

IN THE
Supreme Court of the
United States

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

and

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, *et al.*,

v.

MICHIGAN GAMBLING OPPOSITION.

MEMORANDUM IN OPPOSITION TO THE APPLICATION
TO VACATE STAY OF MANDATE

REBECCA A. WOMELDORF
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W., Suite 900
Washington, D.C. 20005
Telephone (202) 898-5800
Fax (202) 682-1639

JOHN J. BURSCH
Counsel of Record
DANIEL P. ETTINGER
JOSEPH A. KUIPER
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
Telephone (616) 752-2000
Fax (616) 752-2500

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit:

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, directs the Secretary of the Interior, “in his discretion,” to acquire land “for Indians,” with no other directives or limitations. The principal question this case presents is whether Section 5’s standardless delegation is constitutional. The Eighth Circuit Court of Appeals invalidated Section 5 on nondelegation grounds in *South Dakota v. United States Dep’t of the Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated and remanded*, 519 U.S. 919 (1996) (“*South Dakota I*”). And though the circuits have more recently rejected nondelegation challenges to Section 5, they have done so based on purported limits that cannot be found in the statutory text, as Judge Janice Rogers Brown explained in her lengthy dissent from the panel decision below:

Like other courts that have rejected nondelegation challenges to § 5, *Carcieri v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (en banc); *South Dakota v. U.S. Dep’t of the Interior*, 423 F.3d 790, 799 (8th Cir. 2005); *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), the majority nominally performs a nondelegation analysis but actually strips the doctrine of any meaning. . . . Analyzing the statute using ordinary tools of statutory construction, as the Supreme Court has always done in nondelegation cases, I am forced to conclude § 5 is unconstitutional.

MichGO v. Kempthorne, 525 F.3d 23, 34 (D.C. Circuit 2008) (Brown, J., dissenting).

The impetus for the federal circuits’ reluctance to have a frank discussion about the validity of Section 5 appears to be an unstated assumption that the nondelegation doctrine is dead, a belief derived from the fact that this Court has not invoked the doctrine to strike a statute since 1935. (Application at 6.) Section 5’s bald language makes this case an ideal vehicle to reaffirm the doctrine and the important separation of power principles it represents. Thus, while the D.C. Circuit panel below upheld the statute’s constitutionality by a 2-1 vote, and rehearing en banc was denied 7-3, the merits panel unanimously agreed that a stay was proper.

This case's jurisprudential and public importance extends far beyond the fate of the nondelegation doctrine as a bedrock constitutional principle. That is because the trust power is unique, both in its constitutional sensitivity and its practical scope. The Secretary's exercise of his unbridled discretion encroaches directly on a State's right to territorial integrity, its taxing authority, and its ability to exercise police powers. Where such "fundamental aspects of state sovereignty" are concerned, mere "administrative convenience" is insufficient to overcome the States' interests. *FMC v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002). Few, if any, other delegated powers have such direct, fundamental and negative impacts on state sovereignty, particularly where the Secretary is processing large number of applications, involving millions of acres of land, then deeding those lands to a competing sovereign without a State's consent. The jurisprudential significance of this case is heightened dramatically by the Secretary's extraordinary ability "to oust state jurisdiction in favor of government by the beneficiaries he chooses." *MichGO*, 525 F.3d at 40 (Brown, J. dissenting).

The Tribe now asks the Chief Justice to vacate the D.C. Circuit's stay, paving the way for the Secretary to take land in trust for the Tribe's construction of a casino. The Tribe's request is strategic, because once the land is in trust, the Secretary will argue (as he has successfully in the past), that the Quiet Title Act, 28 U.S.C. § 2409a(a), forecloses further review, notwithstanding the filing of a petition for certiorari or this Court's willingness to grant the petition. A stay is therefore necessary to protect Plaintiff Michigan Gambling Opposition ("MichGO") from irreparable harm, and to preserve this Court's ability to consider a significant legal issue that Justices Scalia, Thomas, and O'Connor urged this Court to review in *South Dakota I*, and which 17 States asked this Court to decide in *Carciari*. The D.C. Circuit did not abuse its considerable discretion, either in granting the stay or in rejecting the very same arguments that the Tribe advances in its application to vacate.

STATEMENT

This case did not begin in 2001 (*contra* Application at 2), but in the mid-1990s, when the Tribe applied for federal acknowledgement. In a letter to the Assistant Secretary of Indian Affairs, the Tribe stated that its tribal council had agreed to pursue federal re-acknowledgement provided that “there would never be casinos in our Tribe.” (D.C. Cir. J.A. at 1863.) With its Trust Application, the Tribe submitted its constitution, which stated that the Tribe is “the only Indian Tribe in the State of Michigan which has decided not to sacrifice the future of its membership to gaming interests and the changes to traditions in the community that gaming could bring.” (*Id.*) On the basis of these materials, the United States formally re-acknowledged the Gun Lake Band in October 1998. 63 Fed. Reg. 56936-01 (October 23, 1998). Only three years later, the Tribe broke its promise and asked the Secretary to take land in trust for a casino. (Application at 2.) It is solely because of this broken promise that the Tribe is in a position to claim “irreparable harm,” as alleged in the Application.

MichGO is a Michigan non-profit corporation that seeks to protect the citizenry and quality of life in its community by opposing the proliferation of gambling venues. MichGO brought this action to prevent Defendants Department of Interior (“DOI”) and Bureau of Indian Affairs (“BIA”) (collectively, “Defendants”) from taking land into trust in rural Wayland Township, Michigan, so the Tribe can construct a massive casino complex that will bring 3.1 million visitors annually to a community of just 3,000 residents. (D.C. Cir. J.A. at 465.)

MichGO filed its Complaint in June 2005. Count IV alleges that Section 5 of the IRA, the statute under which Defendants have acted, contains no intelligible standard to limit the Secretary’s authority to take land in trust, and therefore violates the nondelegation doctrine. (D.C. Cir. J.A. at 30-53, 55-57.) The statute simply states that the Secretary is authorized “in his

discretion,” to acquire any interest in lands “for the purpose of providing land for Indians.” 25 U.S.C. § 465.

Unsurprisingly, the District Court was unable to identify an intelligible limiting principle in this broad, statutory text. Accordingly, it based its dismissal of MichGO’s constitutional claim on alleged limiting regulations the DOI had promulgated. (D.C. Cir. J.A. at 270-74.) That holding was directly contrary to *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 473 (2001), in which this Court held that an agency cannot cure an unconstitutional, standardless delegation of power through the promulgation of limiting regulations.

On appeal to the D.C. Circuit, the panel majority rightly chastised the District Court for relying on administrative regulations to provide the intelligible limiting principle. *MichGO*, 525 F.3d 23, 30 (D.C. Cir. 2008). Nonetheless, the majority upheld the statute, inferring a limiting principle from the statute’s purported “purpose” of promoting economic self-sufficiency, a purpose that the majority found implied in the Act’s other provisions, general context, and legislative history. *Id.* at 31-32.

In dissent, Judge Brown agreed with the Eighth Circuit’s *South Dakota I* decision and concluded that Section 5 violates the nondelegation doctrine. She criticized the majority’s willingness to go beyond statutory text to find a limiting standard, noting that when a standard is not ambiguous but instead entirely absent, as is the case here, this Court has refused to create one out of whole cloth. 525 F.3d at 35 (Brown, J., dissenting) (citing *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992)). Judge Brown observed, “rather than an ambiguous standard that requires interpretation, § 5 provides an obvious, unambiguous direction that the Secretary is to have complete discretion,” and the majority’s standard “arises from the majority’s imagination, not from the [statutory] sources.” *Id.* at 36. “To say the purpose is to provide land for Indians in a broad effort to promote economic development . . . is tautology on steroids.” *Id.* at 37.

Judge Brown further noted that even if this “mood of economic self-sufficiency can be said to permeate § 5, it has never constituted a standard to guide the Secretary’s decision.” 525 F.3d at 37. The BIA and the courts have interpreted the statute to grant the Secretary unfettered discretion over which land to take in trust. *See id.* (numerous citations omitted). In holding that Section 5 is nonetheless constitutional, the panel majority took an approach that “differs radically from the Supreme Court’s analytical process in nondelegation challenges.” *Id.* at 38 (citing *Intermountain Rate Cases* [*U.S. v. Atchison, Topeka, & Santa Fe Ry.*], 234 U.S. 476, 485-86, 488 (1914), and *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

Judge Brown concluded by emphasizing Section 5’s exceptional importance: “By taking land in trust for Indians, the Secretary removes it from the jurisdiction of the State in which it sits and places it under the authority of a tribe. . . . Thus, § 5 allows the Secretary, by taking land in trust for Indians, to oust state jurisdiction in favor of government by the beneficiaries he chooses.” 525 F.3d at 39-40; *accord South Dakota I*, 69 F.3d at 882 (“By its literal terms, the statute permits the Secretary to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls. Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present. There are no perceptible ‘boundaries,’ no ‘intelligible principles,’ within the four corners of the statutory language that constrain this delegated authority—except that the acquisition must be ‘for Indians.’ It delegates unrestricted power to acquire land from private citizens for the private use and benefit of Indian tribes or individual Indians.”).

MichGO filed a timely petition for rehearing en banc, and the D.C. Circuit ordered Defendants to respond on the issue of whether Section 5 violates the nondelegation doctrine.¹ Although the court ultimately declined en banc review, Chief Judge David B. Sentelle and Judge Thomas B. Griffith joined Judge Janice Rogers Brown, indicating they would have granted the petition. (Order, *MichGO v. Kempthorne*, No. 07-5092 (D.C. Cir. May 20, 2008).)

With the specter of the Quiet Title Act looming to preempt this Court's further review of the nondelegation issue, MichGO asked Defendants to refrain from taking the Tribe's land in trust pending this Court's decision on a petition for certiorari. Defendants rejected that request, stating that they would proceed with the land acquisition after the mandate issued. Because Defendants' position jeopardized MichGO's ability to pursue further review, MichGO filed an emergency motion to stay. After full briefing in which the Tribe made the identical arguments it now presents in its Application, the same panel that ruled against MichGO by a 2-1 vote unanimously granted the motion for stay. (Application at Ex. 1.) The Tribe now seeks to vacate that unanimous, discretionary act of the D.C. Circuit.

STANDARD OF REVIEW

The power of a Circuit Justice to dissolve a stay entered by a court of appeals "should be exercised with the greatest of caution and should be reserved for exceptional circumstances." *Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.*, 434 U.S. 1316, 1319 (1977) (Marshall, J., in chambers) (citation omitted); accord, e.g., *Kemp v. Smith*, 463 U.S. 1344, 1345 (1983) (Powell, J., in chambers); *O'Connor v. Board of Educ.*, 449 U.S. 1301, 1304 (1980) (Stevens, J., in chambers). Because the D.C. Circuit panel was intimately familiar with this case, having rendered a detailed decision on the merits, its determination that a stay was

¹ The court did not request a response on whether this Court's prospective decision in *Carcieri v. Kempthorne*, 128 S. Ct. 1443 (2008), should apply to this pending case, an issue that MichGO initially raised in a motion to supplement the issues, which the panel denied.

warranted “is deserving of great weight, and should be overturned only if the court can be said to have abused its discretion.” *Commodity Futures*, 434 U.S. at 1319-20 (citations omitted); *accord Garcia-Mir v. Smith*, 469 U.S. 1311, 1313 (1985) (Rehnquist, J., in chambers) (“A stay granted by a court of appeals is entitled to great deference from this Court because the court of appeals ordinarily has a greater familiarity with the facts and issues in a given case.”) (citations omitted).

ARGUMENT

I. THERE IS A REASONABLE PROBABILITY THAT FOUR JUSTICES WILL VOTE TO GRANT MICHGO’S PETITION FOR CERTIORARI.

By granting MichGO’s motion for a stay, the court of appeals implicitly found a likelihood that this Court will grant further review in this case. That finding is amply supported by the following:

1. As Judge Brown explained in dissent, the panel majority’s approach—which mirrors that of the other circuits that have analyzed Section 5’s constitutionality—“differs radically from [this] Court’s analytical process in nondelegation challenges.” *MichGO*, 535 F.3d at 38. In *Whitman*, this Court reiterated that when Congress confers decisionmaking authority on agencies, Congress must “lay down *by legislative act* an intelligible principle to which the person or body authorized to [act] is directed to conform. 531 U.S. at 472 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added)). “Here, by contrast, the [panel] majority perceives a mood of economic development, which Congress did not articulate” in the statutory text. *MichGO*, 535 F.3d at 38.

2. It is for this very reason that the Eighth Circuit in *South Dakota I* likewise concluded that Section 5 is an unconstitutional delegation of legislative power. That court noted that Section 5 has “no perceptible ‘boundaries,’ no ‘intelligible principles’ within the four corners of the statutory language that constrain this delegated authority—except that the

acquisition must be ‘for Indians.’” 69 F.3d at 882. “It is hard to imagine a program more at odds with separation of powers principles.” *Id.* at 885.

3. It is this lack of guidance in the statutory text that distinguishes this case from all other nondelegation cases this Court has decided in the past 75 years. Those cases involved statutes that provided at least some directive for the agency to implement. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 375 (1989) (statute directed the Sentencing Commission to consider seven statutory factors); *Whitman*, 531 U.S. at 475-76 (statute required the EPA “to set air quality standards at the level that is ‘requisite’ . . . to protect the public health with an adequate margin of safety”); *Yakus v. United States*, 321 U.S. 414, 420 (1944) (statute directed agency to set prices that are “fair and equitable”); *Federal Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 600-01 (1944) (statute directed agency to set rates that are “just and reasonable”); *National Broad. Co. v. United States*, 319 U.S. 190, 225 (1943) (statute directed agency to grant broadcast licenses in the “public interest”). Here, Section 5 does not direct the Secretary as to when or how he should take land in trust; the statute simply states the beneficiary of the acquisition: “for Indians.”

4. Even if it were appropriate to infer a limiting principle from legislative history, rather than enacted statutory text, Section 5’s history demonstrates that Congress had an “agrarian focus” in mind when it adopted the statute. *See South Dakota I*, 69 F.3d at 883. As Representative Howard, a chief sponsor of the bill, explained:

Section 5 sets up a land acquisition program to provide land for Indians who have no land or insufficient land, and who can use land beneficially This program would permit the purchase of land for many bands and groups of landless Indians and would permit progress toward the consolidation of badly checkerboarded Indian reservations, *as well as provide additional agricultural land to supplement stock grazing or forestry operations.*

78 Cong. Rec. 11730 (June 15, 1934) (emphasis added). Representative Howard characterized

the acquisition of trust lands to be used for farming as “the keystone of the new Indian policy.” *Id.* at 11729. Representative Hastings described the land to be acquired as “Indian subsistence-homesteads.” *Id.* at 9269.² Thus, the legislative history is a mixed bag, at best.

5. Following the Eighth Circuit’s decision in *South Dakota I*, the Secretary promulgated a new regulation subjecting land-in-trust decisions to judicial review, and the government urged this Court to vacate and remand for further consideration. *See* Pet. for Cert. in *United States Dep’t of Interior v. South Dakota*, No. 95-1956, at 24 (filed June 3, 1996). The United States represented that the IRA is “the cornerstone of modern federal law respecting Indians,” *id.* at 16, and that “Section 5 has provided the primary mechanism for the federal government to restore and replace tribal lands,” *id.* The government described the Eighth Circuit’s decision as one of “fundamental importance,” with “great practical significance.” *Id.* at 16, 17.³

6. This Court accepted the government’s invitation to vacate and remand in *South Dakota I*, but did so over the dissent of Justice Scalia, joined by Justices O’Connor and Thomas, who would have granted certiorari. *See* 519 U.S. 919 (1996) (Scalia, J., dissenting). Justice Scalia expressed extreme skepticism that the Eighth Circuit should reach a different outcome in its nondelegation analysis simply because the Secretary was willing to provide for judicial review. *See id.* at 921-22. At least two sitting Justices, then, have already expressed their desire to hear the principle issue that MichGO’s petition for certiorari will present.

² A comparison of the statute with the original bill as drafted provides further evidence that the statute as enacted lacks intelligible principles. As originally proposed, the IRA contained standards which very likely could have been found to be constitutional. *See* Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong. 2d Sess. at 1-14 (1934); 48 Stat. 984 (1934). Because Congress eliminated the intelligible standards in enacting the final bill, it can hardly be said that the statute’s bald language is somehow constitutional.

³ The government also stated that the *South Dakota I* decision called into question thousands of acquisitions that the Secretary had made since Section 5’s enactment, *see* Petition at 17, a position that may be at odds with the Quiet Title Act, discussed *infra*.

7. In *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), the Tenth Circuit Court of Appeals held Section 5 constitutional, citing its earlier decision in *McAlpine v. United States*, 112 F.3d 1429, 1432 n.3 (10th Cir.), *cert. denied*, 522 U.S. 984 (1997). But *McAlpine* relied on Judge Murphy’s *dissenting* opinion in *South Dakota I*, a dissent that found intelligible limiting principles in the Secretary’s implementing regulations, 69 F.3d at 888 n.2, contrary to this Court’s more recent decision in *Whitman*.

8. Subsequent circuit decisions have all relied on this circular and suspect precedent from *Roberts*. See, e.g., *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d at 966, 972-74 (10th Cir. 2005) (holding that the panel was bound by the *Roberts* decision); *South Dakota v. Department of Interior*, 423 F.3d 790, 795-99 (8th Cir. 2005) (“*South Dakota II*”) (relying on the *Roberts* decision and legislative history); *Carcieri v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (en banc) (relying on *South Dakota II*).

9. The inability of the various states to persuade the circuits to take the nondelegation doctrine seriously prompted 16 of them—Alabama, Alaska, Arkansas, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Massachusetts, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Utah—to submit a brief in *Carcieri* in support of Rhode Island’s request that this Court review Section 5’s constitutionality. As these *amici* States noted in their brief, “No other court has challenged [the Eighth Circuit’s conclusion in *South Dakota I*], or found any significant limitation on the trust power in the text of the IRA.” Br. of the *Amici Curiae* States in Support of the Petitioners in *Carcieri v. Kempthorne*, No. 07-526, at 21 (filed Nov. 21, 2007).

10. This Court ultimately declined the nondelegation question presented in *Carcieri* in favor of a narrow issue of statutory interpretation that will presumably resolve that case without the need to address the constitutional question. Because it is unclear whether MichGO

will be able to invoke a favorable *Carciere* holding,⁴ the constitutional question is cleanly presented for this Court’s review and is dispositive. Notably, this Court decided to review the Section 5 interpretive question presented in *Carciere* despite the absence of a circuit split.

11. The time for the question of Section 5’s constitutionality to “percolate” has now passed. It is clear that simply incanting the *Roberts* decision and the 75 years that have passed since the last successful nondelegation challenge—as the circuit courts have done—is an insufficient basis for concluding that Section 5’s unbridled delegation of legislative power is permissible. The fact that parties have been forced to bring successive, adverse circuit decisions to this Court is a compelling reason to grant MichGO’s cert. petition, not a reason to predict that the petition will be denied (*contra* Application at 1, 7), particularly where those circuit decisions conflict with this Court’s jurisprudence.

12. The D.C. Circuit panel majority and the other circuits that have addressed this question suggest that the inferred limiting principle is tribal economic development. But even if that assumption is true, it offers no intelligible limitation. Any land acquisition “for Indians” could be justified on the basis of economic development, including the parade of hypothetical acquisitions that the Eighth Circuit disparaged in *South Dakota I*, 69 F.3d at 882. The panel majority’s decision, and those of the other circuits, thus stand mainly for the proposition that the nondelegation doctrine is no impediment to an agency’s exercise of unbridled discretion.

⁴ The issue in *Carciere* is whether the Secretary’s authority under Section 5 is limited to taking land in trust for tribes that were federally recognized in 1934, the year the IRA became effective. (*See* 25 U.S.C. § 479, which defines “Indian” as a member of any recognized federal Indian tribe “now [i.e., in 1934] under federal jurisdiction.”). If the answer is yes, the land-in-trust decision in this case is invalid, because the Gun Lake Band was not federally recognized in 1934. MichGO did not present this issue to the D.C. District or Circuit Courts because no federal court had previously adopted Rhode Island’s proffered interpretation of the statute. Because a decision in favor of Rhode Island would constitute a change in law, it should apply to this pending case, even though not raised below until after merits briefs had already been submitted. *Consumers Union of United States, Inc. v. Fed. Power Comm’n*, 510 F.2d 656, 662 (D.C. Cir. 1975). MichGO will elaborate further on this issue in its forthcoming cert. petition.

13. There is a very real impact to States and communities rendered by the proliferation of land-in-trust acquisitions for casino gaming. As the National Indian Gaming Commission reports, tribal gaming revenue quadrupled from 1996 to 2006, from \$6.3 billion to \$25 billion. See <http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/19962006revenues.pdf>. The beneficial and adverse impacts of these casinos—and the onslaught of new groups seeking federal recognition and their own gaming ventures—could and should be addressed in corrective legislation that cabins the Secretary’s authority once this Court invalidates Section 5.

14. If the legislative delegation to the Secretary to acquire lands “in his discretion” “for Indians” constitutes an intelligible principle, then the nondelegation doctrine is truly dead. In light of Section 5’s bald statutory language, this case presents an ideal opportunity to reaffirm the nondelegation doctrine’s continuing vitality, which is now shrouded in doubt due to disuse and unsteady decisions of the lower courts. Conversely, if the government is correct, then this Court should at least give the nondelegation doctrine a public burial. Allowing the doctrine to further flounder in the lower courts is inefficient and will only further unsettle this bedrock area of law.

In sum, while it is difficult to read the tea leaves, there would appear to be more than a reasonable chance that four Justices will consider the question of Section 5’s constitutionality sufficiently meritorious to grant MichGO’s petition for certiorari, and that five Justices would agree with Judge Janice Rogers Brown and the Eighth Circuit decision in *South Dakota I*. The D.C. Circuit panel unanimously reached that conclusion, and in doing so did not abuse its discretion.

II. THE POTENTIAL HARM TO MICHGO IF THE STAY IS VACATED FAR OUTWEIGHS ANY SELF-INFLICTED HARM TO THE TRIBE IF THE D.C. CIRCUIT’S ORDER STANDS.

In recent years, DOI has successfully argued that the Quiet Title Act forecloses review of claims relating to Indian lands once the land has been taken into trust.⁵ *See, e.g., Neighbors for Rational Devel., Inc. v. Norton*, 379 F.3d 956, 961-62 (10th Cir. 2004). Accordingly, if the D.C. Circuit’s stay is vacated, this Court will arguably be deprived of jurisdiction, foreclosing MichGO’s opportunity for appellate review. In this unique situation, Members of this Court have found “irreparable harm” warranting a stay. *See, e.g., Garrison v. Hudson*, 104 S. Ct. 3496, 3497 (Burger, Circuit Justice 1984) (“[F]oreclosure of certiorari review . . . would impose irreparable harm” by rendering the case moot).

The Tribe does not dispute the potential application of the Quiet Title Act to deprive MichGO of its opportunity to seek review in this Court. (Application at 9.) Instead, the Tribe ignores the fact that Defendants will likely rely on the Quiet Title Act to divest this Court of jurisdiction, and it denigrates MichGO’s Section 5 nondelegation challenge as “plainly meritless.” (*Id.*) In making this self-serving assessment, the Tribe ignores (1) the Eighth Circuit’s decision in *South Dakota I* to hold Section 5 unconstitutional, 69 F.3d at 881-85; (2) the preference of Justices Scalia, Thomas, and O’Connor to hear the merits of the nondelegation issue in *South Dakota I*, 519 U.S. 919; (3) Judge Janice Rogers Brown’s compelling dissent from the panel majority’s decision below, 525 F.3d at 33-40; (4) the actions of Chief Judge David B. Sentelle and Judge Thomas B. Griffith in joining Judge Brown in urging the D.C. Circuit to consider the constitutional question *en banc*; (5) the well-respected advocates who have in good faith filed cert. petitions on this very issue in cases like *South Dakota* and *Roberts*; and (6) the 16

⁵ The Quiet Title Act creates an exception to federal courts’ subject-matter jurisdiction by barring suits against the United States relating to “trust or restricted Indian lands.” *See* 28 U.S.C. § 2409a(a).

States that joined Rhode Island in asking this Court to hold Section 5 an unconstitutional delegation of legislative power in the *Carcieri* litigation. MichGO's petition will have merit, and MichGO should have the opportunity for its petition to be heard on the merits, rather than subjected to a rushed judgment based solely on an application to vacate a stay.

In contrast, if the D.C. Circuit's stay order stands, any alleged injury to the Tribe is limited to the few, short months that it will take this Court to consider MichGO's petition for certiorari. Moreover, all of the Tribe's alleged harm stems entirely from its decision to break its promise and seek to open a casino. Ironically, it is Section 5's lack of direction or limits that authorizes Defendants to take land in trust despite the Tribe's broken promise.⁶ For all these reasons, the balancing of harms counsels strongly in favor of the D.C. Circuit's decision to stay this matter.

III. THE PUBLIC INTEREST WEIGHS IN FAVOR OF THE D.C. CIRCUIT'S STAY.

In most litigation, the "public interest" is given lip service by the party seeking relief, which merely restates its alleged irreparable injury and, in conclusory fashion, remarks that this type of injury does not serve the public good. The Tribe's Application is no exception. (Application at 11-13.) But such a superficial analysis in this action must be rejected.

The nondelegation principle is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892); accord *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas

⁶ To date, it cannot even be said that the Tribe "has lost millions of dollars in revenue." (*Contra* Application at 11.) The Tribe is unable to conduct the most lucrative form of gambling, Class III casino gaming, until the State of Michigan authorizes a gaming compact, something which has not yet taken place.

constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature.”) But over the last three-quarters of a century, the nondelegation doctrine has fallen “under a cloud,” *Industrial Union Dep’t, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring in the judgment), spawning debate among Members of this Court, judges in the lower courts, and those in academia. MichGO agrees with the ever-growing number of commentators who have urged this Court to revisit and revitalize the nondelegation doctrine: “A Supreme Court decision to this effect could have some of the salutary effects of the *Lopez* decision in the Commerce Clause area, offering a signal to Congress that it is important to think with some particularity about the standards governing agency behavior.” Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 356 (1999). Given the precarious place the nondelegation doctrine holds in this Court’s jurisprudence, it is no wonder that lower courts are at a loss to determine whether to apply it. This Court’s guidance is sorely needed.

Moreover, the public interest is heightened in this case, which involves the Secretary’s ability “to oust state jurisdiction in favor of government by the beneficiaries he chooses.” *MichGO*, 525 F.3d at 40 (Brown, J., dissenting). The land-in-trust statute impacts literally thousands of acres of land across the country, removing such lands from taxation and state civil and criminal jurisdiction, absent a tribe’s consent. That impact is what prompted 17 States in *Carciari* to request that this Court review Section 5’s constitutionality, a review that would be in the public’s best interests.

For all of these reasons, the D.C. Circuit panel did not abuse its considerable discretion in concluding that the requisite factors weighed in favor of granting a stay of the mandate.

CONCLUSION

The Tribe's application to vacate the D.C. Circuit's unanimous order staying the mandate should be denied.

Respectfully submitted.

REBECCA A. WOMELDORF
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W., Suite 900
Washington, D.C. 20005
Telephone (202) 898-5800
Fax (202) 682-1639

JOHN J. BURSCH
Counsel of Record
DANIEL P. ETTINGER
JOSEPH A. KUIPER
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
Telephone (616) 752-2000
Fax (616) 752-2500