No. 18-61

In the Supreme Court of the United States

STAND UP FOR CALIFORNIA!, ET AL., PETITIONERS

v.

DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Under the Indian Reorganization Act (Act), 25 U.S.C. 5101 *et seq.* (Supp. V 2017), the Secretary of the Interior (Secretary) may take land into trust for "Indians," 25 U.S.C. 5108 (Supp. V 2017), a term that is defined to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. 5129 (Supp. V 2017). The term "tribe," wherever used in the Act, "shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Ibid.* Under the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, where the Secretary takes into trust "off-reservation" land, he may authorize a gaming establishment on those trust lands only if, *inter alia*, he determines that such an establishment "would not be detrimental to the surrounding community." 25 U.S.C. 2719(b)(1)(A). The questions presented are:

1. Whether the Secretary's determination that a gaming establishment on land that the Secretary acquired in trust for the North Fork Rancheria of Mono Indians (North Fork) would not be detrimental to the surrounding community within the meaning of 25 U.S.C. 2719(b)(1)(A) was rationally explained and supported by substantial evidence concerning the establishment's projected effect on problem gambling.

2. Whether the Secretary permissibly determined that North Fork was an "Indian tribe * * * under Federal jurisdiction" in 1934 within the meaning of 25 U.S.C. 5129 (Supp. V 2017) based on, *inter alia*, the Secretary having conducted a vote among all adult Indians residing on North Fork's reservation as to whether they wished to opt out of the statute's application to them.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 879 F.3d 1177. The opinion of the district court (Pet. App. 32-264) is reported at 204 F. Supp. 3d. 212.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2018. A petition for rehearing was denied on April 10, 2018 (Pet. App. 265-266). The petition for a writ of certiorari was filed on July 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 2012, the Secretary of the Interior (Secretary), acting through the Assistant Secretary for Indian Affairs, issued a record of decision to acquire into trust for the North Fork Rancheria of Mono Indians (North Fork or the Tribe) 305.49 acres of land in

Madera County, California. Pet. App. 5. The Secretary also determined that a gaming establishment on the trust lands "would be in the best interest of the [North Fork] tribe and its members, and would not be detrimental to the surrounding community" within the meaning of 25 U.S.C. 2719(b)(1)(A), and the Governor of California concurred. Pet. App. 3-4. The district court upheld those determinations, *id.* at 32-264, and the court of appeals affirmed, *id.* at 1-31.

1. a. Enacted in 1934, the Indian Reorganization Act (IRA or Act), 25 U.S.C. 5101 *et seq.* (Supp. V 2017),[1] seeks "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973) (citation omitted). The IRA authorizes the Secretary, "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands * * * within or without existing reservations * * * for the purpose of providing land for Indians." 25 U.S.C. 5108. The IRA defines "Indian" to include:

> [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and * * * [3] all other persons of one-half or more Indian blood.

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[1] All references to Sections of the IRA are found in the 2017 Supplement of the United States Code.

25 U.S.C. 5129. In addition, the term "'tribe' wherever used in th[e IRA] shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Ibid.*

In *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), this Court held that the phrase "now under Federal jurisdiction" in Section 5129 "unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Id.* at 395.[2] Accordingly, the Court held that Section 5108 did not authorize the Secretary to take land into trust for the Narragansett Tribe, which the Court determined was not under federal jurisdiction when the IRA was enacted. *Id.* at 382-383.

In a concurring opinion, Justice Breyer observed that "an interpretation that reads 'now' as meaning 'in 1934' may prove somewhat less restrictive than it at first appears." *Carcieri*, 555 U.S. at 397. That is because, he explained, "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time." *Ibid.* For instance, Justice Breyer observed, historical evidence indicated that around the time of the IRA, federal officials "wrongly" treated some tribes as not being under federal jurisdiction. *Id.* at 398. If one of those tribes was later recognized, Justice Breyer explained, then the tribe might qualify under the theory that "later recognition reflects earlier 'Federal jurisdiction.'" *Id.* at 399. He noted that "[t]he statute * * * imposes no time limit upon recognition." *Id.* at 398.

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[2] When *Carcieri* was decided in 2009, the IRA's definition of "Indian" was codified at 25 U.S.C. 479 (2006). In 2016, Title 25 was reclassified, and the provisions of the IRA were renumbered as cited in the text.

Justice Souter, joined by Justice Ginsburg, concurred in part and dissented in part. He agreed with Justice Breyer that "[n]othing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content." *Carcieri*, 555 U.S. at 400. He observed that, "in the past, the Department of the Interior has stated that the fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at that time." *Ibid.*

When it enacted the IRA, Congress directed the Secretary, within one year of the Act's passage, "to call * * * an election" at each "reservation" to allow the adult residents there to opt out of the statute's coverage. 25 U.S.C. 5125. Congress further provided that the Secretary's authority to take land into trust under Section 5108 "shall apply to all tribes notwithstanding the provisions of [S]ection 5125." 25 U.S.C. 2202 (Supp. V 2017). Accordingly, tribes that once voted to opt out of the IRA's coverage may nevertheless have the Secretary acquire land in trust for them. See *Carcieri*, 555 U.S. at 394-395 (recognizing the effect of this provision).

b. In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). IGRA recognizes the "exclusive right" of Indian tribes to conduct gaming on "Indian lands," subject to certain conditions. 25 U.S.C. 2701(5); see 25 U.S.C. 2710. One such condition is that no tribe may conduct gaming activities on lands acquired in trust by the Secretary after October 17, 1988 (IGRA's effective date), 25 U.S.C. 2719(a), unless the acquisition falls under a specified exception, 25 U.S.C. 2719(b) (2012 & Supp. V 2017).

Under one such exception, a tribe may conduct gaming on trust lands acquired by the Secretary after October 17, 1988, if the Secretary "determines that [1] a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and [2] would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. 2719(b)(1)(A). Congress adopted this so-called "two-part determination" and the other exceptions contained in Section 2719(b) to ensure that tribes whose federally recognized status was acknowledged only after IGRA's enactment would not be "disadvantaged relative to more established ones." *City of Roseville* v. *Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003), cert. denied, 541 U.S. 974 (2004).

Under regulations of the Department of the Interior (Interior) implementing Section 2719(b), a tribe's application for a two-part determination must contain the "[a]nticipated cost, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment." 25 C.F.R. 292.18(e). When the regulations were promulgated, the Secretary considered but declined to require information about the "social costs attributable to compulsive gamblers enrolled and not enrolled in treatment programs." 73 Fed. Reg. 29,354, 29,369 (May 20, 2008). The application must also contain "[a]ny other information that may provide a basis for a Secretarial Determination whether the proposed gaming establishment would or would not be detrimental to the surrounding community." 25 C.F.R. 292.18(g). The Secretary "will consider all the information submitted" in the application. 25 C.F.R. 292.21(a).

2. In 2004, North Fork, a federally recognized Indian tribe, requested that the Secretary acquire 305.49 acres of land in trust for the Tribe in Madera County, California, on which it might conduct gaming. 69 Fed. Reg. 62,721 (Oct. 27, 2004); see Pet. App. 36, 50-51. In September 2011, the Secretary issued a record of decision making the requisite two-part determination that North Fork's gaming establishment would be in the Tribe's best interest and that it would not be detrimental to the surrounding community. Pet. App. 38, 52-53; see C.A. App. 3867-3961. The Governor of California concurred shortly thereafter. Pet. App. 4.

In November 2012, the Secretary issued a separate record of decision determining that the IRA authorized him to acquire land in trust for North Fork. Pet. App. 54-55; see C.A. App. 4035-4103. In addressing whether the Tribe was "under Federal jurisdiction" in 1934 within the meaning of 25 U.S.C. 5129, the Secretary explained that pursuant to 25 U.S.C. 5125, "a majority of the adult Indians residing at the [North Fork] Tribe's Reservation voted to reject the IRA at a special election duly held by the Secretary on June 10, 1935." Pet. App. 160-161 (citation omitted; brackets in original).[3]

More than two decades after conducting that election, and in accordance with then-prevalent policy of assimilating Indians into contemporary society, Congress enacted the Act of Aug. 11, 1964 (California Rancheria Act), Pub. L. No. 88-419, 78 Stat. 390 (amending Act of Aug. 18, 1958, Pub. L. No. 85-671, 72 Stat. 619), which

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[3] The IRA provided that elections to accept its provisions should be held by June 18, 1935, 25 U.S.C. 5125, and Congress later extended that period through June 18, 1936, see Act of June 15, 1935, ch. 260, § 2, 49 Stat. 378.

directed the Secretary to distribute North Fork's reservation lands to its residents within a "reasonable time." *Ibid.* Although the Secretary attempted to implement the California Rancheria Act's direction to divest the United States of title to the North Fork reservation lands, California Indians later brought a class action on behalf of numerous rancherias (including North Fork) seeking an injunction to "unterminate" the rancherias. See *Amador Cnty.* v. *Salazar*, 640 F.3d 373, 375-376 (D.C. Cir. 2011) (citations omitted) (discussing *Hardwick* v. *United States*, No. C-79-1710 (N.D. Cal. filed July 12, 1979)). The government settled that suit and agreed that the Rancherias "were never and are not now lawfully terminated." *Id.* at 376 (citation omitted); accord C.A. App. 549-550, 565 (stipulations respecting North Fork). Pursuant to the settlement, the Secretary placed North Fork on the official list of federally recognized tribes, where it has remained ever since. 50 Fed. Reg. 6055, 6057 (Feb. 13, 1985); 49 Fed. Reg. 24,084 (June 11, 1984) (memorializing the *Hardwick* settlement).

After completing the administrative processes under IGRA and the IRA, the Secretary acquired the Madera County parcel in trust for the Tribe. Pet. App. 57.

3. Petitioners brought a claim under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, alleging that the Secretary violated IGRA, the IRA, and other statutes in approving the two records of decision required for the construction and operation of North Fork's casino. Pet. App. 37-38. Specifically, petitioners asserted (1) that the Secretary's determination that the proposed gaming activities would not be detrimental to the surrounding community was contrary to law and not supported by substantial evidence, and (2) that North

Fork was not "under Federal jurisdiction" in 1934 because it was not a cohesive tribe at that time. *Id.* at 118, 155-156. North Fork intervened in support of the federal defendants. *Id.* at 5.

a. The district court granted summary judgment to the federal respondents and North Fork on those claims. Pet. App. 32-264. With respect to the Secretary's determination that the proposed gaming activities would not be detrimental to the surrounding community, the court explained that the Secretary had "acknowledged the negative impacts" of the casino on the surrounding community and properly determined that, "overall," they would not be detrimental to the surrounding community within the meaning of IGRA. *Id.* at 126. The court observed that the Secretary's regulations "expressly limited" consideration of problem gambling to "'anticipated costs of treatment programs'" and consequently excluded "'social costs'" of those who did not seek treatment. *Id.* at 150-151 (quoting 73 Fed. Reg. at 29,369). The court determined that the Secretary "adequately addressed the mitigation" of treatment costs for problem gambling and "'clearly considered this aspect of the problem.'" *Id.* at 151 (citation omitted). According to the court, the Secretary's determination that all identified impacts could be adequately mitigated was "reasonable based upon the evidence and analysis reflected in the record." *Id.* at 153.

b. With respect to the IRA, the district court found the Secretary's determination that North Fork was "under Federal jurisdiction" in 1934 to be well-founded. Pet. App. 163. The court explained that "the holding of an election in 1935, required by a 1934 federal statute, at an Indian tribe's reservation, clearly reflects federal obligations, duties, responsibility for or authority over

the tribe by the Federal Government both before and after 1934." *Ibid.* (brackets, citation, and internal quotation marks omitted). The court further stated that the text of Section 5129, which defines "tribe" for purposes of the IRA to mean "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation," 25 U.S.C. 5129, does not require a tribe to be "'single,' 'unified,' or comprised of members of the same historically cohesive or ethnographically homogenous tribe." Pet. App. 183.

4. The court of appeals affirmed. Pet. App. 1-31.

a. The court of appeals upheld the Secretary's IGRA finding that the proposed gaming facility would not be detrimental to the surrounding community. Pet. App. 18-27. The court rejected petitioners' contention that the Secretary was not permitted to consider any community benefits of the proposed casino. *Id.* at 19. The court stated that petitioners "point[] to nothing in IGRA that forecloses the [Secretary], when making a non-detriment finding, from considering a casino's community benefits, even if those benefits do not directly mitigate a specific cost imposed by the casino." *Id.* at 20. The court noted that petitioners did not challenge Interior's regulation that permits the Secretary to consider any information that may provide a basis for determining if the proposed gaming establishment would be detrimental to the community, and it deferred to the Secretary's reasonable view that the regulation permits the Secretary to consider community benefits of gaming. *Ibid.* (citing 25 C.F.R. 292.18(g), 292.21(a)).

The Secretary was "[w]ell aware," the court of appeals explained, that the casino would result in new problem gamblers in the community, but the Secretary reasonably relied on North Fork's promise to cover the

entire amount of the estimated treatment costs for those problem gamblers. Pet. App. 22. The court further stated that even if the promised mitigation did not perfectly address all negative effects of the gaming establishment, petitioners failed to show that any residual effects were "so substantial" as to require the Secretary to conclude that a casino would be "detrimental." *Id.* at 23; see *id.* at 22-23.

b. The court of appeals further rejected petitioners' contention that the Secretary lacked authority under the IRA to take land into trust for North Fork. Pet. App. 8-17. The court determined that ample record evidence supported the Secretary's determination that North Fork was a cohesive tribe "under Federal jurisdiction" in 1934. *Id.* at 12. In light of petitioners' concession that an election conducted pursuant to the IRA was "sufficient" to support that point, *id.* at 8, the court rejected petitioners' contention that the record did not establish that the voters in the 1935 election at North Fork's reservation were members of any one tribe, *id.* at 8-9. The court explained that those voters were "'Indians residing on one reservation' at that time and so, by the IRA's own terms, constituted a 'tribe.'" *Id.* at 9 (quoting 25 U.S.C. 5129).

The court of appeals rejected petitioners' reliance on contemporaneous agency statements purportedly concluding that residency was distinct from tribal affiliation. Pet. App. 10. The court stated that any such materials "cannot overcome the IRA's clear text" and would at most "suggest that a reservation resident might also belong to another tribe that is *not* territorially defined." *Ibid.* The court observed that Congress did not "preclude[] the possibility of holding dual tribal

identities, one based on cultural or genealogical ties and another on residency." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 9-12) that the Secretary's finding that the proposed gaming establishment would not be detrimental to the surrounding community violated IGRA because the Secretary impermissibly weighed the project's economic benefits against the negative effects of new problem gambling. Petitioners further contend (Pet. 12-18) that the Secretary lacked authority under the IRA to take land into trust for North Fork because the record does not demonstrate that North Fork was an "Indian tribe" under federal jurisdiction in 1934. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. Although gaming generally may not be conducted on lands acquired in trust for an Indian tribe after October 17, 1988, the Secretary determined that gaming could occur on the land it acquired in trust for North Fork in Madera County based on a determination that that gaming would be in the best interest of the Tribe and would not be detrimental to the surrounding community. 25 U.S.C. 2719(b)(1)(A). The Secretary's decision was reasonably explained and supported by substantial evidence concerning the establishment's projected effect on problem gambling. That factbound decision does not warrant this Court's review.

a. Under Interior's regulations implementing the Section 2719(b) exceptions, the Secretary considers the "[a]nticipated cost, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment."

25 C.F.R. 292.18(e); see 25 C.F.R. 292.21(a). As explained above (p. 5, *supra*), in promulgating the regulations, the Secretary considered and rejected a requirement that the agency analyze the "social costs attributable to compulsive gamblers enrolled and not enrolled in treatment programs." 73 Fed. Reg. at 29,369. Petitioners do not challenge Interior's regulation, which is entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984); cf. *Citizens Exposing Truth About Casinos* v. *Kempthorne*, 492 F.3d 460, 467 (D.C. Cir. 2007) (according *Chevron* deference to the Secretary's determination that a Section 2719(b) exception was satisfied).

Consistent with Interior's regulation, the Secretary estimated the treatment costs that Madera County would likely incur by examining a study conducted by the State of California, in which the County participated, to estimate the number of problem gamblers likely resulting from the proposed casino. See C.A. App. 710-711. In finding that the casino would not be detrimental to the surrounding community, the Secretary relied on North Fork's promise to pay the estimated $63,606 in treatment costs of an additional part-time counselor: $50,000 in annual payments earmarked for treatment expenses, *id.* at 711, and an additional $1,038,310 annual lump-sum payment that specifically incorporates the remaining $13,606, see Pet. App. 22, 245-246; C.A. App. 712-713. In addition, North Fork promised to undertake other mitigation measures such as training its staff, educating the public about problem gambling and treatment, refusing services to problem gamblers, and establishing procedures for gamblers to exclude themselves from the facility. See C.A. App. 3911-3912, 3948-3949. Based on the foregoing, the Secretary reasonably

determined that the potential effects of problem gambling were reduced to a "less than significant level." *Id.* at 711.

b. Petitioners contend (Pet. 9-10), however, that the Secretary made his non-detriment finding only after concluding that "the economic benefits of gaming * * * outweigh[] the detriments." Petitioners misinterpret the record. The Secretary relied on record evidence to estimate treatment costs, and North Fork reimbursed those costs dollar-for-dollar. See p. 12, *supra*. Accordingly, there are no unfunded treatment costs to balance against project benefits. The district court correctly explained that "the Secretary did not conclude that the benefits outweigh any detriments, or suggest that the benefits to the surrounding community will compensate the community for any detriments." Pet. App. 125-126 (brackets, citations, and internal quotation marks omitted). Rather, the Secretary found that the "weight of the evidence in the record strongly indicates" that North Fork's gaming establishment "would not result in detrimental impact on the surrounding community." *Id.* at 126 (citation omitted).

Under Interior's unchallenged regulation, the Secretary does not consider the social costs attributable to problem gamblers. Requiring the Secretary to address social problems like "bankruptcy, suicide, and divorce," as petitioners suggest (Pet. 9), would entail federal involvement in traditionally state matters, upending the balance that Congress struck in enacting IGRA. See 25 U.S.C. 2702 (policy declaration). Should petitioners desire a different balance of interests, they may seek legislative change. See, *e.g.*, H.R. 5079, 114th Cong., 2d Sess. (2016) (proposing limitations on the Secretary's

authority to approve gaming in California under Section 2719(b)(1)(A)).

Even if a benefits-and-costs balancing approach were at issue, the court of appeals' approval of the Secretary's decision as "permissibl[e]" is sound. Pet. App. 23; see *id.* at 125. Petitioners point to nothing in IGRA that prohibits the Secretary from considering a casino's community benefits, *id.* at 20, and Interior's regulations expressly authorize the Secretary to consider "[a]ny other information that may provide a basis" for determining whether a proposed casino would be detrimental to the surrounding community, 25 C.F.R. 292.18(g). Petitioners do not challenge that regulation.

Petitioners contend (Pet. 11-12) that allowing the Secretary to consider the casino's net effect in determining whether it would be detrimental to the surrounding community means that a monetary payment could always offset detrimental impacts that will be caused by gaming, even where the Secretary never analyzes whether problem gambling services could be employed at a particular casino. That contention ignores the Secretary's determination that problem gambling treatment costs would be fully mitigated. That determination was supported by a study in which Madera County participated, conducted by California's Office of Problem Gambling—a state agency that provides expertise for disorder-prevention and treatment programs. C.A. App. 710-711; see Pet. App. 128-129, 245; see also Cal. Welf. & Inst. Code §§ 4369, 4369.2 (West 2016). Petitioners identify no reason why Madera County and North Fork could not work with that office to ensure that the problem gambling services contemplated by the Secretary's decision are implemented effectively.

Petitioners assert (Pet. 9-12) that the first question presented is of exceptional importance because the court of appeals' decision will allow the Secretary to make the two-part determination in 25 U.S.C. 2719(b)(1)(A) any time the Tribe is willing to pay for offsetting problem-gambling treatment costs. That assertion overstates the likely practical effect of the decision below. The two-part determination process has "not [been] widely used by tribes seeking to conduct gaming," S. Rep. No. 199, 114th Cong., 1st Sess. 6 n.32 (2015), and the Secretary's determination has no effect unless the State's governor agrees with it.[4]

Although a court's inquiry must be thorough, the standard of review under the APA is narrow. See *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, the Secretary "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co.* v. *Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983). Substantial evidence supports the Secretary's factual conclusions, and further review is not warranted. See *Dickinson* v. *Zurko*, 527 U.S. 150, 164 (1999); see also *Kappos* v. *Hyatt*, 566 U.S. 431, 436 (2012) (affirming review of "factual findings under the APA's deferential 'substantial evidence' standard").

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[4] Interior has informed this Office that it has identified 51 requests by tribes (including the request in this case) seeking a two-part determination since IGRA's enactment, only ten of which resulted in fully positive determinations in which a governor concurred. Although challenges to a few such determinations by the Secretary are now being litigated, no new two-part determinations have been rendered since January 2017.

2. a. Petitioners further contend (Pet. 12-18) that the court of appeals erred in holding that the Secretary articulated an adequate basis for concluding that the Indian residents of North Fork Rancheria in 1934 were members of an "Indian tribe" within the meaning of the IRA. That contention is incorrect. The IRA defines "tribe" to include "any Indian tribe" and "the Indians residing on one reservation." 25 U.S.C. 5129. As the court of appeals explained, the Secretary's efforts in 1916 to purchase the North Fork Rancheria for the Tribe's use with funds appropriated by Congress "confirms the North Fork's longstanding tribal existence." Pet. App. 11. The court further held that the Indians of North Fork Rancheria who voted in an election conducted shortly after the IRA's passage constituted an Indian tribe within the meaning of Section 5129 because they were residing together on a reservation. Pet. App. 8-9.

b. Petitioners contend (Pet. 14-15) that the court of appeals' interpretation of the IRA's plain text is wrong because it would expand the Secretary's authority by allowing the Secretary to acquire land in trust for the "descendants of any Indian [who was] living on a reservation in 1934." But the Secretary acquired the land at issue for North Fork, not for individual Indians, and the Secretary has discretionary authority to acquire land for individual Indians only under conditions not present here. See 25 C.F.R. 151.3(b) (providing that the Secretary may acquire land in trust for individual Indians "(1) [w]hen the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or (2) [w]hen the land is already in trust or restricted status").

To the extent petitioners are arguing that the court of appeals' decision expands the Secretary's authority to take land into trust for currently federally recognized tribes, that argument is also incorrect. Petitioners do not dispute that the Indians on North Fork's reservation were "under Federal jurisdiction" in 1934. 25 U.S.C. 5129; see Pet. App. 8. Rather, they contend (Pet. 15-16) that those Indians were not a "formal tribe" in 1934. According to petitioners (*ibid.*), the definition of "tribe" in 25 U.S.C. 5129 specifies four different kinds of tribes—(1) "Indian tribe," (2) "band," (3) "pueblo," and (4) "Indians residing on one reservation"—but only the first of these ("Indian tribe") is referenced in Section 5129's definition of "Indian" ("members of any recognized *Indian tribe*"). *Ibid.* (emphasis added). Based on that assumption, petitioners contend (Pet. 15-16) that 25 U.S.C. 5108 does not authorize the Secretary to take land into trust for a tribe referred to as a "band" or "pueblo" or for a tribe comprised of "Indians residing on one reservation."

Petitioners did not present that argument below, and the argument is meritless in any event. The IRA's definition of "tribe" in Section 5129 is not reasonably read to specify four mutually exclusive categories. Nor is the definition of "Indian" in the same provision reasonably read to include only members of the first category of "tribe." Members of Indian entities recognized by the United States are considered "Indians" whether the federal government refers to the group as an "Indian tribe," "band," or "pueblo"—all of which are anthropological terms without legal significance.

Moreover, petitioners' proposed distinction between the terms "tribe," "band," and "pueblo" finds no support in the Secretary's actual practice of extending federal

recognition to Indian tribes. The federal government does not differentiate among currently recognized tribes based on which, if any, of those terms appear in their respective names. When Congress directed the Secretary to publish annually a current list of federally recognized Indian tribes, it broadly defined "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." 25 U.S.C. 5130(2). The current list includes many Indian entities incorporating the word "Band," "Pueblo," or similar descriptors into their names. 83 Fed. Reg. 4235, 4236-4240 (Jan. 30, 2018). In petitioners' view, those tribes would not be eligible to have land taken into trust for them under the IRA.

The IRA's definition of "tribe" is better understood as including two categories: (1) Indian communities recognized as tribes outside of the context of the IRA (whether referred to as "Indian tribe," "band," "pueblo," or something else) based on their genealogical, social, and political relationships; and (2) Indians residing together on a reservation recognized as a tribe under the IRA. Both categories are entitled to the IRA's benefits.

c. Petitioners contend (Pet. 16) that the court of appeals' decision is inconsistent with two legal opinions in which the Solicitor of the Interior in 1934 answered a variety of questions about the newly enacted IRA. The court rejected petitioners' reliance on those documents on the ground that "agency statements cannot overcome the IRA's clear text" and further observed that the materials cited by petitioners "are fully consistent with the proposition that the residents of a single reservation constitute a tribe under the IRA." Pet. App. 10.

d. Furthermore, petitioners' contention (Pet. 17-18) that the court of appeals' decision "undermines the 'inherent sovereign power' held by 'Indian tribe[s]'" misapprehends the governing law and the IRA's text. Pet. 17 (citation omitted; brackets in original). In petitioners' view, a community of Indians residing together on a reservation cannot constitute an "Indian tribe" unless they have followed the "statutory method" for exercising their right to adopt a constitution and bylaws under the IRA. *Ibid.* (citing 25 U.S.C. 5123). The cited provision, however, provides a "right," not an obligation, to organize in that way, 25 U.S.C. 5123(a), and it expressly recognizes that tribes may adopt governing documents under other procedures, 25 U.S.C. 5123(h).

e. Finally, petitioners' argument (Pet. 17-18) that Congress had no authority to recognize Indians residing together on a reservation as a tribe was not presented below and lacks merit in any event. Petitioners misplace reliance (Pet. 17) on *United States* v. *Sandoval*, 231 U.S. 28 (1913), in which a federal indictment for introducing intoxicating liquor into Santa Clara Pueblo was dismissed on the ground that the Pueblo was not "Indian country." *Id.* at 36. This Court reversed, explaining that the Pueblo people were Indians. After reviewing Pueblo customs in some detail, the Court concluded that, under the Indian Commerce Clause and long-established legislative, executive, and judicial practice, it was for Congress, not the judiciary, to determine whether federal guardianship over Indians may cease. *Id.* at 38-49. Having so held, this Court observed that "it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe,

but only that in respect of *distinctly Indian communities* the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Id.* at 46 (emphasis added).[5]

This Court thus has long recognized that "distinctly Indian communities" have arisen as a result of past federal policies toward Indians. For example, in *United States* v. *McGowan*, 302 U.S. 535 (1938), the Court held that the Reno Indian Colony was Indian country subject to federal jurisdiction even though it was "composed of several hundred Indians residing on" land purchased by Congress in order "to provide lands for needy Indians scattered over the State of Nevada." *Id.* at 537; see *id.* at 539. Through treaties, statutes, and executive orders, many reservations were established for Indians from multiple aboriginal communities with the combined community thereafter recognized as a tribe. Under the Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927, for example, Snohomish, Snoqualmie, Skokomish, and Indians from other signatory tribes were allowed to settle on the Tulalip Reservation in Washington State and are together now federally recognized as the

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[5] Nor is petitioners' argument (Pet. 18) advanced by citing *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). That case identified the structure and legislative history of the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.*, 436 U.S. at 60-62, as well as the possible intrusion upon a "tribe's right to define its own membership," as supporting the conclusion that the judiciary should not recognize an implied civil action for declaratory or injunctive relief under that statute, *id.* at 72 & n.32. In no way does the case support petitioners' contention (Pet. 17-18) that Congress may not define "Indian tribe" as it has done through Section 5129's plain text.

Tulalip Tribes. See Tulalip Tribes, *We are Tulalip*, http://www.tulaliptribes-nsn.gov.

The aboriginal communities of California suffered exceptional population decline and dislocation. As a result, members of many of California's federally recognized tribes descend from ancestors who had lived in different aboriginal communities prior to contact with settlers. See, *e.g.*, *City of Roseville* v. *Norton*, 348 F.3d 1020, 1022 (D.C. Cir. 2003) (upholding the Secretary's decision to take land into trust for the Auburn Indian Band "formed when several surviving families of the Maidu and Meiwok Tribes * * * grouped into a small community that survived much of the depredation that came with the settlement of California"), cert. denied, 541 U.S. 974 (2004); see also *County of Amador* v. *United States Dep't of the Interior*, 872 F.3d 1012, 1015 (9th Cir. 2017) (upholding Interior's decision to take land into trust for the Ione Band of Miwok Indians, an "amalgamation of several 'tribelets' indigenous to Amador County and the surrounding area," including the Northern Sierra Miwok, the Wapumne, the Foothill Nisenan, and the Plains Miwok), cert. denied, No. 17-1432 (Oct. 1, 2018). Congress was aware of the situation of the California Indian communities, yet it did not exempt them from the IRA, as it originally did for certain tribes in other regions. See 25 U.S.C. 5118 (excluding Alaska Natives and Oklahoma Indians from application of certain IRA provisions in 1934); cf. 25 U.S.C. 5119 (extending the Act to those groups two years later); 25 U.S.C. 5201-5210 (Supp. V 2017) (extending similar provisions to those groups two years later).

f. Petitioners identify no circuit conflict on the IRA issue. To the contrary, the Ninth Circuit recently considered the same issue in a dispute concerning another

California Rancheria, and it agreed with the court of appeals' decision in this case that "nothing in the text of the IRA requires a tribe within the meaning of [Section 5129] to be single, unified, or comprised of members of the same historically cohesive or ethnographically homogenous tribe." *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty.* v. *Zinke*, 889 F.3d 584, 595 (2018) (brackets, citations, and internal quotation marks omitted). In the absence of any circuit conflict, petitioners have identified no issue of exceptional importance that would warrant this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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