No. 17-____

IN THE
Supreme Court of the United States

SHARP IMAGE GAMING, INC.,
Petitioner,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Indian Gaming Regulatory Act, 25 U.S.C. 2701–2721, contracts for the management of casino-style Indian gaming activity must be approved by the Chairman of the National Indian Gaming Commission. *See id.* §§ 2710(d)(9), 2711(a)(1). The Act provides that, for purposes of this requirement, a management contract "shall be considered to include all collateral agreements to such contract that relate to the gaming activity." *Id.* § 2711(a)(3). An implementing regulation provides that a "management contract" encompasses a collateral agreement "if such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. 502.15.

The question presented is:

Whether a collateral agreement to a management contract for an Indian gaming operation is subject to approval by the National Indian Gaming Commission only if the collateral agreement itself provides for management of all or part of the operation.

RULE 29.6 STATEMENT

The parties to the proceeding below were Sharp Image Gaming, Inc. and Shingle Springs Band of Miwok Indians. Sharp Image Gaming, Inc. has no parent corporation, and no publicly held corporation holds 10% or more of its stock.

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INTRODUCTION

This case involves a frequently recurring question under the Indian Gaming Regulatory Act: must the Chairman of the National Indian Gaming Commission approve every collateral contract related to a casino-style Indian gaming operation? The answer to that question has great practical significance to Indian gaming, which plays a crucial role in funding tribal governments and providing economic opportunity on reservations.

The California Court of Appeal answered that question yes, requiring such approval here even for a plain-vanilla promissory note. It thus created a conflict with the approach taken by the Second and Seventh Circuits. In *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 547 F.3d 115 (2d Cir. 2008), in a unanimous decision by then-Judge Sotomayor, the Second Circuit held that a collateral agreement requires Commission approval "only if it 'provides for the management of all or part of a gaming operation.'" *Id.* at 130 (quoting 25 C.F.R. 502.15). The Seventh Circuit, adopting the same interpretation, has twice held that collateral agreements that do not provide for the management of gaming operations are not subject to Commission approval. *See Stifel, Nicolaus & Co. v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015); *Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684 (7th Cir. 2011).

In the decision below, the California Court of Appeal expressly rejected *Catskill Development*'s interpretation and required Commission approval for a promissory note even though the note itself did not

provide for management of any gaming activity. This decision conflicts with the Second Circuit's approach and squarely conflicts with the Seventh Circuit's decisions.

The decision below also contradicts the plain language of the implementing regulation upon which *Catskill Development* and subsequent decisions relied. Under that regulation, the definition of management contract—and, thus, the Commission's authority to approve collateral agreements—includes only agreements that "*provide[] for the management of all or part of a gaming operation*." 25 C.F.R. 502.15 (emphasis added). Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this regulation is entitled to deference because Congress delegated rulemaking authority to the Commission, and because the regulation is a reasonable interpretation of the Act, comporting with both its text and its stated purposes and policies.

This Court should grant review to resolve these conflicts and dispel the uncertainty the decision below has created concerning the treatment of collateral agreements in California, the state with the largest segment of the rapidly growing Indian gaming industry.

OPINIONS BELOW

The opinion of the California Court of Appeal, Third Appellate District (App. 1a) is reported at 15 Cal. App. 5th 391. The opinion of the trial court denying respondent's motion to dismiss (App. 83a) is unreported.

JURISDICTION

The judgment of the California Court of Appeal, Third Appellate District was entered on September 15, 2017. App. 1a. The Court of Appeal denied a petition for rehearing on October 16, 2017. App. 108a. On December 20, 2017, the California Supreme Court denied a petition for review. App. 111a. This Court has jurisdiction under 28 U.S.C. 1257(a).

STATUTES AND REGULATIONS INVOLVED

Relevant statutory provisions and regulations are reproduced in the appendix. App. 130a–141a.

STATEMENT

A. Statutory Framework

The Indian Gaming Regulatory Act (the "IGRA" or the "Act"), 25 U.S.C. 2701–2721, requires the Chairman of the National Indian Gaming Commission to approve any "management contract" concerning casino-style Indian gaming. *Id.* § 2711(a)(1); *see also id.* § 2710(d)(9) (extending approval requirement to "Class III" or casino-style gaming). For purposes of this requirement, the Act considers a "management contract" to include "all collateral agreements to such contract that relate to the gaming activity," *id.* § 2711(a)(3), and the Commission's implementing regulations clarify that the only collateral agreements that come within the definition of "management contract" are those that "provide for the management of all or part of a gambling operation," 25 C.F.R. 502.15.

Congress enacted the Indian Gaming Regulatory Act in 1988, shortly after this Court held Indian gaming largely insulated from state gaming regulations, *see California v. Cabazon Band of Mission Indians*,

480 U.S. 202, 218–222 (1987), in order "to provide a statutory basis for the regulation of gaming by an Indian tribe." 25 U.S.C. 2702(2). Congress recognized that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government," *id.* § 2701(4). Accordingly, the Act regulates Indian gaming to shield it from organized crime, ensure that Indian tribes are its primary beneficiaries, and assure fair and honest gaming, *id.* § 2702(2), while simultaneously promoting tribal autonomy and economic development, *id.* § 2702(1). *See generally* Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99 (2010).

The Act establishes the National Indian Gaming Commission (the "NIGC" or "Commission"), *see* 25 U.S.C. 2704–2708, and, among other things, delegates to the Commission authority to promulgate regulations implementing the Act, *id.* § 2706(b)(10).

While the Act places some forms of traditional gaming involving minimal prizes under the exclusive jurisdiction of Indian tribes, *id.* § 2710(a)(1), it allows more serious gaming such as card games and bingo only if such gaming is permitted by the state in which it is conducted and the tribe conducting the gaming passes a resolution devoting gaming revenues to funding tribal government, the tribe's general welfare, and other specified purposes. *Id.* § 2710. Slot machines and traditional casino games such as blackjack are permitted only if these requirements are satisfied and there also is a Tribal-State compact permitting such games. *Id.* § 2710(b); *see also id.* §§ 2703(7)(B) & (8) (defining "class II" and "class III" gaming).

The Act also regulates contracts for the operation and management of regulated gaming activities. It limits the duration of such contracts and requires them to provide, among other things, minimum guaranteed payments to the relevant tribe, ceilings on repayment of costs, and adequate accounting and access procedures. *Id.* §§ 2711(b)(1)–(5). In addition, Section 11(a)(1) of the Act makes all management contracts for the operation and management of regulated gaming activity "[s]ubject to the approval of the Chairman" of the Commission. 25 U.S.C. 2711(a)(1); *id.* § 2710(d)(9); *see also* 25 C.F.R. 533.7 (stating that management contracts not approved by the Chairman "are void").

Section 11(a)(3) expands the meaning of management contract for purposes of Commission approval to include certain "collateral agreements":

> any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

25 U.S.C. 2711(a)(3). The Commission's implementing regulations in turn define management contract to include collateral agreements providing for "management of all or part of a gaming operation":

> Management contract means any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation.

25 C.F.R. 502.15.

B. Factual Background

The decision below, as relevant here, involves a promissory note issued in November 1997 (the "Note"), App. 126a–129a, as part of several agreements between petitioner Sharp Image Gaming, Inc. ("Sharp Image") and respondent Shingle Springs Band of Miwok Indians (the "Tribe").

The Tribe is a federally recognized Indian tribal government with a reservation in El Dorado County, California. App. 9a. Although this reservation is strategically located along one of the two highways from the Bay Area to Lake Tahoe, it had no access to public roadways and was effectively landlocked except for a single road through a residential neighborhood. *Id.*

The Tribe nonetheless decided to build a casino, and it contacted petitioner Sharp Image, which at that time supplied video gaming machines to over two dozen Indian casinos in California. App. 9a; 5 Reporter's Transcript ("RT") 1166, 1173, 1176–1178. Believing that the road to the reservation was public, 5 RT 1196, Sharp Image agreed to take on the project, and in May of 1996, it entered into a Gaming Machine Agreement with the Tribe under which it agreed to provide up to 400 gaming machines to a casino on the reservation in exchange for 30% of the net revenues from the machines and from table games at the casino. App. 10a. In addition, Sharp Image agreed to advance the Tribe the funds needed to build a temporary casino under a tent and to acquire equipment and furnishings for that facility as well as construction of a larger facility. App. 9a–10a.

Although the tent casino opened in October of 1996, it was shut down after only one night due in part to

safety problems created by limited access to the casino. App. 10a–11a. After a neighborhood association obtained a judgment that the access road to the reservation was private, 5 RT 1196–1197, Sharp Image explored alternative ways to access the reservation, including spending millions of dollars to purchase properties along the highway to provide a new access road. 5 RT 1203–1204.

In 1997, Sharp Image and the Tribe decided to update their contractual arrangements. Sharp Image proposed and the Tribe agreed to an Equipment Lease Agreement in which the Tribe agreed to lease 400 video gaming devices, once again in exchange for 30% of net revenues. App. 112a–125a. The Equipment Lease Agreement gave Sharp Image "the exclusive right to lease or otherwise supply additional gaming devices to Lessee [the Tribe] to be used at its existing or any future gaming facility or facilities." App. 112a. The Agreement also contained a waiver of sovereign immunity from any suit to enforce the Tribe's obligations under the Agreement. App. 122a.

At the same time, the Tribe executed the Note, which focuses on the advances that Sharp Image had made for construction of the Tribe's casino. App. 126a. The Note rolled up the advances into a single sum, $3,167,692.86, which "represents the full amount owed up to September 30, 1997." *Id.* The Note also reduced the interest rate from 12% to 10%. App. 10a, 13a, 126a.

The Note contains two references to gaming operations. *First*, the Note states that payment of principal and interest shall commence approximately two months after 400 video gaming devices "are installed

and in operation at Borrower's Gaming Facility and Enterprise." App. 126a–127a. *Second*, the Note provides that the principal and interest be paid in equal monthly installments over the course of a year, except that, if the Tribe "is not financially able to maintain the equal monthly installments and continue operating the casino without operating at a loss," the Tribe may "make a minimum payment equal to 25% of the gross net revenues it receives from the operation of the video gaming devices described above." App. 127a.

The Note also contains a waiver of sovereign immunity for suits to enforce the Note. App. 128a ("Borrower hereby express[ly] waives its sovereign immunity from any suit, action or proceeding to enforce the terms of this Note.").

Sharp Image continued to advance funds after the Note was signed, and, even though the Note was limited to its stated amount, App. 126a, the parties understood the Tribe was to repay these additional advances under the Note. 32 Appellant's Appendix ("AA") 8430, 8437. Sharp Image also sought to introduce the Tribe to potential gaming managers who could invest additional funds into the casino project. App. 14a–15a.

The Tribe, however, decided to sever its ties with Sharp Image. In June 1999, the Tribe entered into development and management agreements with a management company. App. 15a. Although initially offers were made to buy out Sharp Image's exclusive right to supply gaming machines, *id.*, the Tribe eventually repudiated its agreements with Sharp Image, including the Note, on the ground that they were void from their

inception because they had not been approved by the Commission. App. 15a–16a.

C. The Proceedings Below

When the Tribe began construction of a casino under its 1999 agreements, Sharp Image sued the Tribe in California state court, asserting breach of the Equipment Leasing Agreement and the Note as well as oral agreements concerning advances following the Note. App. 17a.[1]

The pre-trial proceedings focused on the Equipment Leasing Agreement rather than the Note. After obtaining an advisory opinion letter from the general counsel of the Commission that the Agreement was an unapproved management contract, the Tribe moved to dismiss, arguing that "complete preemption" deprived state courts of jurisdiction over claims concerning the Equipment Leasing Agreement. App. 18a–23a. After the trial court ruled the advisory opinion letter inadmissible and denied the motion, App. 23a, the Tribe obtained a decision letter from the chairman of the Commission to the same effect and again moved to dismiss the Equipment Leasing Agreement based on preemption. App. 24a–27a. The trial court denied this motion on the ground that the Tribe's repudiation of the Agreement deprived the Commission of jurisdiction

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[1] Sharp Image initially also alleged claims based on the Gaming Machine Agreement, App 17a, but later dropped those claims, App. 30a.

over the Agreement and precluded preemption.[2] App. 28a–29a; *see also* App. 30a (denying summary judgment based on statute of limitations).

The case then went to trial. The jury found that the Tribe breached the Equipment Lease Agreement and awarded approximately $20.4 million in damages. App. 30a–31a. The jury also found that the Tribe breached the Note and awarded approximately $10 million on the Note. App. 31a.

The Tribe filed an appeal, which the United States supported with an amicus brief, App. 32a, and the Third Appellate District of the California Court of Appeal reversed. App. 81a.

The Court of Appeal's decision focused primarily on preemption and the Equipment Lease Agreement rather than the Note. The Court first ruled that Sharp Image's claims were subject to preemption and that the trial court should have decided if the agreements at issue were subject to Commission approval. App. 34a–53a. Then, after considering the deference due the Commission's opinions concerning the Equipment Lease Agreement, App. 53a–65a, the Court determined that the Equipment Lease Agreement (as well as its predecessor, the Gaming Machine Agreement) was a management contract, which should have been submitted to the Commission for approval, because it gave

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[2] The Tribe filed a writ petition in the California Court of Appeal seeking to overturn this decision, which was denied, *see Shingle Springs Band of Miwok Indians v. Sharp Image Gaming, Inc.*, 2010 WL 4054232, at *3 (E.D. Cal. Oct. 15, 2010), and then sought an injunction in federal court, which also was denied, *id.* at *6–*15.

Sharp Image too much control over the Tribe's use of gaming devices and provided for net revenues based on table games as well as the video gaming machines. App. 66a–72a.

The Court of Appeal did not turn to the Note until the end of its decision, ruling it a collateral agreement that should be considered a management contract and subject to Commission approval. App. 72a–81a. The Court of Appeal reasoned that the Note is related to the Gaming Management Agreement and the Equipment Leasing Agreement, which it had found were management contracts, because the Note concerns repayment of funds advanced in connection with those agreements, App. 75a, and the Note references gaming activities in triggering payment obligations and setting an alternative payment amount. App. 75a–76a; *see also* App. 81a (deeming Note subject to Commission approval because "the terms of the collateral agreement are connected to the gaming activity provisions of the management contracts").

The Court of Appeal did not find that the Note itself provided for management of any gaming activity. It recognized that the Second and the Seventh Circuits have interpreted the Act to require Commission approval of collateral agreements only if those agreements provide for management of gaming activities. App. 76a. However, attributing this interpretation to two related district court cases, *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659 (W.D. La. 2005), and *Jena Band of Choctaw Indians v. Tri-Millennium Corp. Inc.*, 387 F. Supp. 2d 671 (W.D. La. 2005), the Court of Appeal rejected this interpretation. App. 76a–80a & n.30. In addition to deriding the interpretation for "[p]iecing together" language from the

Commission's implementing regulations, App. 77a, the Court of Appeal asserted that the interpretation would render superfluous both the Act's definition of management contracts and the definition of collateral agreements in the implementing regulations. App. 78a–79a. The court also asserted that the "*Jena Band* interpretation" conflicts with the text of the Act and serves no legitimate policy. App. 79a–80a.[3]

Sharp Image's subsequent petitions for rehearing in the Court of Appeal and for review in the California Supreme Court were denied. App. 108a, 111a.

REASONS FOR GRANTING THE WRIT

Although Sharp Image disagrees with the California Court of Appeal's ruling on the Equipment Leasing Agreement, this petition focuses solely on the Court's ruling on the Note. In that ruling, the decision below interpreted the Commission's authority to review management contracts so broadly that it encompasses a plain-vanilla promissory note simply because the Note was connected with and referred to gaming activity. That interpretation conflicts with the Second Circuit's approach, which requires collateral agreements to provide for the management of gaming activity, and it creates a square conflict with decisions of the Seventh Circuit over an important and recurring question concerning the scope of the National Indian Gaming Commission's authority that warrants review.

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[3] Because the Court found that Sharp Image's claims were preempted by the Act, it did not reach the Tribe's other arguments on appeal. App. 3a n.1.

I. THE CALIFORNIA COURT OF APPEAL'S DECISION CONFLICTS WITH DECISIONS OF THE FEDERAL COURTS OF APPEALS

In a 2008 decision involving one of the nation's largest gaming companies, the Second Circuit held that Section 11(a)(1) of the Indian Gaming Regulatory Act, 25 U.S.C. 2711(a)(1), requires Commission approval of an agreement collateral to a management contract "only if it 'provides for the management of all or part of a gaming operation.'" *Catskill Development*, 547 F.3d at 130 (quoting 25 C.F.R. 502.15). Since that decision, federal courts have followed this interpretation. The California Court of Appeal's decision expressly rejects the interpretation and creates a square conflict with two Seventh Circuit decisions following that interpretation.

The decision below did not find that the Note provides for management of gaming operations. It found only that the Note is "connected to the gaming activity provisions of the management contracts." App. 81a. Nevertheless, the decision held that the Note required Commission approval. *Id.* Moreover, in so doing, the court expressly rejected federal decisions holding a collateral agreement requires Commission approval only if the agreement provides for the management of all or part of a gaming operation. App. 76a–80a.

In addition to contradicting the Second Circuit's interpretation of the Act in *Catskill Development*, this ruling squarely conflicts with two Seventh Circuit cases following *Catskill Development's* interpretation. In *Wells Fargo Bank*, 658 F.3d 684, an Indian tribe issued bonds secured by revenues from a casino, and the trustee of an indenture accompanying the bond sued for

breach, *id.* at 688–690. The Seventh Circuit held that the trustee could not rely on the waiver of sovereign immunity in the indenture because it was a management contract under the Act and the Commission had not approved it. *Id.* at 702. The Seventh Circuit, however, held that the trustee should have been allowed to amend its claims based on other documents containing sovereign immunity waivers. *Id.* at 700–701. Although these documents were related to the indenture and thus "collateral agreements," following *Catskill Development,* the Seventh Circuit held that "a document collateral to a management contract 'is subject to agency approval … only if it provides for the management of all or part of a gaming operation.'" *Id.* at 701, quoting *Catskill Development*, 547 F.3d at 130.

The Seventh Circuit reiterated this ruling in a related case with a more complete record concerning the collateral documents at issue In *Stifel, Nicolaus & Co.*, 807 F.3d 184, the trustee and several bond purchasers sued to enjoin the tribe from seeking a declaration in tribal court that the bond was invalid. The plaintiffs relied on two resolutions concerning the bond that contained sovereign immunity waivers. *Id.* at 191–192. Although these resolutions were "collateral" to the indenture it had found to be a management contract, the Seventh Circuit held that they were not subject to approval by the Commission because they did not provide for management of gaming operations. *Id.* at 203–205. In so doing, the court reiterated the rule adopted in *Catskill Development* and followed by *Wells Fargo*:

> a document that is collateral to a management contract in the sense that it is related does not require approval; it is only when that related agreement al-

> so provides for "the management of all or part of a gaming operation" that NIGC approval is required.

Id. at 203.

The decision below cannot be reconciled with the Seventh Circuit's decisions. The California Court of Appeal did not find that the Note was subject to Commission approval because it provided for the management of a gaming operation. Instead, in direct contradiction of *Catskill Development*'s interpretation of the Act and the holdings in *Wells Fargo* and *Stifel, Nicolaus & Co.*, the Court of Appeal held that the Note was subject to Commission approval merely because it is related to gaming activity and management contracts. App. 74a. The collateral agreements in *Wells Fargo* and *Stifel, Nicolaus & Co.*, however, also related to the trust indenture that was found to manage gaming activities. *See Wells Fargo*, 658 F.3d at 700–701. Thus, the California Court of Appeal's decision conflicts with the decisions of the Second and Seventh Circuits.

II. THE CALIFORNIA COURT OF APPEAL'S DECISION MISCONSTRUES THE INDIAN GAMING REGULATORY ACT

In rejecting the *Catskill Development* interpretation adopted by the Second and Seventh Circuits, the California Court of Appeal also departed from the plain language of the Commission's implementing regulations. It thus failed to give the Commission proper deference and misconstrued the Act.

Section 11(a)(1) of the Act makes any "management contract" subject to Commission approval, 25 U.S.C. 2711(a)(1), and Section 11(a)(3) states that under that provision a management contract "shall be considered

to include all collateral agreements to such contract that relate to the gaming activity," *id.* § 2711(a)(3). A Commission regulation defining management contract clarifies exactly how a collateral agreement must relate to gaming activity in order to be considered a management contract:

> Management contract means *any* contract, subcontract, or *collateral agreement* between an Indian tribe and a contractor … *if such* contract or *agreement provides for the management of all or part of a gaming operation*.

25 C.F.R. 502.15 (emphasis added). As *Catskill Development* recognized, under this definition, not all collateral agreements are deemed management contracts and require Commission approval. Instead, "a collateral agreement is subject to agency approval … only if it 'provides for the management of all or part of a gaming operation.'" 547 F.3d at 130 (quoting 25 C.F.R. 502.15).

This regulation is entitled to deference. Congress gave the Commission authority to promulgate regulations implementing the Act. *See* 25 U.S.C. 2706(b)(10). Accordingly, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts must defer to the interpretation of the Act in the Commission's regulations "if the statute is ambiguous and if the agency's interpretation is reasonable." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016). The Commission's definition of management contract easily satisfies this test.

Section 11(a)(3) of the Act is ambiguous. It states that, for purposes of Section 11(a)(1), a management contract shall be considered to include all collateral

agreements that "relate to the gaming activity." 25 U.S.C. 2711(a)(3). But it does not specify how a collateral agreement must relate to gaming activity. The California Court of Appeal asserted that this provision plainly applies where a collateral agreement "become[s] subject to regulation by virtue of their relationship to management contracts or management contractors." App. 79a. That is plainly wrong. Section 11(a)(3) does not say that collateral agreements should be considered management contracts if they have a relationship with "management contracts or management contractors." It says that collateral agreements should be considered management contracts if they relate to "gaming activity," 25 U.S.C. 2711(a)(3), and because Section 11(a)(3) does not explain what sort of relationship is required, it leaves the provision ambiguous.

The Commission's implementing regulations provide a reasonable interpretation of the relationship required by Section 11(a)(3). The relevant regulation defines management contract to include collateral agreements that "provide for the management of all or part of a gaming operation." 25 C.F.R. 502.15. This is a perfectly reasonable interpretation. Collateral agreements that provide for "management … of a gaming operation" plainly relate to gaming activity, and the definition's focus on management activity is consistent with Section 11(a)(3)'s function—which is to identify the collateral agreements considered management contracts.

The regulation is also consistent with the Act's stated policies. *First,* the regulation ensures that the Commission reviews collateral agreements for which it has standards to apply. One of the problems noted by

the Act was the absence of clear standards for regulating Indian gaming. *See* 25 U.S.C. 2701(3) ("existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands"). While the Act provides standards for contracts that manage Indian gaming activity, the Commission "has no standards to use for approval" of collateral agreements that do not manage such activity, as a former Commission general counsel has recognized, *see* Kevin Washburn, THE MECHANICS OF INDIAN GAMING MANAGEMENT CONTRACT APPROVAL, 8 GAMING L. REV. 333, 345 (2004). Limiting the necessity for Commission approval to collateral agreements that provide for gaming management spares the Commission from reviewing agreements without any standards. *Id*.

Second, the regulation furthers the policy of promoting tribal autonomy. While the Act was intended to provide a statutory basis for regulating Indian gaming, 25 U.S.C. 2702(2), it also recognized and sought to further the federal policy of promoting "tribal self-sufficiency." *id*. §§ 2701(4), 2702(1). By limiting the requirement for Commission approval, the regulation ensures that agreements implicating the Act's core concerns are subject to approval, while leaving other agreements to the discretion of the tribes and thereby recognizing their self-sufficiency and autonomy.

Third, the regulation promotes tribal economic development. *See* 25 U.S.C. 2701(4); *id*. § 2702(1). The Commission typically takes one to three years to review and approve a management contract. *See* Washburn, *supra*, 8 GAMING L. REV. at 334. As commentators have recognized, however, "[f]requently in gaming-related transactions, time is of the essence." Staudenmaier & Khalsa, *Theseus, the Labyrinth, and*

the Ball of String: Navigating the Regulatory Maze to Ensure Enforceability of Tribal Gaming Contracts, 40 J. MARSHALL L. REV. 1123, 1125–1126, 1134 (2007). By limiting the scope of Commission review of collateral agreements, the regulation allows construction and other aspects of casino development projects unrelated to management of gaming activity to move forward while Commission review of related management contracts is being conducted.

The overwhelming weight of authority supports application of the plain language of the Commission's implementing regulation. *Catskill Development* relied on the regulation in ruling that a collateral agreement is subject to Commission approval under Section 11(a)(1) of the Act "only if it 'provides for the management of all or part of a gaming operation.'" *Catskill Development*, 547 F.3d at 130 (quoting 25 C.F.R. 502.15). While two district court decisions predating *Catskill Development* held that collateral agreements required Commission approval merely because they were related to management contracts,[4] every other federal decision both before and after *Catskill Development* has held that a collateral agreement must provide for management of gaming activity. *See Stifel, Nicolaus & Co.*, 807 F.3d at 203 ("it is only when that related agreement also provides for the 'management of all or part of a gaming operation' that NIGC approval is required"); *Wells Fargo Bank*, 658 F.3d at 701 ("a

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[4] *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts*, 249 F. Supp. 2d 901, 907 (W.D. Mich. 2003); *Sonoma Falls Developers, LLC v. Dry Creek Rancheria Band of Pomo Indians of California*, 2002 WL 34727095, at *4 (N.D. Cal. Dec. 26, 2002).

document collateral to a management contract is subject to agency approval only if it provides for the management of all or part of a gaming operation") (quotation omitted).[5] *See generally* Washburn, *supra*, 8 GAMING L. REV. 333, 345 (2004) ("The NIGC has authority to approve a collateral agreement only if it also meets the definition of 'management contract,' that is, it provides for the 'management of all or part of a gaming operation.'").

Before filing its amicus brief in this case, the Commission also recognized this interpretation. In opinion letters, the Commission's general counsel repeatedly stated, often citing *Catskill Development*, that the Commission had "authority to review and approve gaming-related contracts and collateral agreements to management contracts *to the extent that they implicate*

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[5] *See also Jena Band of Choctaw Indians v. Tri-Millennium Corp.*, 387 F. Supp. 2d at 678 ("only collateral agreements that also provide for the management of all or part of a gaming operation are void without NIGC approval"); *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d at 667 (same); *United States ex rel. Saint Regis Mohawk Tribe v. President R.C.-St. Regis Management Co.*, 2005 WL 1397133, at *3 (N.D.N.Y. June 13, 2005) ("The Commission regulations clearly provide that a collateral agreement is a management contract if it provides for the management of all or part of a gaming operation.") (quotation omitted); *BounceBackTechnologies.com v. Harrah's Entertainment, Inc.*, 2003 WL 21432579, at *7 (D. Minn. June 13, 2003) (holding that an agreement did not require Commission approval because it "does not provide for the management of all or part of a gaming operation") (quotation omitted).

management."[6] In addition, the Commission as a whole took the same position in terminating a contemplated rulemaking proceeding concerning collateral agreements. National Indian Gaming Comm'n, Notice of No Action, 76 Fed. Reg. 63325, 63325 (Oct. 12, 2011) ("IGRA does not require approval of agreements collateral to management contracts unless those agreements also provide for management.").

The California Court of Appeal made no attempt to reconcile its interpretation of Section 11(a)(3) with the Commission regulation defining management contract upon which the *Catskill Development* relied—and, indeed, criticized the federal courts for "[p]iecing together" the language of the regulation. App. 77a. Instead, the Court of Appeal asserted that the plain language of

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[6] Letter from Eric Shepard to George Gholson, Chairman of Timbisha Shoshone Tribe, August 27, 2013 at 1 (emphasis added) (citing, among other authorities, *Catskill Development*, 547 F.3d at 130), *available at* http://bit.ly/2FyVZjM; *see also* Letter from Penny J. Coleman to Larriann Musick, Chairman of La Jolla Band of Luiseno Indians, April 2, 2010, at 1 ("The authority of the NIGC to review and approve gaming-related contracts is limited by IGRA to management contracts and collateral agreements to management contracts to the extent that they implicate management.") (citing, among other authorities, *Catskill Development*, 547 F.3d at 130), *available at* http://bit.ly/2HvKvKh; Letter from Penny J. Coleman to Edward Fleisher, Nov. 3, 2006, at 6 ("[O]nly collateral agreements that provide for the management of all or part of gaming operation are 'management contracts' requiring the NICG Chairman's approval."), *available at* http://bit.ly/2FA1BKG. These letters are available on the Commission's website at https://www.nigc.gov/general-counsel/management-review-letters.

the regulation should be ignored because following it would render the definition of management contracts in the Act and the definition of collateral agreements in its implementing regulations "mere surplusage." App. 78a–79a. This argument, which picks up on an abbreviated argument made by the United States in its amicus brief below, contradicts the positions repeatedly taken by the Commission prior to that amicus brief, and is demonstrably wrong.

The Commission's regulation does not render the Act's definition of management contracts meaningless or unnecessary. Section 11(a)(3) states that a management contract "shall be considered to include all collateral agreements to [a management contract] that relate to the gaming activity." 25 U.S.C. 2711(a)(3). The Commission's regulation does what a regulation is supposed to do: it clarifies what the ambiguous phrase "relate to the gaming activity" means by requiring a collateral agreement to "provide[] for the management of all or part of a gaming operation" to be considered a management contract. 25 C.F.R. 502.15.

The California Court of Appeal asserted that there would be no need to reference collateral agreements in the Act if such agreements must qualify as a management agreement to be subject to Commission review. App. 78a. But the Act imposes numerous requirements on management contracts, including provisions for "adequate accounting procedures," "access to daily operations of the gaming to appropriate tribal officials," a "minimum guaranteed payment to the Indian tribe," and "an agreed ceiling for the repayment of development and construction costs." 25 U.S.C. 2711(b)(1)–(4). By stating that collateral agreements may be considered management contracts for purposes

of Commission review, Section 11(a)(3) makes clear that, even when there is an agreement containing all the provisions that the Act requires a management contract to contain, some other, "collateral" agreements may be considered management contracts and subjected to Commission approval. In other words, contracts that do not satisfy all the Act's requirements for a "management contract" may nonetheless be "collateral agreements" subject to Commission review, but only where those "collateral agreements" provide for management of gaming activity. Moreover, this holds true under the regulation defining management contracts to include only collateral agreements that provide for management of gaming activity.

That regulation also does not render the regulation defining collateral agreement superfluous. Even though the Commission only approves management contracts (and collateral agreements that qualify as management contracts), it "has taken the position that … collateral agreements must be submitted" to it. National Indian Gaming Comm'n, Notice of Inquiry, 75 Fed. Reg. 70680, 70683 (Nov. 18, 2010). As a former Commission official has explained, "review of collateral agreements is a key ancillary aspect of management contract review," which the Commission needs to ensure it understands the management contracts it reviews. Washburn, *supra*, 8 GAMING L. REV. at 345–346. The definition of collateral agreement determines the scope of the agreements the Commission examines in reviewing a management contract. Indeed, the Commission "created a broad definition of the term 'collateral agreement' to insure that it can review all the documents needed for meaningful management contract review." *Id*. at 346.

Thus, the California Court of Appeal failed to offer any persuasive reason for ignoring the plain language of the Commission's implementing regulations and rejecting the overwhelming weight of federal authority.

III. THIS PETITION RAISES AN IMPORTANT AND RECURRING QUESTION THAT WARRANTS REVIEW

This case presents an important and recurring question concerning the scope of the Commission's authority—whether collateral agreements are subject to Commission approval even if they do not provide for management of gaming activities—that needs a clear and certain answer.

The importance of Indian gaming cannot be disputed. According to the Commission, there are now nearly 500 Indian gaming facilities with gross revenues exceeding $30 billion. National Indian Gaming Comm'n, Gross Gaming Revenues 2012-2016, *available at* https://www.nigc.gov/commission/gaming-revenue-reports; *see also* National Indian Gaming Comm'n, Growth in Indian Gaming Graph 2007-2016, *available at* https://www.nigc.gov/commission/gaming-revenue-reports (showing that, on average, Indian gaming revenues grew by more than half a billion dollars annually over the last nine years). These revenues are used "to fund education, improve health and elder care, enhance police and fire departments, build housing and roads, develop environmental programs, launch commercial ventures, and buy back reservations lands." Sandra J. Ashton, *The Role of the National Gaming Commission in the Regulation of Tribal Gaming*, 37 NEW ENG. L. REV. 545, 545–546 (2003); *see also* Randal K.Q. Akee et al., *The Indian Gaming Regulatory Act and Its Effects on*

American Indian Economic Development, 29 J. ECON. PERSPECTIVES 185, 185, 187 (2015) ("Indian gaming has allowed marked improvement in several important dimensions of reservation life.").

This case raises a fundamental question concerning the scope of the Commission's authority over Indian gaming. Because expansion of the Commission's authority limits the corresponding authority of the Indian tribes, this issue has direct impact on the autonomy and self-sufficiency of Indian tribes in connection with their gaming operations. In addition, as noted above, the scope of the Commission's authority affects the potential for development. *See supra* p. 18. Indeed, the decision below construed the Commission's authority so broadly that it voided a plain-vanilla promissory note simply because the note referenced gaming activity.

Questions whether collateral agreements must be approved by the Commission arise frequently. Before the Second Circuit's decision in *Catskill Development* and its adoption by the Seventh Circuit effectively resolved the question in the federal courts, the question was raised in numerous cases. *See Stifel, Nicolaus & Co.*, 807 F.3d at 203; *Wells Fargo Bank*, 658 F.3d at 701; *Catskill Development*, 547 F.3d at 130; *Jena Band of Choctaw Indians v. Tri-Millennium Corp.*, 387 F. Supp. 2d at 678; *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d at 667; *United States ex rel. Saint Regis Mohawk Tribe,* 2005 WL 1397133, at *3; *BounceBackTechnologies.com*, 2003 WL 21432579, at *7; *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 249 F. Supp. 2d at 907; *Sonoma Falls Developers, LLC*, 2002 WL 34727095, at *4. Tribes also frequently requested "declination" letters advising

whether collateral agreements are subject to Commission review.[7] And because the Act generally limits management contracts to a five-year term, *see* 25 U.S.C. 2711(b)(5), questions concerning what collateral agreements must be reviewed recur with each new cycle of management contracts.

This case is a good vehicle for considering the question presented. The Note plainly does not trigger Commission review under *Catskill Development*'s interpretation, because it does not provide for management of gaming activity. Indeed, the Note does not even give the Tribe the right to any revenue from that activity. It merely requires the Tribe to repay advances made to enable the Tribe to develop a casino (at a reduced interest rate). App. 126a; *see also supra* p. 7. The Note does *reference* gaming activity in describing when payments must be made and in setting reduced payment levels in case of financial difficulties. App. 126a. But those references do not confer any management authority over gaming activity. Thus, while the references make the Note "collateral" to a man-

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[7] *See, e.g.,* Letter from Eric Shepard to George Gholson, Chairman of Timbisha Shoshone Tribe, August 27, 2013 at 5, *available at* http://bit.ly/2FyVZjM; Letter from Penny J. Coleman to Larriann Musick, chairman of La Jolla Band of Luiseno Indians, April 2, 2010, at 7, *available at* http://bit.ly/2HvKvKh; Letter from Penny J. Coleman to Michell Hicks, Principal Chief of Eastern Band of Cherokee Indians, March 6, 2008, at 2, *available at* http://bit.ly/2FO1c6H; Letter from Penny J. Coleman to Edward Fleisher, Nov. 3, 2006, at 9, *available at* http://bit.ly/2FA1BKG; Letter from Penny J. Coleman to Chief Paul Spicer, Seneca-Cayuga Tribe of Oklahoma, June 21, 2006, at 9–10, *available at* http://bit.ly/2ImUjYx.

agement contract, they do not make it the sort of collateral agreement that qualifies as a management contract under the Commission's regulations and thus subject to Commission approval under *Catskill Development*.

It is also important to dispel the confusion that the decision below creates in California. Indian gaming has "especially thrived in California." Suzianne Painter-Thome, *If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*, 14 LEWIS & CLARK L. REV. 311, 317 (2010). California has a disproportionate number of Indian casinos, and their revenues are the highest in the country. National Indian Gaming Comm'n, Gross Gaming Revenues by Region 2015 and 2016, *available at* https://www.nigc.gov/commission/gaming-revenue-reports. As a consequence, absent review, the California Court of Appeal's decision in this case will have a disproportionate impact on Indian gaming operations.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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