No. 09-1433

In The Supreme Court of the United States

SCHAGHTICOKE TRIBAL NATION,

Petitioner,

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; INTERIOR BOARD OF INDIAN APPEALS; KENT SCHOOL CORPORATION; STATE OF CONNECTICUT; TOWN OF KENT; and THE CONNECTICUT LIGHT AND POWER COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals properly reviewed the petitioner's claim that undue political pressure had influenced a federal administrative agency decision.

CORPORATE DISCLOSURE STATEMENT

Respondent Kent School Corporation discloses that it has no parent corporation, and there is no publicly held company owning 10% or more of the corporation's stock.

Respondent The Connecticut Light and Power Company discloses that 100% of its stock is held by Northeast Utilities, which is a publicly traded Massachusetts Business Trust.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

COUNTER STATEMENT OF THE CASE

This petition arises from an administrative appeal of the Federal respondents' decision that the petitioner Schaghticoke Tribal Nation ("STN") failed to satisfy two of the mandatory acknowledgment criteria necessary for federal tribal acknowledgment. The denial of the STN's federal acknowledgment petition came in a Reconsidered Final Determination ("RFD") issued October 11, 2005 by Associate Deputy Secretary James Cason. The original final determination ("FD") granting federal acknowledgment to the STN was vacated as deeply flawed by the Interior Board of Indian Appeals ("IBIA"), an independent board of administrative law judges. The RFD, following the directions of the IBIA on reconsideration, properly concluded that those significant deficiencies required that the STN's petition for acknowledgment be denied.

Because the RFD was amply supported by the record evidence, the STN's appeal was based to a very large degree on extra-record evidence. In particular, the STN attempted to argue that the RFD was the result of improper political influence. The record and the evidence, however, simply do not support the claim. It was the FD that was the anomaly in the process, and the independent IBIA concluded that it was inconsistent with the acknowledgment regulations. Despite having been permitted to take extraordinary discovery, including the depositions of several high level Interior Department officials, the

STN fell far short of sustaining its burden to set aside the agency's decision on the basis of improper influence.

As grounds for its petition, the STN maintains that a conflict among the Courts of Appeals exists as to the proper standard for addressing a claim of improper political influence. STN Pet., at 34-37. As demonstrated below, no such conflict exists, and certiorari is simply not warranted in this case.

This Opposition is submitted on behalf of the respondents State of Connecticut, Kent School Corporation, Town of Kent, and The Connecticut Light and Power Company (collectively, "State Respondents").

A. Federal Tribal Acknowledgment

Federal acknowledgment creates a government-to-government relationship between the United States and an Indian tribe. A federally acknowledged Indian tribe is entitled to the immunities and privileges of a quasi-sovereign entity and to the benefits and services available to Indian tribes from the federal government. 25 C.F.R. § 83.2.

The standards and procedures governing acknowledgment petitions are set forth in the Department's regulations at 25 C.F.R. Part 83 and are predicated on longstanding principles relating to tribal status. The acknowledgment regulations are "intended to apply to groups that can establish

a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present." *Id.*, § 83.3(a).

The acknowledgment criteria set forth precise standards and the types of evidence necessary for federal tribal acknowledgment. In particular, under the acknowledgement regulations, criterion 83.7(b) requires proof that "a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present." *Id.*, § 83.7(b). Criterion 83.7(c) requires proof that "[t]he petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present." 25 C.F.R. § 83.7(c) (emphasis added). Both the community and political authority criteria must be demonstrated on a "substantially continuous basis." 25 C.F.R. § 83.6(e).

B. Because of Massive Gaps in the STN's Evidence, the Proposed Finding Proposed to Deny Acknowledgement.

On December 5, 2002, then-Assistant Secretary Neal McCaleb issued a proposed finding ("PF" or "STN PF") that the STN should be denied federal acknowledgment. The PF concluded that the STN had failed to satisfy the requirements of criterion (b)—the continual existence of a distinct community—from 1940 to 1967 and from 1996 to the present. FD, at 18-19. The PF used state recognition

as "additional evidence" to the otherwise limited direct evidence of community for 1900 to 1940. *Id.* It further found that the STN lacked evidence satisfying criterion (c)—the maintenance of political authority and influence—from 1801 to 1875, 1885 to 1967, and 1996 to the present. *Id.* at 62. There simply was no evidence of political leadership or authority from 1801 to 1875. *Id.* What little evidence existed for the period 1885 to 1967 did not demonstrate the exercise of political authority or influence within the meaning of the regulations, and state recognition did not add to this insufficient evidence. *Id.* at 63.

C. The Final Determination Wrongly Used State Recognition and Miscalculated Marriage Rates to Grant Recognition.

On January 29, 2004, Principal Deputy Assistant Secretary—Indian Affairs Aurene Martin issued the Final Determination ("FD" or "STN FD"). In a complete about-face, the FD acknowledged the STN as a federal Indian tribe.

The FD reached this result only through a manipulation of the evidence and the acknowledgment standards. Like the PF, the FD concluded that there was little or no evidence of political authority or influence for most of the nineteenth and twentieth centuries. The scant evidence that the STN had submitted to address the deficiencies for the period of 1801 to 1875 was readily dismissed as "provid[ing] no specific information

in regard to political authority or influence." FD, at 85-86. For the period of 1892 to 1936, the FD expressly rejected each and every argument and piece of evidence on political authority the STN offered. *Id.* at 91-107. For other periods, the FD acknowledged that the direct evidence was alone insufficient. *Id.* at 118-23. Yet despite these lengthy periods of woefully inadequate evidence, the FD reached the conclusion that the STN should receive federal acknowledgment.

To reach this conclusion, among other things, the FD wrongly concluded that both criteria (b) and (c) were satisfied from 1800 to 1820 and 1840 to 1870 on the basis of an analysis that purports to show that Schaghticoke members intermarried at rates in excess of 50 percent.[1] STN FD, at 26-39. Rather than basing its calculations on the percentage of *marriages* that were between Schaghticoke members, the FD used a so-called "endogamy" analysis based on the percentage of *individuals* who married other Schaghticoke. *Id.* The effect of this error was to inflate the rate by counting each member in a marriage rather than counting the marriage itself.

Moreover, the FD "reevaluated" the use of the State's historical relationship with the Schaghticoke, referred to as "state recognition," to make up for the

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[1] The acknowledgment regulations permit the conclusive presumption that both community and political authority existed when marriage rates exceed a 50 percent threshold. 25 C.F.R. §§ 83.7(b)(2)(ii), 83.7(c)(3).

gaps in the evidence that could not otherwise be explained away. In direct contradiction to existing precedent, the FD concluded that the State's "implicit" recognition of a distinct political body could be used to establish the existence of political authority even when there was no evidence of actual political authority or influence between tribal leaders and members. FD, at 118-20.

The degree to which the FD manipulated the acknowledgment process in the misuse of state recognition to compensate for the lack of required evidence was revealed starkly in a memorandum prepared by the OFA staff in preparation for the FD. This "Schaghticoke Briefing Paper" dated January 12, 2004, sought guidance in particular on the question: *"Should the petitioner be acknowledged even though evidence of political influence and authority is absent or insufficient for two substantial historical periods, and if so, on what grounds?"* OFA Briefing Paper, at 1 (italics in original). After noting that there was "little or no evidence" of political influence or authority for large periods of the nineteenth and early twentieth centuries, OFA stated: *"If applied as it was in the Schaghticoke PF, the weight of continuous state recognition with a reservation would not provide additional evidence to demonstrate that criterion 83.7(c) (political influence) has been met for this time period." Id.* (emphasis added). OFA then offered four options: (1) acknowledge the STN despite the absence of evidence on the basis of state recognition; (2) decline to acknowledge the STN

"based on the regulations and existing precedent;" (3) acknowledge the STN outside the regulations; or (4) decline to acknowledge the STN but support legislative recognition. *Id.* at 2-3 (emphasis added). The OFA Briefing Paper conceded that the first option required a change from past precedent on how state recognition could be used as evidence and that the second option *"maintains the current interpretations of the regulations and established precedents concerning how continuous tribal existence is demonstrated."* *Id.* at 3 (emphasis added). Despite reaching that conclusion, OFA nonetheless recommended the first option without explaining how that result was consistent with the regulations or why it should depart from past precedent.

From the FD and the OFA Briefing Paper, several aspects of the FD's disregard for the acknowledgment regulations and precedent became apparent: First, it is plain in the FD that the STN lacked the evidence to satisfy the criteria in the absence of state recognition as a substitute. Second, a denial of acknowledgment was the only option consistent with prior precedent and the regulations. Third, to acknowledge the STN would require a departure from prior precedent and a change in how state recognition could be used. Fourth, no justification was available for the departure from precedent and the regulations except that it was necessary to accomplish the acknowledgment of this petitioner.

D. The IBIA Vacated the FD, Concluding That the FD Misused State Recognition to Make Up for the Lack of Evidence of Political Authority and Community.

The State Respondents timely filed a request for reconsideration with the Interior Board of Indian Appeals ("IBIA").[2] Among other things, the State Respondents claimed that (1) the FD erroneously used the State's relationship with the Schaghticoke as a substitute for otherwise wholly absent or insufficient evidence of community and political authority; and (2) Schaghticoke marriage rates were improperly calculated and used to satisfy criteria (b) and (c) for extensive periods, contrary to the regulations and prior precedent.

After the briefing was concluded, OFA filed a "Supplemental Transmittal" with the IBIA on the marriage rate issue. Having reviewed the State Respondents' claims in their request for reconsideration and the STN's response, OFA stated in the Supplemental Transmittal that the FD "is not consistent with prior [acknowledgment] precedent in calculating the rates of marriages under [25 C.F.R. §] 83.7(b)(2)(ii), provides no explanation for the inconsistency[, and] there is no evidence that the [FD]

[2] Under the acknowledgment regulations, a petitioner or interested party may seek independent review of a final determination by filing a request for reconsideration with the IBIA. 25 C.F.R. § 83.11(d).

intended to deviate from precedent." Supp. Trans., at 2.

In a decision dated May 12, 2005, the IBIA vacated the FD and remanded the STN petition for further consideration. Following its decision in *In re Federal Acknowledgment of Historical Eastern Pequot Tribe*, 41 IBIA 1 (2005), issued the same day, the IBIA concluded that the State's relationship with the Schaghticoke "is not reliable or probative evidence for demonstrating the actual existence of community or political influence or authority within that group." *In re Federal Acknowledgment of Schaghticoke Tribal Nation*, 41 IBIA 30, 34 (2005). In addressing the use of state recognition as evidence for criteria (b) and (c) in *Historical Eastern Pequot*, the IBIA stated that, even assuming that the State in fact implicitly recognized a distinct political body, that alone did not demonstrate the existence of a community or the exercise of political authority. 41 IBIA at 18. Such recognition "would need to be more than 'implicit,' and would need to be expressed in some way that reflected the *actual or likely existence* of those [community] interactions and social relationships." *Id.* (emphasis added).

In other words, the mere existence of some form of relationship between the State and the group itself is not probative of community or political authority. Instead, the agency "must articulate more specifically how the State's actions toward the group during the relevant time period(s) reflected or indicated the likelihood of community and political influence or

authority within a single group." *Id.* at 21. If it could not do so, criteria (b) and (c) could not be satisfied. *Id.*

The IBIA concluded that the way the FD had used state recognition was inconsistent with the acknowledgment regulations. If state recognition was to be used as evidence, the IBIA directed, evidence of the State's relationship with the Schaghticoke would have to demonstrate that the Schaghticoke had existed as a community and had exercised political authority. The mere fact that the State had some largely unarticulated relationship with the Schaghticoke or its members was not enough to fill the gaps in the evidence. Rather than offering state recognition as demonstrating the existence of community or political authority, "the FD uses state recognition as a nonspecific catch-all 'additional evidence' to tip the scales for finding that criteria (b) and (c) are satisfied." *Historical Eastern Pequot,* 41 IBIA at 21 (emphasis added). This use of state recognition was contrary to the acknowledgment regulations. *STN*, 41 IBIA at 34.

The IBIA vacated the STN FD and remanded the matter to the Assistant Secretary for further consideration. The STN has not challenged any part of the IBIA's decision.

E. Properly Applying the Criteria and the Directions of the IBIA, the Reconsidered Final Determination Denied Recognition.

On October 11, 2005, Associate Deputy Secretary James E. Cason issued the Reconsidered Final Determination ("RFD"), denying the STN petition. Following the IBIA's directions that state recognition in and of itself could not be used as evidence of community or political authority, the RFD evaluated the State's relationship with the Schaghticoke and concluded that "it does not provide evidence for political influence or authority within the Schaghticoke, and the State did not formulate its policies towards the Schaghticoke based on the recognition of the existence of bilateral political relations within the Schaghticoke." RFD, at 58.

The RFD therefore concluded, consistent with the PF issued nearly three years earlier, that there was insufficient evidence to satisfy criterion (b) (community) from 1920 to 1967 and after 1996. RFD, at 45. It further found that there was insufficient evidence to satisfy criterion (c) (political authority) from 1801 to 1875, 1885 to 1967, and after 1996. *Id.* at 58, 62. The RFD also analyzed marriage rates within the Schaghticoke during the nineteenth century, applying the proper methodology, and concluded that marriage rates never exceeded the 50 percent threshold required to satisfy criteria (b) and (c). *Id.* at 36. Thus, after properly calculating Schaghticoke marriage rates for the nineteenth century and after eliminating the misuse of state

recognition, the RFD concluded that the evidence failed to demonstrate the STN had existed as a community for approximately five decades and failed to demonstrate it had exercised political authority or influence for most of the last two centuries. Under a proper application of the acknowledgment standards, the STN's petition was decidedly deficient.

In reexamining the State's relationship under the standards directed by the IBIA, the RFD concluded that the State's relationship was not explicitly or implicitly based on recognition of a government-to-government relationship with the Schaghticoke or on the existence of bilateral political relations within the group. RFD, at 48. It further found that the State's relationship evolved "in often contradictory and *ad hoc* ways, in response to short-term issues of immediate concern, or based on previous legislative actions that may have been out of date or in need of revision." *Id.* at 48-49. Applying the standards articulated by the IBIA, the RFD found that nothing in the State relationship with the Schaghticoke could serve as evidence of the actual exercise of political authority or influence within the group. *Id.* at 48-50.

In the absence of the unlawful use of state recognition, both the FD and the RFD had found that the other evidence offered by the STN of political authority or influence was insufficient. FD, at 91-124; RFD, at 52-58. The STN has not challenged these well-supported findings.

F. The District Court Proceedings

The STN appealed the RFD to the District Court by a petition for review pursuant to the APA, 5 U.S.C. § 702 *et seq.* The STN's petition for review alleged, among other things, that the RFD was influenced by improper political and congressional interference.

Although APA appeals are ordinarily limited to a review of the administrative record, the District Court did permit the STN to conduct broad and unusual discovery. In particular, the District Court permitted the depositions of former Interior Secretary Gale Norton; Associate Deputy Secretary James Cason, the official who issued the RFD; Lee Fleming, the Director of OFA; and David Bernhardt, former deputy chief of staff to Secretary Norton.

The parties filed cross-motions for summary judgment. On August 22, 2008, the District Court granted summary judgment in favor of the respondents and denied the STN's motion for summary judgment. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389 (D. Conn. 2008). The District Court concluded that "the evidence presented by the STN does not show that the legislative activity *actually* affected the outcome on the merits" and that "[n]othing suggests that the actual decision maker was impacted by the political pressures exerted by state and federal legislators or their surrogates." *Id.* at 412. As to the merits, the District Court determined (a) that the RFD "came to a researched and well-reasoned conclusion regarding

the state recognition issue" that properly followed the IBIA's ruling, *id.* at 413-14; and (b) that the RFD's marriage rate analysis was proper and resulted in "an informed, reasoned decision," *id.* at 416-17.

G. Court of Appeals

The STN appealed to the U.S. Court of Appeals for the Second Circuit. It argued, among other things, that its claim of improper political influence should be judged under an appearance of impropriety standard. The Court of Appeals affirmed the District Court in a per curiam decision. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132 (2d Cir. 2009).

The Court of Appeals rejected the STN's argument that an appearance of bias standard applied, noting that the standard for a claim of improper political influence was "clear." *Id.* at 134 n.1. Such a claim must demonstrate that "'the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute.'" *Id.* at 134 (quoting *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984)).

Applying this standard, the Court of Appeals upheld the District Court's conclusion that the STN's evidence did not support a claim of improper influence. It emphasized that "the Interior Department officials uniformly testified in depositions that they were not influenced by the

political clamor" and that there was no evidence that pressure was exerted on the actual decision maker, Cason. *Id.*

H. The STN's Evidence of Alleged Improper Influence.

The STN asserts that its petition is not "factbound." STN Pet., at 8. Ironically, it then proceeds with an extensive factual discussion to demonstrate what it believes is the evidence supporting its claim of improper political influence. Thus, it is necessary to review what the alleged evidence is to see how far short it falls from establishing the claim.

There is no question that the FD was highly controversial and sparked great concern among Connecticut's public officials. Federal acknowledgement of an Indian tribe can have a serious and significant impact on a state, its municipalities and its citizens. It creates a quasi-sovereign entity, removing the tribe and potentially significant areas of land from the reach of certain aspects of state and local authority. Among other things, federally acknowledged Indian tribes have immunity from suit, *see Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); may pursue land claims under federal law, 25 U.S.C. § 177; can seek to conduct casino gaming, 25 U.S.C. § 2701 *et seq.*; and are exempted broadly from much of state and local taxation and regulatory authority, *see Oklahoma Tax Comm'n v. Chickasaw*

Nation, 515 U.S. 450 (1995). Given the seriousness of the matter for all involved and the evidence that came to light about the FD, the public expression of concern was entirely ordinary, justified and appropriate. The decision in the FD to recognize the STN was a sudden and unsupported reversal of the earlier PF and was inconsistent with the evidence in the record and contrary to the acknowledgment regulations. Connecticut's public officials were quite right to express their objection and to suspect things were seriously amiss.

The District Court afforded the STN an extraordinary opportunity to seek extra-record discovery, including the depositions of key Interior officials. Despite this discovery, the STN did not adduce any evidence of undue or improper influence on the relevant decision makers. 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.

1. The Congressional Meetings With Secretary Norton Do Not Constitute Improper Influence and Did Not Create an Appearance of Bias.

The STN lists a number of meetings and other communications that it contends demonstrate either an appearance of impropriety or actual improper influence. STN Pet., at 18-19, 20, 24-26. The STN's characterization does not survive scrutiny. In these

various meetings and communications, members of the Connecticut congressional delegation and others expressed their serious concerns with the acknowledgment process in general and the FD in particular. There is nothing improper or out of ordinary for such communications to take place. Moreover, the Interior officials uniformly testified that they were not influenced by these criticisms and communications.

In the Spring of 2004, while the Intervenor's request for reconsideration was pending before the IBIA, three meetings took place between members of Congress and Secretary Norton. Two of the meetings Secretary Norton described as "straightforward" and "routine." Norton Dep., at 105-09, 175-78. At a March 30, 2004 meeting, attended by Representatives Shay, Johnson and Simmons of Connecticut and Representative Wolf of Virginia, Congressman Wolf threatened to tell the President that Norton should be fired. *Id.* at 167-68. Secretary Norton testified that she "did not lose any sleep over the threat." *Id.* at 168-69. Moreover, other Interior Department officials, including the actual decision maker Cason, testified that no one told them about the threat and that they knew little or nothing about the meetings. Cason Dep., at 34-39, 53-54; Fleming Dep., at 65-67.

Most importantly, each of the Interior officials testified that none of the congressional criticisms had any influence or effect on the RFD. Norton Dep., at 112, 183, 261; Cason Dep., at 91-92; Fleming Dep., at 168-75, 190-91. Although they were all aware that the

FD had been controversial and that there were strong expressions of concern by the Connecticut congressional delegation and others, such controversy was not unusual, and there is nothing in any of their testimonies to suggest that they were in any way improperly influenced by it. Norton Dep., at 183; Cason Dep., at 67-68; Fleming Dep., at 43-45, 70-71, 92-93, 175.

2. Congressional Hearings and Proposed Legislation Were Not Improper and Did Not Create the Appearance of Improper Political Influence.

The STN points to three congressional hearings as causing undue pressure on the agency. STN Pet., at 19. These actions were entirely legitimate and unremarkable congressional activities. 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.

Three hearings were held by various House and Senate committees on March 31, 2004, May 5, 2005, and May 11, 2005. The subject matter of the hearings involved the federal acknowledgment process, and at each the STN FD was addressed.[3] These hearings

[3] *See Betting on Transparency: Toward Fairness and Integrity in the Interior Department's Tribal Recognition Process*, Hearing before the House Committee on Government Reform

(Continued on following page)

were appropriate exercises of legitimate legislative authority. Congress cannot reasonably be barred from conducting hearings merely because the inquiry touches on or arises from an administrative decision. *See ATX, Inc. v. United States Dept. of Transportation*, 41 F.3d 1522, 1527-28 (D.C. Cir. 1994). Indeed, the object of the hearing was to evaluate whether the acknowledgment process was, on a broad scale, being conducted in violation of the governing regulations. The BIA, like most any other federal agency, is no stranger to even strong criticism. To suggest that public criticism raised at an otherwise legitimate congressional hearing somehow intimidated the BIA into submission is completely without support.

Similarly, the introduction of a bill by Congresswoman Johnson to overturn the STN decision cannot possibly be evidence of impermissible congressional pressure. STN Pet., at 26-27. It is beyond question that a member of Congress has the authority to introduce legislation on such a topic without somehow upending and invalidating an administrative decision merely by doing so.

108th Cong., 2d Sess. (May 5, 2004); *Federal Recognition and Acknowledgment Process by the Bureau of Indian Affairs*, Hearing before the House Committee on Resources, 108th Cong., 2d Sess. (Mar. 31, 2004); *Oversight Hearing on Federal Recognition of Indian Tribes,* Hearing before the Senate Committee on Indian Affairs, 109th Cong., 1st Sess. (May 11, 2005).

The STN also unpersuasively relies on an attempt by Congresswoman Johnson to meet with Interior officials to submit the results of a survey of her constituents about casino gaming in Connecticut. *Id.* at 20. The meeting never actually took place, Cason testified that he knew nothing about it, and Fleming properly notified others that the survey results were not to be considered. Cason Dep., at 93; Fleming Dep., at 106-12. Far from proving impermissible congressional interference, this reflects that the Federal respondents were not influenced by political pressures and that they understood these acts as not affecting their decision making.

The Interior officials testified unequivocally that none of these congressional activities had any impact on the decision making process that produced the RFD. Cason Dep., at 40-41, 47-49; Norton Dep., at 187, 190-91, 212, 245; Bernhardt Dep., at 119-21; Fleming Dep., at 170-73. Indeed, Associate Deputy Secretary Cason, the actual decision maker, testified that he could not even recall being told about them. Cason Dep., at 40-41, 47-49.

3. The STN's Remaining Contentions of Improper Influence Are Unsupported.

The STN cites one insignificant instance as suggesting some impropriety as to the IBIA. STN Pet., at 20. This is critically fatal to its claim inasmuch as the IBIA's decision vacating the FD was the salient moment in this litigation. *See* § E *supra.*

In a February 10, 2005 letter to the Chief Administrative Judge of the IBIA, Representatives Johnson, Shays and Simmons inquired of the status of the matter then pending before the IBIA, expressing their hope for an impartial review consistent with the acknowledgment regulations and their view that the FD was unlawful and erroneous. Letter dated Feb. 10, 2005 from Reps. Johnson, Shays & Simmons. Although the letter was not served on the parties, the IBIA responded appropriately.[4] The STN in fact filed an extensive response to the Congressmen's letter. Thus, any possible prejudice that could have resulted from the communication was cured. Plainly, this cannot support a claim of improper influence, appearance or otherwise, as to the IBIA.

The STN also notes a communication made by Connecticut Attorney General Blumenthal in which he hand delivered a letter to Secretary Norton on May 17, 2004, expressing concern about the FD. STN Pet., at 23-24. The letter was served on the other parties following its delivery to the Secretary. The communication was deemed to technically violate the

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[4] The Chief Administrative Judge made the letter part of the record, provided copies of the letter to the parties, and by separate order provided the parties with the opportunity to file responses to the letter. Letter of Chief Administrative Judge Linscheid dated Feb. 22, 2005. *See* 43 C.F.R. § 4.27(b)(1) (providing that *ex parte* communications on the merits should be made part of the record and parties given an opportunity to respond).

District Court's order on communications with Interior officials that required notice to the parties of any meeting with those officials. The District Court addressed the violation by amending its order to clarify that notice must be provided prior to the communication, a requirement not contained in the original order. It hardly demonstrates impropriety or its appearance in the issuance of the RFD.

Finally, the STN quixotically references an ex parte communication between District Court Judge Dorsey and Connecticut Governor Rell. STN Pet., at 27-29. The STN concedes that "the letter [does] not furnish independent grounds for relief on appeal." *Id.* at 28. Apparently, it is offered up solely to show why the STN "might feel" that there was an appearance of impropriety. *Id.* at 29. How this communication demonstrates that Interior Department officials were improperly pressured is simply not explained. It is in fact irrelevant.

REASONS FOR DENYING THE WRIT

The STN's petition should be denied. It fails to demonstrate the existence of a conflict among the Circuits as to the appropriate standard to be applied to claims of improper political influence in agency decision making. Moreover, the highly unique context in which this matter arose and was decided counsels against granting the petition.

A. There Is No Conflict Among the Circuits Regarding the Standard to Be Applied to Improper Influence Claims Requiring This Court's Resolution.

The STN claims that certiorari is warranted to resolve a conflict between the Circuits as to the standard to be applied to a claim of improper political influence. STN Pet., at 36. It suggests that the Second Circuit in this case applied a standard that fails to take into consideration the differences between quasi-judicial and quasi-legislative administrative proceedings. It further contends that other Circuits have "explicitly or implicitly recognized" such differences. *Id.* at 34-35. What the STN pointedly fails to do, however, is explain what the conflict actually is in the standards that have been applied for political influence claims. In fact, a review of the cases it cites to support its claim of a split among the Circuits reveals that no such conflict exists.

The courts of appeals have consistently applied a standard—in both quasi-judicial and quasi-legislative proceedings—that requires a showing that political pressure actually caused an agency decision maker to base its decision on factors that are not relevant under the applicable law. *Press Broadcasting Co., Inc. v. FCC*, 59 F.3d 1365, 1369 (D.C. Cir. 1995); *Radio Ass'n on Defending Airwave Rights, Inc. v. United States Dept. of Transportation*, 47 F.3d 794, 807 (6th Cir.), *cert. denied,* 516 U.S 811 (1995); *ATX, Inc. v. United States Dept. of Transportation*, 41 F.3d 1522, 1528 (D.C. Cir. 1994); *Chemung County v. Dole*, 804

F.2d 216, 222 (2d Cir. 1986); *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984); *Peter Kiewet Sons' Co. v. United States Army Corps of Eng'rs*, 714 F.2d 163, 170-71 (D.C. Cir. 1983). Both the District Court and the Court of Appeals properly evaluated the STN's claims under this standard. 587 F.3d at 134; 587 F. Supp. 2d at 409-10. Nonetheless, the STN argues that the appropriate standard for reviewing its claim of improper political influence is an "appearance of bias" or "appearance of impropriety" standard. Specifically, it contends that an appearance of impropriety, without any evidence that political pressure actually improperly influenced the agency's decision, should be enough to invalidate the decision. STN Pet., at 36-37.

The courts of appeals have developed a standard for political influence claims that "focus[es] on the nexus between the pressure and the actual decision maker." *ATX, Inc.*, 41 F.3d at 1528. "The test is whether 'extraneous factors intruded into the calculus of consideration' of the individual decision maker." *Id.* at 1527 (quoting *Kiewit*, 714 F.2d at 170). An action or communication by members of Congress or others, including contemporaneous hearings or introduction of legislation, is not impermissible interference unless that interference reaches the agency decision maker and results in that decision maker using "extraneous factors"—that is, factors other than those relevant under the applicable law—to make its decision. *Id.* at 1527-28. Thus, the proper inquiry focuses not on the alleged improper

communication or activity in the abstract, but rather on whether the conduct caused the decision maker to make its decision on impermissible grounds.

The cases the STN cites do not demonstrate a divergence on the proper standard among the Circuits. STN Pet., at 34-35. In particular, the STN relies on two early cases involving improper influence claims—*Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966),[5] and *D.C. Federation of Civic Assns. v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972)—that it argues stand for the proposition that in quasi-judicial administrative proceedings the mere appearance of impropriety is sufficient to invalidate an otherwise valid agency decision. In doing so, however, the STN ignores several key subsequent cases that developed the standard for judicial evaluation of improper influence claims.

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[5] *Pillsbury* involved congressional hearings in which an agency decision maker was sharply questioned about the decision while it was pending with that decision maker. *Pillsbury*, 354 F.2d at 964. Almost all, and certainly the most significant, of the alleged improper conduct in this case directed at Interior Department officials by members of Congress or others occurred while the matter was pending before the IBIA and not the Secretary, the Assistant Secretary, Associate Deputy Secretary, or OFA. For this reason alone, *Pillsbury* does not apply to this case. *Kiewit*, 714 F.2d at 170 n.47; *Koniag, Inc. v. Andrus*, 580 F.2d 601, 610 (D.C. Cir.) (*Pillsbury* does not apply where agency representative not called on to prejudge any pending matter), *cert. denied*, 439 U.S. 1052 (1978).

In *Peter Kiewit Sons' Co. v. United States Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983) ("*Kiewit*"), which the STN incorrectly cites as a case applying the appearance of impropriety standard, STN Pet., at 35 n.18, the court explicitly discussed both *Pillsbury* and *D.C. Federation*. In *Kiewit*, the court acknowledged that the *Pillsbury* court emphasized that the appearance of impartiality was the "*sine qua non* of American *judicial* justice." *Id.* at 170 (quoting *Pillsbury*, 354 F.2d at 964). Nonetheless, the *Kiewit* court noted that "*Pillsbury* also emphasized the effect of communications on the 'decisional process' of the adjudicators." *Id.* (quoting *Pillsbury*, 354 F.2d at 954). Therefore, *Kiewit* concluded, "[p]ressure must be evaluated in the context of a concrete decision process." *Id.* Similarly, the *Kiewit* court stated that in *D.C. Federation* the court held that an agency decision maker could not consider congressional threats in reaching a decision. *Id.* at 169. Although *D.C. Federation* did not involve an agency adjudication, the *D.C. Federation* 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. The *Kiewit* court expressly disavowed such a standard. Instead, the *Kiewit* court explained:

> In either [the quasi-legislative or quasi-adjudicative] context, the proper focus is not on the congressional communications in the abstract, but rather upon the relation between the communications and the adjudicator's decision making process. A

> court must consider the decision maker's input, not the legislator's output. *The test is whether 'extraneous factors intruded into the calculus of considerations' of the individual decision maker.*

Id. at 169-70 (quoting *D.C. Federation*, 459 F.2d at 1246) (emphasis added)).

Similarly, in *ATX, Inc. v. United States Dept. of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994), which did involve an administrative adjudication, the court expressly reaffirmed the extraneous factor standard articulated in *Kiewit* as well as *Kiewit*'s explanation of the *Pillsbury* and *D.C. Federation* cases. *Id.* at 1527. Although the court in *ATX* acknowledged that "the appearance of bias or pressure may be no less objectionable than the reality," *id.* (quoting *D.C. Federation*, 459 F.2d at 1246-47), it nonetheless emphasized that an agency adjudication will not be set aside unless the political influence caused the actual decision maker to base its decision on factors other than those provided by governing law. *Id.* Although the STN cites both of these cases in support of its argument for an appearance of impropriety standard, *see* STN Pet., at 35-36 n.18, it conveniently ignores what those cases say about *Pillsbury* and *D.C. Federation* and their clear application of the extraneous factor standard.

The remaining cases that the STN relies on to demonstrate a split among the Circuits either simply do not support the proposition for which they are cited or in fact applied or are entirely consistent with

the extraneous factor standard. *Esso Standard Oil Co. (Puerto Rico) v. Lopez-Freyetes*, 522 F.3d 136, 146-48 (1st Cir. 2008) (finding due process violation based on agency structure that was "severely biased" and other evidence of actual bias); *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 611 (3rd Cir. 1977) (although noting that "courts must not tolerate undue legislative interference with an administrative agency's adjudicative functions," court concluded no such interference because evidence showed agency's decision was not actually the result of congressional pressure); *Monieson v. CFTC*, 996 F.2d 852, 865 (7th Cir. 1993) (finding only that there was no congressional interference without any discussion of an appearance standard), *cert. denied*, 434 U.S. 1062 (1978); *State of California ex rel State Water Resources Control Bd. v. FERC*, 966 F.2d 1541, 1552 (9th Cir. 1992) (finding "the record does not disclose that [the agency's] decision was the result of undue influence"); *Portland Audubon Soc'y v. Endangered Species Committee*, 984 F.2d 1534 (9th Cir. 1993) (holding only that members of White House staff were subject to ex parte communications prohibition under APA); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996) (applying standard articulated in *ATX*, 41 F.3d at 1527).

In sum, there is no conflict among the Circuits as to the standard to be applied to improper political influence claims requiring a resolution by the Court.

B. The Unique Context of the Case Weighs Against Granting the Petition.

In attempting to persuade this Court to grant certiorari, the STN suggests that this question presented is not "uniquely 'Indian,'" but rather one that any litigant before an administrative agency could face. STN Pet., at 5. It is plain from the record, however, that the context in which the issue has arisen in this case is extraordinarily unique. Even assuming there were other grounds supporting a grant of the petition, which there are not, this case provides an inappropriate vehicle for this Court to reach the question.

First, it is highly noteworthy that the STN, both at the Court of Appeals and before this Court, has abandoned any claim as to the merits of the RFD's denial of federal tribal acknowledgment. As the District Court concluded as to the merits, the RFD was detailed, well reasoned, and entirely consistent with the appropriate legal standards governing acknowledgment petitions. 587 F. Supp. 2d at 413-18. Indeed, once the critical legal question as to the proper use of state recognition was resolved adversely to the STN by the independent administrative law judges of the IBIA, the resolution of the STN's petition for acknowledgment was not even a close call. Massive gaps in its evidence as to the key criteria of community and political authority demanded denial of the acknowledgment petition.

Second, it was in fact the IBIA's decision—rejecting the FD's misuse of state recognition to make up for the massive evidentiary deficiencies—that was the critical decision in the administrative process. Nothing in the record comes even close to establishing that the IBIA was improperly influenced or that its decision was infected by an appearance of bias. Instead, the record reveals that it was the FD that was the anomaly in the proceedings. Against this background, even if the RFD were to be judged against an appearance of bias standard, the STN's claims would fail.

Given the highly unique nature of the proceedings, certiorari is not warranted in this case.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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