2017 WL 4350726 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF KANSAS and Board of County Commissioners of Cherokee County, Kansas, Petitioners,
v.
NATIONAL INDIAN GAMING COMMISSION, et al., Respondents.

No. 17-463.
September 25, 2017.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Petition for Writ of Certiorari

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***i** QUESTION PRESENTED

The Indian Gaming Regulatory Act ("IGRA") prohibits gaming on Indian lands taken into trust after October 17, 1988, with certain exceptions. 25 U.S.C. § 2719. By regulation, the National Indian Gaming Commission ("NIGC") has implemented a procedure for Indian tribes to request a legal opinion determining whether newly acquired Indian lands meet one of the exceptions under § 2719. 25 C.F.R. § 292.3.

Here, the NIGC issued a legal opinion through its acting general counsel declaring that certain Kansas land owned by the Quapaw Tribe of Indians "is eligible for gaming under the last recognized reservation exception." App. 69. Petitioners sought judicial review of the NIGC's determination under the Administrative Procedure Act ("APA").

The Tenth Circuit concluded that IGRA silently precludes judicial review of NIGC gaming-eligibility legal opinions because such opinions are not included in 25 U.S.C. § 2714, which provides a list of NIGC decisions considered final under the APA. *See* 5 U.S.C. § 701(a)(1). The Court also held that gaming-eligibility legal opinions are not final agency actions under the APA, opining that no legal consequences flow from such decisions, even though NIGC legal opinions regarding gaming-eligibility can pave the way for tribes to game on Indian lands. *See* 5 U.S.C. § 704.

The question presented is:

Whether NIGC legal opinions that determine whether Indian lands are eligible for gaming under IGRA are reviewable final agency actions.

***ii** PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs-appellants below, are the State of Kansas and the Board of County Commissioners of Cherokee County, Kansas.

Respondents, who were defendants-appellees below, are the National Indian Gaming Commission ("NIGC"), Jonodev Osceola Chaudhuri, Commissioner of the NIGC, in his official capacity; Daniel J. Little, Associate Commissioner of the NIGC, in his official capacity; Eric N. Shepard, Acting General Counsel of the NIGC, in his official capacity; United States Department of the Interior; Ryan Zinke, Secretary of the United States Department of the Interior, in his official capacity; Kevin K. Washburn, Assistant Secretary for Indian Affairs for the United States Department of the Interior, in his official capacity; John Berrey, as Chairperson of the Quapaw Tribe of Oklahoma Business Committee and Chairperson of the Downstream Development Authority; Thomas Mathews, as Vice-Chairperson of the Quapaw Tribe of Oklahoma Business Committee; Tamara Smiley-Reeves, as Secretary/Treasurer of the Quapaw Tribe of Oklahoma Business Committee, Secretary of the Quapaw Tribe of Oklahoma Development Corporation, and member of the Downstream Development Authority; T.C. Bear, as Member of the Quapaw Tribe of Oklahoma Business Committee and the Quapaw Gaming Authority; Betty Gaedtke, as Member of the Quapaw Tribe of Oklahoma Business Committee; Ranny McWatters, as Member of the Quapaw Tribe of Oklahoma Business Committee and Treasurer of the Downstream Development Authority; Marilyn Rogers, as Member of the Quapaw Tribe of Oklahoma Business ***iii** Committee, Quapaw Gaming Authority, and Downstream Development Authority; Trenton Stand, as Member of the Quapaw Gaming Authority; Lori Shafer, as Member of the Quapaw Gaming Authority; Justin Plott, as Member of the Quapaw Gaming Authority; Fran Wood, as Member of the Quapaw Gaming Authority; Larry Ramsey, as Secretary of the Downstream Development Authority; Barbara Kyser-Collier, as Executive Director of the Quapaw Tribe of Oklahoma Tribal Gaming Agency; Erin Shelton, a/k/a Erin Eckart, as Deputy Director of the Quapaw Tribe of Oklahoma Tribal Gaming Agency; Rodney Spriggs, as President of the Quapaw Development Corporation; Art Cousatte, as Vice-President of the Quapaw Development Corporation; Donna Mercer, as Treasurer of the Quapaw Development Corporation; Jerri Montgomery, as Member of the Quapaw Development Corporation; Quapaw Development Corporation; Downstream Development Authority of the Quapaw Tribe of Oklahoma (O-Gah-Pah); Quapaw Gaming Authority. [1]

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CASES

STATUTES, REGULATIONS, TREATIES

***1** The State of Kansas and the Board of County Commissioners of Cherokee County, Kansas respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 861 F.3d 1024, and reprinted at App. 1-20.

The District Court's memorandum and order granting respondents' motions to dismiss is reported at 151 F. Supp. 3d 1199, and reprinted at App. 21-67.

The National Indian Gaming Commission's legal opinion was not published. It is available at App. 68-102.

JURISDICTION

The Tenth Circuit issued its opinion on June 27, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 701(a) provides:
This chapter applies, according to the provisions thereof, except to the extent that -

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

***2** 5 U.S.C. § 702 provides, in relevant part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 704 provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

***3** 25 U.S.C. § 2714 provides:

> Decisions made by the [National Indian Gaming] Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5.

25 U.S.C. § 2719(a) provides, in relevant part:
[G]aming regulated by this chapter shall not be conducted on lands acquired by the Secretary [of the Department of the Interior] in trust for the benefit of an Indian tribe after October 17, 1988, unless -

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(2) the Indian tribe has no reservation on October 17, 1988, and -

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(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

STATEMENT OF THE CASE

A. Statutory Background

The Indian Gaming Regulatory Act ("IGRA") was enacted to provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. § 2701(3). That is, "to ensure that each place, facility, or location where class II or III gaming will occur is ***4** located on Indian lands eligible for gaming." 25 C.F.R. § 559.1.

Congress established the National Indian Gaming Commission ("NIGC" or "Commission") within the Department of the Interior to regulate gaming under IGRA. 25 U.S.C. § 2704(a). The Chair of the Commission (or his or her designee), subject to an appeal to the Commission, has the power to order the temporary closure of gaming activities, to levy and collect civil fines, and to approve tribal ordinances or resolutions regulating class II and III gaming, among other powers. 25 U.S.C. § 2705; 25 C.F.R. § 502.1. The Chair is required to appoint a general counsel to the Commission. 25 U.S.C. § 2707(a).

IGRA allows Indian tribes to engage in, or license and regulate, gaming on Indian lands within a tribe's jurisdiction if certain requirements are met. *See* 25 U.S.C. § 2710(b), (d). Indian lands include "any lands title to which is … held in trust by the United States for the benefit of any Indian tribe." 25 U.S.C. § 2703(4)(B). And one of the requirements is that a tribe must obtain approval of a tribal gaming ordinance by the NIGC Chair. *Id.*

The default rule under IGRA is that gaming is prohibited on "lands acquired by the Secretary [of the Department of the Interior] in trust for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. § 2719(a). One exception to this rule, known as the last recognized reservation exception, applies where "the Indian tribe has no reservation on October 17, 1988" and "such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States ***5** within which such Indian tribe is presently located." 25 U.S.C. § 2719(a)(2)(B). By regulation, the NIGC implemented a procedure that allows a tribe to request a legal opinion from the NIGC

determining whether newly acquired lands meet one of the exceptions to IGRA's general prohibition on gaming on Indian lands placed into trust after October 17, 1988. 25 C.F.R. § 292.3.

In addition to determining whether lands are eligible for gaming under § 2719 and approving tribal gaming ordinances under §§ 2710 and 2712, the NIGC also is tasked with approving gaming management contracts (§§ 2711, 2712), and imposing civil penalties and issuing closure orders for violations of IGRA (§ 2713). Section 2714 provides that "[d]ecisions made by the [NIGC] pursuant to sections 2710 [tribal gaming ordinances], 2711 [management contracts], 2712 [review of existing ordinances and contracts], and 2713 [civil penalties and closure orders] of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5."

B. Factual and Procedural Background

1. The Quapaw Tribe of Indians is a federally recognized tribe. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 81 Fed. Reg. 26,826, 26,830 (May 4, 2016). Under an 1833 treaty with the United States, the Tribe left its land in Arkansas and relocated to a reservation in what is now northeast Oklahoma and southeast Kansas. *See* Treaty with the Quapaw, 7 Stat. 424 (May 13, 1833).

***6** The Kansas portion of the reservation was known as the "Quapaw Strip" because it was only a half-mile wide from north to south. App. 6. The Tribe later ceded the Quapaw Strip to the United States, except for a small set-aside for a member of the Tribe. App. 6. In 1895, during the allotment era, the United States dissolved the remainder of the Quapaw reservation and allotted the Quapaw's Oklahoma land to individual Tribe members. *See* Act of March 2, 1895, 28 Stat. 876, 907 (1895).

At issue in this case is a 124-acre parcel (the "Kansas land") that is within the historic boundaries of the Quapaw Strip and abuts the Kansas-Oklahoma state line. App. 6. The Tribe acquired the Kansas land in 2006 and 2007 to serve as a parking lot for the Tribe's Downstream Casino Resort, which is located on adjacent trust lands on the Oklahoma side of the state line. App. 6.

2. In 2011, the Tribe applied to have the Secretary of the Interior place the Kansas land into trust, stating that the land would be used only for "additional parking for the Downstream Resort/Casino." App. 122. In early 2012, the Miami Agency of the Bureau of Indian Affairs ("BIA"), located in Oklahoma, sent the Kansas Governor a "Notice of (*Non-Gaming*) Land Acquisition Application," which described the land as a parking lot and said "there is no expected change in use of the property at this time." App. 117, 119 (emphasis added).

Concerned that the land would be used to expand the Tribe's casino into Kansas, and provide gaming on the Kansas side of the state line, the State objected to the Tribe's land-into-trust application. Cherokee ***7** County echoed the State's objections in a letter of its own, which it later withdrew based on the Tribe's assurances that the Kansas land would not be used for gaming purposes.

In June 2012, the Miami Agency of the BIA agreed to take the land into trust. The Agency based its decision in part on the Tribe's assurance that "there will be no change in land use" because one section of the tract would be used for the existing parking lot and the other section would remain primarily agricultural. App. 108.

3. After convincing the Secretary of the Interior to take the Kansas land into trust for non-gaming purposes, the Tribe did an about-face. It asked the NIGC to issue a legal opinion that the Kansas land *is eligible for gaming* under the last recognized reservation exception to IGRA's general prohibition on gaming on Indian lands taken into trust after October 17, 1988.

The State of Kansas objected to the Tribe's request because the land was placed into trust for *non-gaming* purposes. App. 28. Citing this Court's decision in *Carcieri v. Salazar,* 555 U.S. 379 (2009), the State also argued that the Kansas land did not qualify for the last recognized reservation exception. App. 28. That exception requires (among other things) that the Indian lands be "located in a State other than Oklahoma" and be "within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe *is presently located.*" 25 U.S.C. § 2719(a)(2)(B) (emphasis added). In *Carcieri,* the Court held that a substantially identical phrase in the Indian Reorganization Act ("IRA") - "recognized Indian Tribe ***8** *now under Federal jurisdiction*" - unambiguously means "recognized Indian Tribe under Federal jurisdiction *at the time the IRA was enacted.*" 555 U.S. at 388-91 (emphasis added). Thus, the State argued, the last recognized reservation exception requires the Tribe to show that it was located in Kansas on October 17, 1988, when IGRA was enacted. App. 28.

A 15-page legal opinion issued by the NIGC's Acting General Counsel concluded that the Kansas land "is eligible for gaming under the last recognized reservation exception of IGRA." App. 69. Without addressing *Carcieri* (or even mentioning the case), the legal opinion concluded that the Kansas land satisfied the last recognized reservation exception because, in addition to satisfying the exception's other requirements, the Tribe had some tribal government and tribal member presence on the land in 2014 when the opinion was issued. *See* App. 100. The legal opinion also claimed to be judicially unreviewable. App. 101. The Department of the Interior's Solicitor's Office reviewed the legal opinion and concurred with it. App. 69.

4. Petitioners sought judicial review of the NIGC legal opinion in the U.S. District Court for the District of Kansas under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). They challenged, among other things, the NIGC's determination that a tribe is "presently located" in a State for purposes of the last recognized reservation exception as long as the tribe is found to have some minimal presence in the State at the time the tribe seeks the exception or conducts gaming operations. *See* App. 28-29, 34. The NIGC moved to dismiss the Petitioners' APA claims, arguing ***9** that the District Court lacked subject matter jurisdiction because the NIGC legal opinion was not an appealable final agency action. App. 34. The District Court granted the NIGC's motion to dismiss, concluding that 25 U.S.C. § 2714, which provides a list of NIGC decisions considered final under the APA, silently prohibits review of any other agency decisions under IGRA, including gaming-eligibility opinions under 25 U.S.C. § 2719. *See* App. 44. In the alternative, the District Court concluded that the NIGC legal opinion was not a final agency action under the APA. App. 49.

5. Petitioners timely appealed the District Court's decision and a three-judge panel of the U.S. Court of Appeals for the Tenth Circuit affirmed. App. 20.

a. First, the panel addressed whether IGRA precludes judicial review of NIGC opinions declaring certain lands eligible (or ineligible) for gaming under 25 U.S.C. § 2719. *See* 5 U.S.C. § 701(a)(1).

Section 2714 provides that "[d]ecisions made by the Commission pursuant to sections 2710 [tribal gaming ordinances], 2711 [management contracts], 2712 [pre-IGRA ordinances and contracts], and 2713 [civil penalties] of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to [the APA]." 25 U.S.C. § 2714.

The panel began with a passing reference to the presumption in favor of judicial review and acknowledged that § 2714's omission of § 2719 gaming-eligibility legal opinions does not by itself render the NIGC legal opinion unreviewable. App. 8, 10. But the panel failed to faithfully apply these well-settled ***10** principles. The panel first turned the presumption of reviewability on its head, emphasizing that "[n]othing in … section [2714] provides that NIGC General Counsel letters are final agency actions." App. 9. Then it concluded that the NIGC legal opinion was not reviewable primarily because

§ 2714 specifically provided review of certain NIGC decisions, but not gaming-eligibility legal opinions. App. 9. The "implied corollary" of § 2714, the panel held, "is that other agency actions are not final" and therefore not reviewable. App. 9.

Turning to IGRA's broader structure, the panel observed, quite rightly, that § 2719 gaming-eligibility determinations typically are made and enforced through one of § 2714's enumerated reviewable actions (for example, through the NIGC's approval of a tribal gaming ordinance, gaming management contract, or through enforcement actions). App. 11. But the panel failed to acknowledge that the Tribe could (and had every incentive to) avoid agency action under those provisions here. The Tribe already had a non-site-specific gaming ordinance that purports to authorize Class II gaming on any of the Tribe's "Indian Lands" and Class III gaming on any "Indian Lands" where the Secretary of the Interior has approved a tribal-state compact. *See* App. 15. The Tribe was not required to use a gaming management contract to operate the new facility. Plus, the possibility of any enforcement action by the NIGC was entirely speculative.

The panel attempted to buttress its conclusion by relying on IGRA's legislative history, which even the panel recognized could be seen as sending "conflicting signals about which agency actions constitute final ***11** decisions." App. 12. And although the Department of the Interior's own regulations recognize that the NIGC can make "final agency decisions … pursuant to 25 U.S.C. § 2719," 25 C.F.R. § 292.26(a), the panel instead latched on to the regulation's self-serving statements that agency legal opinions categorically are never final agency actions. App. 13.

b. Next, the panel turned to whether the NIGC legal opinion qualifies as final agency action under the APA. App. 14. *See* 5 U.S.C. § 702. The panel concluded that the legal opinion was not "final" because it did not determine any rights or obligations and no legal consequences flowed from it. *See* App. 14.

Petitioners argued that the NIGC legal opinion enabled the Tribe to expand its casino to the Kansas land, arguably triggered a statutory obligation to negotiate a class III gaming compact with the Tribe, and prompted the Tribe to sue the State in order to force Kansas to negotiate a gaming compact. App. 14. Indeed, just one month after the District Court determined the NIGC legal opinion was insulated from judicial review, the Tribe sued Kansas in federal district court to force the State to negotiate a class III gaming compact. *Quapaw Tribe of Indians v. Kansas,* Case No. 16-2037-JWL-TJJ (D. Kan.). The suit was dismissed based on the State's assertion of sovereign immunity. *See Seminole Tribe of Fla. v. Florida,* 517 U.S. 44 (1996).

Yet the panel held that the NIGC legal opinion had no legal effect because the panel opined that the Tribe's right to game on the Kansas land derived from its sovereign authority, not the legal opinion. In the panel's view, the Tribe could have obligated the State ***12** to negotiate without the legal opinion, the State was to blame for the Tribe's federal court suit because Kansas allegedly declined to participate in compact negotiations, and the NIGC could reconsider the eligibility of the Kansas land for gaming at any time. App. 15-18.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision that § 2714 Provides an Exclusive List of Reviewable Agency Actions under IGRA Deepens a Circuit Split.

The first reason the Court should grant review is because the Circuits are divided over whether § 2714 implicitly precludes judicial review of agency actions under IGRA that are not listed in § 2714.

In the decision below, the Tenth Circuit doubled down on a previous Tenth Circuit panel's passing observation that § 2714 "define[es] what constitutes 'final agency action' under IGRA." *Oklahoma v. Hobia,* 775 F.3d 1204, 1210 (10th Cir. 2014); App. 9-10. The panel here reasoned that because § 2714 lists certain NIGC decisions that are appealable final actions under the APA, "the implied corollary is that other agency actions are not final, and ergo, not reviewable." App. 9 (internal quotation marks omitted).

By contrast, the D.C. Circuit has held that § 2714 does *not* implicitly preclude judicial review of other final agency actions under IGRA. In *Amador County v. Salazar,* 640 F.3d 373 (D.C. Cir. 2011), a county challenged a decision by the Secretary of the Interior to approve a class III tribal-state gaming compact by taking no action regarding the compact within 45 days ***13** of its submission to the Secretary. *See* 25 U.S.C. § 2710(d)(8)(C). In response, the Secretary made the same argument the Tenth Circuit panel adopted below - that § 2714 implicitly precludes review of agency decisions not specified as reviewable. Specifically, he argued that § 2714 indicates congressional intent to preclude review of his "no-action" approval of the compact because § 2714 only provides that *NIGC* decisions under § 2710 are reviewable final agency actions, and does not expressly provide that decisions made (or not made) by the *Secretary* under § 2710 are subject to review. *See Amador County,* 640 F.3d at 381.

The D.C. Circuit first concluded that "no intent to preclude judicial review is fairly discernible in [IGRA's] statutory scheme." *Id.* at 380. The court then easily rejected the argument the Tenth Circuit adopted here, explaining that "[i]t is well established … that the existence of a judicial review provision covering certain actions under a statute does not preclude judicial review of other actions under the same statute." *Id.* at 381.

The Eighth Circuit, in contrast, has suggested that § 2714 indicates a congressional intent to preclude review of agency decisions not listed in that section. In *In re Sac & Fox Tribe of Mississippi in Iowa / Meskwaki Casino Litigation,* 340 F.3d 749 (8th Cir. 2003), the Eighth Circuit mentioned § 2714 on its way to determining that IGRA precludes judicial review of temporary closure orders issued by the NIGC Chair. But the Eighth Circuit primarily relied on other strong indicators of congressional intent to preclude review of temporary closure orders, including providing a right ***14** to a hearing before the full Commission to review the temporary order and the right to judicial review of that decision. *See Sac & Fox,* 340 F.3d at 756, 761; *see also* 25 U.S.C. § 2713(b), (c). These other indicators the Eighth Circuit relied on only highlight the lack of any textual clues that Congress intended § 2714 to preclude review of gaming-eligibility legal opinions.

II. The Tenth Circuit's Decision Conflicts with this Court's Precedents.

Review also is warranted because the Tenth Circuit's decision is contrary to this Court's cases in two respects: (1) notwithstanding the well-settled presumption in favor of judicial review, the Tenth Circuit effectively applied a presumption *against* review, interpreting IGRA's silence regarding the reviewability of gaming-eligibility determinations as barring review of the NIGC's legal opinion under 5 U.S.C. § 701(a)(1); and (2) the Tenth Circuit's decision is at odds with this Court's pragmatic approach to determining the finality of agency action under 5 U.S.C. § 704.

A. The Tenth Circuit Effectively Applied a Presumption *Against* Judicial Review in Holding that IGRA Categorically Precludes Review of NIGC Gaming-Eligibility Legal Opinions *Sub Silentio*.

1. "From the beginning" this Court has applied a strong presumption that judicial review of administrative action "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Mich. Acad. of Family Physicians,* 476 U.S. 667, 670 (1986) (internal ***15** quotation marks omitted) (citing *Marbury v. Madison,* 5 U.S. 137, 163 (1803)). Just a year ago, this Court reaffirmed this settled principle: A statute that makes some agency actions " 'reviewable should not suffice to support an implication of exclusion as to other[]' agency actions." *U.S. Army*

Corps of Engineers v. Hawkes Co., 136 S. Ct. 1807, 1816 (2016) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 141 (1967)). The "right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Labs.,* 387 U.S. at 141.

Rather, the starting point for deciding whether a statute precludes judicial review is "the strong presumption that Congress intends judicial review of administrative action." *Bowen,* 476 U.S. at 670. This presumption, "like all presumptions used in interpreting statutes, may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent," including "inferences of intent drawn from the statutory scheme as a whole." *Block v. Cmty. Nutrition Inst.,* 467 U.S. 340, 349 (1984). But agencies attempting to shield their actions from judicial review bear the "heavy burden" of showing the necessary congressional intent to preclude review. *Mach Mining, LLC v. EEOC,* 135 S. Ct. 1645, 1651 (2015) (internal quotation marks omitted).

2. The decision below begins by acknowledging the "strong presumption" in favor of judicial review. App. 8. But instead of applying a presumption in favor of judicial review, the panel effectively applied a presumption *against* judicial review. Instead of requiring the NIGC to show that Congress intended to *preclude* review, the Tenth Circuit required Kansas to ***16** show that Congress intended IGRA to *provide* for review of NIGC legal opinions. App. 9. The court thus quite literally turned the "strong presumption" on its head.

Turning to § 2714, the court concluded that the "implied corollary" of the statute's express identification of "four categories of NIGC decisions that constitute reviewable 'final agency actions' under the APA" - decisions regarding (1) tribal gaming ordinances, (2) management contracts, (3) ordinances and contracts that predate IGRA, and (4) civil penalty and closure orders for violating IGRA or its implementing regulations - "is that other agency actions are not final, and ergo, not reviewable." App. 9 (internal quotation marks omitted). The Tenth Circuit's heavy reliance on this "implied corollary" to conclude that § 2714 exclusively "defin[es] what constitutes final agency action under IGRA" cannot be squared with this Court's rigorous application of the strong presumption in favor of judicial review. App. 9-10.

For example, in *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667 (1986), the Secretary of the Department of Health and Human Services argued that two Medicare statutes barred judicial review of regulations promulgated under Part B of the Medicare program because Congress had authorized review of "any determination … as to … the amount of benefits under part A" but failed to authorize review of such decisions under part B. *Id.* at 673 (internal quotation marks omitted). The Court roundly rejected the argument because the statute "on its face is an explicit *authorization* of judicial review, *not a bar.*" *Id.* at 674 (emphasis added). The same is true of § 2714. ***17** The argument the Tenth Circuit adopted - that § 2714's failure to specifically provide for review of gaming-eligibility legal opinions, while providing for review of other agency actions, impliedly precludes judicial review of such legal opinions - cannot be squared with this Court's decision in *Bowen.*

The Environmental Protection Agency ("EPA") made a similar argument in *Sackett v. EPA,* 566 U.S. 120 (2012). EPA argued that because Congress expressly provided for prompt judicial review when the EPA assesses administrative penalties after a hearing, but did not expressly provide for review of compliance orders, Congress must have intended to preclude judicial review of EPA compliance orders. *Id.* at 129. As in *Bowen,* the Court rejected the argument: If the express provision of judicial review in one section of a statute could alone "overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all." *Id.*

3. The Tenth Circuit attempted to support its interpretation of § 2714 by relying on IGRA's structure and internally inconsistent legislative history. Neither is sufficient under this Court's cases to sustain the NIGC's heavy burden of showing that Congress intended to preclude judicial review of gaming-eligibility legal opinions.

a. The Tenth Circuit concluded that because the NIGC actions deemed final and reviewable under § 2714 correspond to the NIGC's decisionmaking authority under §§ 2710 through 2713, those must be the only reviewable agency decisions under IGRA. App. 10. As in *Bowen* and *Sackett,* the "right to review is too important to be excluded on such slender and ***18** indeterminate evidence of legislative intent." *Abbott Labs.,* 387 U.S. at 141.

The decision below is particularly troubling because IGRA's structure as a whole points in exactly the opposite direction, *i.e.*, that Congress intended for gaming-eligibility determinations to be judicially reviewable. As the Tenth Circuit correctly noted, IGRA is designed to ensure that gaming-eligibility determinations under § 2719 - which are central to IGRA's structure and purpose - are generally enforced through judicially reviewable actions taken under §§ 2710 through 2713. *See* 25 U.S.C. § 2714. So where, as here, a tribe has devised a way to avoid these traditional avenues of judicial review, there is good reason to believe that Congress did not intend to insulate the resulting agency decisions from judicial review. The "inferences of intent drawn from the statutory scheme as a whole" actually undermine the Tenth Circuit's reasoning and ultimate decision. *See Bowen,* 476 U.S. at 673 n.4.

b. IGRA's legislative history offers no support either. To begin with, any reliance on legislative history should be cautious and sparing. *See Sackett,* 132 S. Ct. at 1373 (focusing analysis on statutory text and structure, not even mentioning legislative history). Here, the two pieces of relevant legislative history both come from a committee report by the Senate Select Committee on Indian Affairs that even the panel acknowledged "gives conflicting signals about which agency actions constitute final decisions." App. 12.

The Report first states: "Judicial review. - *All* decisions of the [NIGC] are final agency decisions for purposes of appeal to Federal district court." ***19** S. Rep. No. 100-446, *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3078 (emphasis added). The report later states that IGRA "[p]rovides that certain Commission decisions will be final agency decisions for purposes of court review." *Id.* at 3090. Like § 2714 itself, the report says nothing about limiting judicial review to the NIGC actions listed in § 2714. Thus, IGRA's legislative history is a far cry from "specific legislative history that is a reliable indicator of congressional intent." *See Bowen,* 476 U.S. at 673.

c. Finally, the decision below conflicts with the Department of the Interior's own regulations, which assume that gaming-eligibility determinations under § 2719 can be judicially reviewable. When issuing new regulations in 2008, the Department of the Interior made clear that "[t]hese regulations do not alter final agency decisions made pursuant to 25 U.S.C. § 2719 before the date of enactment of these regulations," 25 C.F.R. § 292.26(a), which presumably include "written opinion[s] regarding the applicability of 25 U.S.C. § 2719 for land to be used for a particular gaming establishment," *id.* § 292.26(b).

B. The Tenth Circuit Failed to Apply this Court's Pragmatic Approach to Determining the Finality of Agency Actions.

This Court's test for determining final agency action under the APA has two prongs: (1) "the action must mark the consummation of the agency's decisionmaking process" and (2) the "action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997) ***20** (internal quotation marks omitted). The decision below addressed only the second prong, concluding that the NIGC legal opinion does not determine any rights or obligations and will produce no legal consequences for the parties. App. 14. The Tenth Circuit's parsimonious application of the finality requirement fundamentally contradicts the "pragmatic approach" this Court has "long taken to finality of agency actions." *Hawkes,* 136 S. Ct. at 1815 (internal quotation marks omitted).

1. For example, in *U.S. Army Corps of Engineers v. Hawkes Co.,* 136 S. Ct. 1807 (2016), the Court recently looked to practical effects and consequences to hold that an approved jurisdictional determination ("JD") is final. *See id.* at 1814-15. The Court first observed that a "negative" JD - one that states a party's property does not contain jurisdictional waters (which was not at issue in the case) - creates a five-year safe-harbor under the Clean Water Act, which would be a "legal consequence" that satisfies *Bennett*'s second prong. *Id.* Therefore, the Court reasoned, affirmative JDs also have legal consequences: They not only "represent the denial of the safe harbor that negative JDs afford," they also warn that if property owners "discharge pollutants onto their property without obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties." 136 S. Ct. at 1815.

Hawkes represents the Court's longstanding approach. In *Frozen Food Express v. United States,* 351 U.S. 40 (1956), the Court considered whether an Interstate Commerce Commission order specifying which commodities the Interstate Commerce Commission believed were exempt by statute from ***21** regulation, and which it believed were not. *Id.* at 41-42; *see also Hawkes,* 136 S. Ct. at 1815. "Although the order 'had no authority except to give notice of how the Commission interpreted' the relevant statute, and 'would have effect only if and when a particular action was brought against a particular carrier,' " the Court "held that the order was nonetheless immediately reviewable." *Hawkes,* 136 S. Ct. at 1815 (quoting *Abbott Labs.,* 387 U.S. at 150). That is because the "order … 'warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties.' " *Id.* (quoting *Frozen Food,* 351 U.S. at 44).

2. A similar dynamic is in play here. Had the NIGC issued a negative legal opinion - one determining that the Kansas land was not eligible for gaming under IGRA - such a ruling would have warned the Tribe that if it attempted to game on the land it would do so at the risk of facing civil penalties and possible forced closure of the gaming facility in an enforcement action by the Commission. *See* 25 U.S.C. § 2713. Thus, under *Hawkes* and *Frozen Food,* not only is a negative NIGC gaming-eligibility opinion a reviewable final agency action, an affirmative NIGC gaming-eligibility opinion is a reviewable final agency action too. *See Hawkes,* 136 S. Ct. at 1815; *Frozen Food,* 351 U.S. at 44.

Here, the NIGC's affirmative gaming-eligibility determination provided the Tribe the legal assurance it needed to expand its casino to Kansas. The decision below emphasizes that "tribes' right to game on Indian lands derives from their sovereign authority," not from the legal opinion. App. 14. But the decision ignores the ***22** important fact that under IGRA's general rule, gaming is prohibited on the Kansas land because that land was taken into trust after October 17, 1988, and gaming is allowed on the land only if the last recognized reservation exception applies. IGRA does not allow gaming on Indian lands based simply on tribes' sovereignty; the statute creates a detailed framework for determining whether and to what extent gaming is allowed, including a presumption against gaming on lands taken into trust after October 17, 1988. Without the NIGC legal opinion, the uncertainty regarding whether the Kansas land is eligible for gaming would have precluded the Tribe from expanding its gaming operations to the Kansas land.

Moreover, the decision below incorrectly states that the "only condition" under IGRA that triggers a State's obligation to negotiate a tribal-state compact "is a tribe's request to enter into such negotiations."App. 16. Rather, IGRA provides that "[a]ny Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, *or is to be conducted*, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A) (emphasis added). The NIGC legal opinion moved the Tribe to decide it could game on the Kansas land and to take steps toward opening a gaming facility, including filing a lawsuit in federal court trying to force the State to negotiate a tribal-state gaming compact.

It is no coincidence that the Tribe sued the State in federal court to force tribal-state compact negotiations just one month after the District Court found that the ***23** NIGC legal opinion was unreviewable. *See Quapaw Tribe of Indians*

v. Kansas, Case No. 16-2037-JWL-TJJ (D. Kan.) (complaint filed January 19, 2016). The suit is evidence of the important legal consequences (discussed above) that flowed from the NIGC legal opinion. And the Tribe's suit in federal court against Kansas is, itself, an important legal consequence. *See Seminole Tribe of Fla. v. Florida,* 517 U.S. 44,58 (1996) ("The Eleventh Amendment … serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." (internal quotation marks omitted)).

Finally, the decision below falls back on the possibility that the NIGC may, someday and on its own, adopt a different interpretation of the last recognized reservation exception. App. 19-20. But as this Court has said, the mere possibility that the NIGC could change its mind down the road - which is purely speculative - does not render its otherwise definitive legal opinion unreviewable. *See Hawkes,* 136 S. Ct. at 1814 (explaining that the possibility that the Corps of Engineers may revise an approved jurisdictional determination "does not make an otherwise definitive decision nonfinal").

III. The Tenth Circuit's Decision Significantly Disrupts the IGRA Regime and Will Lead to Serious Consequences in Kansas and Other States.

The question presented has far-reaching implications for Indian tribes and States, the delicate tribal-state balance Congress struck in IGRA, and respect for this Court's decisions.

*24 A. Tribes and States Beyond the Quapaw and Kansas Will Feel the Detrimental Effects of Allowing the NIGC to Shield Gaming-Eligibility Determinations from Judicial Review.

When IGRA took effect on October 17, 1988, the State of Kansas had only four resident federally recognized Indian tribes within its borders: the Sac and Fox Nation of Missouri in Kansas and Nebraska, the Kickapoo Tribe in Kansas, the Prairie Band of Potawatomi Indians, and the Iowa Tribe of Kansas and Nebraska. *See Oyler v. Allenbrand,* 23 F.3d 292, 295 (10th Cir. 1994). The NIGC's interpretation of the last recognized reservation exception, which the decision below shields from judicial review, adds a fifth tribe and could allow more tribes that once had land in Kansas and are now located in Oklahoma to purchase land and build casinos in Kansas to the detriment of both the resident tribes' and the State's interests. Both the Iowa and the Sac and Fox moved to intervene in the District Court to protect their interests, but those motions were denied when the court dismissed Petitioners' case. App. 67.

The question presented in this case is bound to recur beyond Kansas. For example, in both Arkansas and Missouri, tribes have suggested they intend to build casinos on newly acquired land under the last recognized reservation exception. The Quapaw Tribe in Arkansas appears to be employing the same strategy to avoid judicial review as it did in Kansas. And there are strong incentives for the Osage Nation in Missouri to do the same. The Court should grant review to resolve the important question presented.

*25 B. The Tenth Circuit's Failure to Apply this Court's Pragmatic Approach to Finality Upsets the Delicate Tribal-State Balance Congress Struck in IGRA.

IGRA's overarching purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). This includes providing "clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3), and "ensur[ing] that each place, facility, or location where class II or III gaming will occur is located on Indian lands eligible for gaming," 25 C.F.R. § 559.1.

In pursuing this purpose Congress deliberately and carefully struck a delicate balance between state and tribal interests regarding gaming. *See, e.g.*, 25 U.S.C. § 2710(b)(1)(A), (d)(1)(B) (allowing class II and class III gaming only on Indian lands in States that generally allow such gaming); *id.* § 2710(d)(1)(C) (requiring a tribal-state compact for class III gaming); *see also New Mexico v. Dep't of Interior,* 854 F.3d 1207, 1226 (10th Cir. 2017); *Texas v. United States,* 497 F.3d 491, 506 (5th Cir. 2007).

IGRA also contemplates that the determination of whether Indian lands are eligible for gaming under § 2719 generally will be contained in the NIGC's approval of a tribal gaming ordinance (§ 2710) or management contract (§ 2711), or its review of pre-IGRA ordinances and contracts (§ 2712). Decisions in each of these contexts ultimately would be subject to judicial review. *See* 25 U.S.C. § 2714.

***26** For example, for class II gaming, IGRA requires approval of a gaming ordinance approved by the NIGC Chair, which is appealable to the Commission. 25 U.S.C. §§ 2705(a)(3); 2710(b)(1)(B). But in many cases, as here, a tribe will have a non-site-specific gaming ordinance that permits gaming on any of the Tribe's Indian lands. *See N. County Cmty. Alliance, Inc. v. Salazar,* 573 F.3d 738, 746 (9th Cir. 2009) ("most gaming ordinances approved by the NIGC do not identify specific sites"). IGRA also requires approval of any management contract for class II or III gaming facilities by the NIGC Chair, which also is appealable to the Commission. *See* 25 U.S.C. §§ 2705(a)(4), 2711. But nothing in IGRA requires a tribe to use a management contract, and tribes (like the Quapaw) with non-site-specific gaming ordinances have strong incentives not to enter new management contracts in order to avoid further NIGC and judicial review of whether Indian lands are eligible for gaming. Although a tribe typically must notify the NIGC Chair that it intends to issue a facility license for a new gaming facility, *see* 25 C.F.R. §§ 559.1, 559.2, NIGC regulations do "not establish any mechanism or system whereby facility licenses are submitted to the Commission for approval." Facility License Standards, 73 Fed. Reg. 6019, 6022 (Feb. 1, 2008).

Contrary to Congress's delicate balancing of tribal and state interests, the Tenth Circuit's decision deals the Tribe all the cards. The NIGC legal opinion provided the legal assurance the Tribe needed to pursue gaming on the Kansas land. With that assurance in hand, the Tribe could construct and open a class II gaming facility on the Kansas land without any administrative or judicial review of either the ***27** NIGC legal opinion or the Tribe's decision to open a gaming facility. But if the NIGC legal opinion were negative - if it determined that the Kansas land was *not eligible* for gaming - the Tribe could obtain administrative and judicial review of the NIGC's determination by simply amending its gaming ordinance to specifically authorize gaming on the Kansas land, and then seeking approval of the amendment by the Chair and the Commission.

The Tenth Circuit's failure to apply this Court's pragmatic approach to determining the finality of agency actions upsets the delicate and careful tribal-state balance Congress struck in IGRA. By removing the availability of judicial review of NIGC gaming-eligibility legal opinions, the decision below may leave States with only less desirable options for preventing unlawful gaming on Indian lands within state boundaries, or at least receiving a judicial determination on such lawfulness, possibly leading to precisely the sort of acrimony and inter-sovereign disputes over the uses of Indian lands that IGRA was enacted to avoid. *See* 25 U.S.C. § 2701(3).

C. The Decision Below Allows the NIGC and Tribes to Shield from Judicial Review Gaming-Eligibility Determinations that Ignore this Court's Precedents.

The decision below allows the NIGC and the Tribe to shield from judicial review an administrative determination that completely ignores and blatantly conflicts with this Court's decision in *Carcieri v. Salazar,* 555 U.S. 379 (2009). The NIGC legal opinion concluded that a Tribe satisfies IGRA's requirement of being "presently located" in a State for

purposes of the ***28** last recognized reservation exception as long as it has some governmental presence in the State at the time it seeks to open gaming facilities. *See* App. 100. That is, the NIGC interpreted the "presently located" requirement as not requiring a tribal presence in the State at the time IGRA was enacted. In *Carcieri,* however, this Court interpreted an effectively identical phrase in the Indian Reorganization Act ("IRA") to mean just the opposite. It held that the phrase, "recognized Indian Tribe now under Federal jurisdiction," unambiguously means "recognized Indian Tribe under Federal jurisdiction *at the time the IRA was enacted.*" *Id.* at 388-91 (emphasis added). The NIGC's interpretation of the key words of IGRA's last recognized reservation exception cannot be squared with this Court's decision in *Carcieri* and should not evade review.

CONCLUSION

The petition for writ of certiorari should be granted.

Footnotes

1 All individual respondents are parties to this proceeding in their official capacities. The names listed are those used in the court below. Any successor in office to the respondents is automatically substituted as a party. Supreme Court Rule 35.3.