlement Act involved in this case. *Id.* at 19a.[8]

3. Petitioners argue (Pet. 28-29) that the court of appeals improperly took account of the Department of the Interior's interpretation of the Settlement Act. That argument also does not merit review. To begin with, just as was true with respect to the Indian canon of construction, the court's discussion of the agency's interpretation was not necessary to the court's holding that the Settlement Act does not prevent the Secretary from taking the lands at issue into trust; rather, the court simply added that, "[i]nsofar as agency deference

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[8] Petitioners imply that the Nation's Indian Tribes have been transformed by the passage of the IGRA into wealthy, co-equal participants in the legislative process. That is incorrect. The vast majority of the Nation's Indian Tribes continue to live at or below the poverty level. In addition, "[m]ore than two-thirds of Indian Tribes do not participate in Indian gambling at all." *Final Report of the National Gambling Impact Study Commission* 6-2 (July 18, 1999), drafted pursuant to the National Gambling Impact Study Commission Act, Pub. L. No. 104-169, 110 Stat. 1482. And for the majority of Indian Tribes that do have gambling facilities, "the revenues have been modest." *Id.* at 6-3.

remains appropriate in this case, it confirms our interpretation of the Settlement Act." Pet. App. 19a.

In any event, as this Court has repeatedly recognized, agencies are not forbidden from clarifying or changing their position on the interpretation of a statute with which they are charged with administering. As long as an agency provides a reasoned explanation for its change in position, its interpretation may still be afforded deference by a reviewing court. See *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996); *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 416 (1993). The court of appeals in this case concluded that "[t]he Department of the Interior has provided a reasoned analysis in support of its new determination that § 8(b) refers only to land purchased with money from the settlement fund," and that, "even according [that interpretation] less deference than usual," the court should still "take account of the agency's position." Pet. App. 21a. That conclusion is correct and does not merit further review.[9]

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[9] Moreover, the factual premise of petitioners' argument—*i.e.*, that the Department changed its position on the proper interpretation of the Settlement Act—is itself debatable. A regional solicitor of the Bureau of Indian Affairs initially concluded that lands located outside the settlement area must be held in fee and may not be held in trust, relying primarily on the legislative history of the Settlement Act. Following a more detailed analysis of the statute, however, that same official later reconsidered his view and determined that the lands at issue could be taken into trust. The regional solicitor was not authorized to bind the Department, and the agency itself has only adopted one position: that the Settlement Act does not prevent the Secretary from exercising her general authority pursuant to the IRA with respect to lands that are not acquired with settlement funds. Cf. *Wisconsin* v. *City of New York*, 517 U.S. 1, 23 (1996) ("[T]he mere fact that the Secretary's decision overruled the views of some of his subordinates is

4. Finally, review is not warranted to consider petitioners' broad-brush arguments that the sovereignty of Connecticut has been (or will be, with respect to hypothetical future trust applications by the Tribe) improperly diminished. The only question decided by the court of appeals is whether the Settlement Act categorically precludes the Secretary from exercising her general authority under Section 5 of the IRA to take lands into trust for the Tribe, even with respect to lands that were not acquired by the Tribe with settlement funds. To the extent that petitioners object to the scope of the Secretary's authority to take lands into trust for Indians pursuant to Section 5, or to the exercise of that authority in this case based on particular factors other than the Settlement Act, they may present those arguments on remand to the district court, and possibly still prevail in their effort to prevent the Secretary from taking the lands at issue into trust. See note 3, *supra*; Gov't C.A. Br. 38-39. In that regard, the interlocutory nature of this case in itself counsels strongly against granting certiorari. See *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., respecting the denial of the petition for writ of certiorari).

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by itself of no moment in any judicial review of his decision."); see Gov't C.A. Br. 35-36.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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