No. 09-1433

IN THE

Supreme Court of the United States

SCHAGHTICOKE TRIBAL NATION,
Petitioner-Appellant,

v.

DIRK KEMPTHORNE, Secretary, Department of the Interior, JAMES E. CASON, Associate Deputy Secretary, Department of the Interior, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, and INTERIOR BOARD OF INDIAN APPEALS,
Respondents-Appellees.

THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OF KENT, and THE CONNECTICUT LIGHT AND POWER COMPANY,
Intervenors-Appellees.

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

PETITIONER'S REPLY BRIEF

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The central proposition of the Petition for Certiorari is that Petitioner has a Federal Due Process right to have its claim (that undue political influence affected an administrative adjudicative decision) reviewed under a particular legal standard (the appearance of bias or impropriety). Notably, the

question presented does not involve a lower court's *application* of a settled standard, but rather involves a lower court's *refusal to apply* the appearance of bias standard in quasi-judicial proceedings.

A. There is a Clear Conflict Among the Courts of Appeals

It is significant that Respondents do not take issue with Petitioner's predicate assertion that the tribal acknowledgment process is an adjudicative (quasi-judicial) process. *See* Pet. for Cert. 32-33. Respondents contend, however, that "no such conflict exists" among the Circuit Courts of Appeals with respect to the standard for reviewing claims of undue political influence on adjudicative proceedings. *See* Brief in Opposition 2, 23.

As a threshold matter, the Respondents have a crabbed view of what constitutes a "conflict." Petitioner maintains that there is a direct conflict between the decision of the Court of Appeals below (which refused to "broaden" the Second Circuit's "actually influenced" standard for evaluating a claim of undue political influence, *see* App. to Pet. for Cert. 108a n.1), and decisions of other Circuits that have evaluated such claims under an "appearance of bias" standard. *See* discussion *infra*. But even if no "direct" conflict existed, a grant of certiorari would be warranted because of the "divergent approaches" of various Courts of Appeals to this important constitutional issue; *see Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 300 (1986) ("The importance of the case, and the divergent approaches of other courts to the issue, led us to grant certiorari . . . ."); or because of the obvious "apparent conflict" between the decision below, and decisions of one or more Courts of Appeals. *See, e.g., English v. General Elec-*

tric Co., 496 U.S. 72, 78 (1990) (certiorari granted to review decision of Fourth Circuit "[b]ecause of an apparent conflict with a decision of the First Circuit"); *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 516 (1994) (certiorari granted "[b]ecause of an apparent conflict among the Courts of Appeals"); *Rogers v. United States*, 422 U.S. 35, 36 (1975) (same); *United States v. Maze*, 414 U.S. 395, 397-98 (1974) (same). Furthermore, given the importance of the constitutional question presented, certiorari would be warranted even if the precise issue had not previously been considered. *See Begier v. IRS*, 496 U.S. 53, 57 n. 2 (1990) (granting certiorari even though "[n]o other Court of Appeals had decided a case that presents the precise issue we decide here.").

The Respondents' erroneous view of what constitutes a conflict, is compounded by their fundamental misunderstanding of several cases relied on by Petitioner.

For example, the Respondents claim that Petitioner "incorrectly cites [*Peter Kiewit Sons' Co. v. United States Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983)] as a case *applying* the appearance of impropriety standard." (Emphasis added.) Brief in Opposition 26. The Respondents' discussion of that case is demonstrably wrong on two counts.

First, Petitioner *did not* claim that *Peter Kiewit Sons'* "applied" an appearance of impropriety standard. Petitioner cited that case as one of many cases that has "either expressly or implicitly recognized" the distinction between quasi-judicial (adjudicative) proceedings and quasi-legislative (rulemaking) procedures. Pet. for Cert. 34. Petitioner stands by that assertion.

Second, Respondents have misconstrued the *Peter Kiewit Sons'* decision. In their brief, the Respondents state that in *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972), the court, "in dicta, said that if it had involved a quasi-judicial decision, such a decision could have been invalidated solely on the basis of an appearance of bias or pressure." Brief in Opposition 26. That statement is an accurate reference to *D.C. Federation*. Yet in the very next sentence of their brief, the Respondents state: "The *Kiewit* court *expressly disavowed* such a standard." (Emphasis added.) Brief in Opposition 26.

The *Peter Kiewit Sons'* court did no such thing, as evidenced by this quotation:

> Since the Secretary [of Transportation]'s action in that [*D.C. Federation*] case was not judicial or quasi-judicial, the [*D.C. Federation*] court noted that the test for improper interference was whether the congressional action *actually* affected the decision. The [*D.C. Federation*] court indicated that if the decision had been judicial or quasi-judicial, it could be invalidated by "the appearance of bias or pressure." Under this standard, pressure on the decisionmaker alone, without proof of effect on the outcome, is sufficient to vacate a decision.

(Emphasis in original.) *Peter Kiewit Sons', supra*, 169. Rather than "expressly disavow" an "appearance of bias or pressure" standard, as Respondents mistakenly claim, *Peter Kiewit Sons'* cited *D.C. Federation*'s "appearance of bias or pressure" standard (for judicial or quasi-judicial actions), *with approval*. Petitioner's understanding of *Peter Kiewit Sons'* is reinforced—if reinforcement is needed—by the very

next sentence in the decision, which states: "In *either context* [i.e., under either standard], the proper focus is not on the content of congressional communications in the abstract, but rather upon the relation between the communications and the adjudicator's decisionmaking process." (Emphasis added.) *Peter Kiewit Sons'*, *supra*, 169-70. Thus, *Peter Kiewit Sons'*, which involved purely "discretionary" proceedings for debarment of a government contractor, *see id.*, 168, did not (and had no need to) *apply* an appearance of bias standard. But it acknowledged that such a standard *was* a cognizable standard in the District of Columbia Circuit for judicial or quasi-judicial administrative proceedings; and that under either standard (actually influenced or appearance of bias), courts necessarily must focus on the relationship between "the communications and the adjudicator's decisionmaking process." *Id.*, 169-170.

The Respondents are equally wrong in their description of *ATX, Inc. v. United States Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994). The *ATX* decision not only is filled with approving references to the "appearance" standard; *see id.*, 1527-28 (because the certificate proceeding was quasi-judicial, "we must determine whether congressional interference occurred, *or appeared to*, to such an extent as to compromise the administrative process") (Emphasis added.); *id.*, at 1529 ("There is a strong potential for an *appearance of impropriety* in allowing congressional opinion testimony in a quasi-judicial proceeding . . . .") (Emphasis added.); but the court *decided* the case by applying both an "appearance of impropriety" standard and an "actually affected" standard. *See*, *id.*, at 1527 ("we conclude that the congressional input neither created *an appearance of impropriety* nor *actually affected* the outcome") (Emphasis

added.); *id.*, at 1529 ("the testimony here falls far short of creating a *fatal appearance of bias*") (Emphasis added.). In short, the Respondents' claim of "no conflict" is based on a distorted view of the relevant case law.

B. A Biased Decisionmaker is Never Harmless

Petitioner has not challenged the merits of the Reconsidered Final Determination, but only the fairness of the process by which that decision was reached. The Respondents, however, have raised the specter of harmless error, i.e., arguing that "even if the RFD were to be judged against an appearance of bias standard, the STN's claims would fail." Brief in Opposition 30.

In advancing such a suggestion, the Respondents' fail to appreciate that the question of whether a decisionmaker is biased, or appears to be biased—whether from political pressure or any other factor—is a question involving a "structural defect" that is not subject to harmless error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 307-310 (1991) (while most "trial errors" are subject to harmless error analysis, "structural defects," which "affec[t] the framework within which the trial proceeds," are not). *See also*, *Rivera v. Illinois*, 556 U.S. __ 129 S.Ct. 1446, 1455-56 (2009) ("'Among those basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury.'") (internal quotation marks omitted); *Gomez v. United States*, 490 U.S. 858, 876 (1989) (same).

Harmless error principles that are applicable in federal criminal and civil cases generally, are also applicable in the administrative arena. *See Shinseki v. Sanders*, 129 S. Ct. 1696, 1704-06 (2009); *National*

Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 659-60 (2007). Because the Petitioner's claim involves a structural defect, harmless error considerations have no place in this case.

C. An Appearance Standard is Proportionate to the Interests at Stake

In their brief, the Respondents repeatedly remind the Court that Petitioner was not able to *prove*, in the courts below, that political pressure *actually* influenced the RFD, inasmuch as the deposed Interior Department officials testified that they were not influenced by political pressure:

—"Indeed, the uncontroverted testimony of the Interior Department officials deposed by the STN is that they were not influenced by any of the alleged political pressure." Brief in Opposition 16;

—"Moreover, the Interior officials uniformly testified that they were not influenced by these criticisms and communications." *Id.*, 17;

—"Moreover, other Interior Department officials, including the actual decision maker [James] Cason, testified that no one told them about the threat [by Congressman Frank Wolf to tell the President that Secretary of the Interior Gale Norton should be fired] and that they knew little or nothing about the meetings."[1] *Id.*;

—"Most importantly, each of the Interior officials testified that none of the congressional criticisms had any influence or effect on the RFD." *Id.*;

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[1] Norton testified at her deposition that Cason, as part of her leadership team, would have heard about the threat. Pet. for Cert. 25-26.

—"Moreover, the Interior Department officials testified in depositions taken by the STN that none of these actions had any influence over the decision making resulting in the RFD." *Id.*, 18.

The power of denial by Government officials provides further justification for this Court to grant certiorari to consider whether the Due Process Clause requires evaluation of a political influence claim under an appearance of bias standard. When this case was decided in the District Court, on the basis of cross-motions for summary judgment, the District Court was required to draw all reasonable inferences against the Respondents (and Federal Defendants) when ruling on their cross-motions for summary judgment. However, the District Court ruled that it "must accept the evidence presented at face value, in particular the testimony by the agency decisionmakers that they were not unduly pressured by particular politicians or the political climate at large." App. to Pet. for Cert. 38a.

The Members of the Court should not ignore, as Justices, what they know as men and women. *See United States v. Maze*, *supra*, 403 n. 7 ("Since we are admonished that we may not as judges ignore what we known as men. . . ."). "[I]t would be naïve to think that abuses of power never take place or that government agencies never accede to strong political pressure." *Sokaogon Chippewa Community (Mole Lake Band of Lake Superior Chippewa) et al. v. Babbitt*, 961 F. Supp. 1276, 1281 (W.D.Wis. 1997). Political appointees are unlikely to admit having been subjected to (or worse, having yielded to) political pressure. A standard that is satisfied only by proof of the "actual influence" of political pressure, is

hardly commensurate with the Due Process right to a fair adjudicative hearing.

D. *Caperton*: The "Appearance," "Risk," "Potential" or "Probability" of Bias

The Petitioner has phrased the question presented in terms of an "appearance of bias" or "appearance of impropriety" standard, because those standards have been applied or endorsed in the decisions of other Circuits on which the Petitioner relies. *See* Pet. for Cert. 34-36. All of those decisions, of course, predate this Court's most recent pronouncement regarding a potentially biased decisionmaker. *See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. __, 129 S. Ct. 2252 (2009). There, the Court held that in certain circumstances Due Process may be violated by a serious or substantial "risk of actual bias," by a "probability of actual bias," or by an "unconstitutional 'potential for bias.'" *Id.*, 2257, 2259, 2262-2265.[2]

Although *Caperton* involved the issue of judicial recusal, it is highly instructive here. Due Process may require judicial recusal in only a limited number of situations, but Due Process *always* requires a fair hearing before an unbiased adjudicator. If, post-*Caperton*, the probability of bias is sufficient in extreme cases to require judicial recusal on constitutional grounds, how can a Federal Court of Appeals, post-*Caperton*, insist on a rigorous "actually influenced" standard as the *minimum* standard that a

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[2] In a dissenting opinion, Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito), seemed to acknowledge the close relationship between a "probability of bias" and an "appearance of bias." *See id.*, 2268 ("there are a number of factors that could give rise to a 'probability' or 'appearance' of bias").

Petitioner must satisfy when asserting a Due Process claim of undue political influence at a quasi-judicial (adjudicative) proceeding? Stated another way, if a probability of bias is sufficient in extreme cases to require judicial recusal on Due Process grounds, then *no greater burden* should be placed on a litigant seeking to prove that a quasi-judicial administrative proceeding was constitutionally unfair due to political pressure. And, as already pointed out, other Courts of Appeals had already determined, even prior to *Caperton*, that the appropriate burden for such proceedings was the appearance of bias or impropriety.

E. Did the Second Circuit Consider *Caperton*?

The *Caperton* decision was released on June 8, 2009, the same day that the Petitioner filed its Reply Brief in the United States Court of Appeals for the Second Circuit. Petitioner's counsel subsequently submitted a letter to the Clerk of the Second Circuit, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, notifying the court of the *Caperton* decision, and of its claimed relevance to this case. The Federal Defendants thereafter sent a Rule 28(j) letter to the court, arguing, inter alia, that "*Caperton*'s "probability of actual bias" standard was "much higher than a mere 'appearance of bias.'" Letter to Catherine O'Hagan Wolfe, Clerk of Court, from Assistant United States Attorney John B. Hughes, p. 1 (Oct. 2, 2009).

The *Caperton* decision was neither discussed nor cited in the Second Circuit's opinion rejecting Petitioner's claims on appeal. App. to Pet. for Cert. 68a-75a. Consequently, it cannot be known whether, or to what extent, the Second Circuit ever considered it. Although Petitioner is seeking a formal grant of certiorari, Petitioner simply notes that the Court

does have the power to issue a "GVR" order, which involves granting certiorari, vacating the judgment, and remanding for further consideration. *See Lawrence v. Chater*, 516 U.S. 163, 165-170 (1996) (discussing considerations that guide the Court's exercise of its GVR power); *Stutson v. United States*, 516 U.S. 193, 194-197 (1996). As noted in *Lawrence v. Chater*, *supra*, the GVR power has been used where an "intervening" decision of the Court may call into question the decision of a Court of Appeals. *Id.*, 166-167. In *Lawrence*, the Court noted that in *Robinson v. Story*, 469 U.S. 1081 (1984), the Court "GVR'd for further consideration in light of a Supreme Court decision rendered almost three months *before* the summary affirmance by the Court of Appeals that was the subject of the petition for certiorari." (Emphasis in original.) *Lawrence v. Chater*, *supra*, 169. *See also id.*, at 184 (Scalia, J., with whom Thomas, J., joins) (noting that in *Stutson v. United States*, *supra*, the intervening decision leading to the GVR order "had been on the books for well more than a year before the Eleventh Circuit announced the judgment under review, and for almost two years before that court denied rehearing"). In this case, the *Caperton* decision was issued a little more than four months before the Court of Appeals' affirmance (on Oct. 19, 2009). Since the Second Circuit's *per curiam* opinion does not reveal "whether or how it considered a precedent of [this Court] that the District Court had no opportunity to consider," *Lawrence v. Chater*, *supra*, 169, a remand to the Second Circuit for further consideration in light of *Caperton*, also would appear to be "an appropriate exercise of [the Court's] discretionary certiorari jurisdiction." *Id.*, 166.

CONCLUSION

For the reasons set forth in the Petition for a Writ of Certiorari, and in this Reply Brief, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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