No. 18-61

IN THE

Supreme Court of the United States

STAND UP FOR CALIFORNIA!, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT NORTH FORK RANCHERIA OF MONO INDIANS

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QUESTIONS PRESENTED

The petition seeks review of the D.C. Circuit's decision upholding two determinations by the Department of the Interior (the "Department")—pursuant to the Indian Gaming Regulatory Act ("IGRA") and the Indian Reorganization Act ("IRA"), respectively—to authorize a proposed gaming project by the North Fork Rancheria of Mono Indians ("North Fork"). The questions presented are:

1. Whether the D.C. Circuit correctly upheld the Department's determination that North Fork's proposed gaming project "would not be detrimental to the surrounding community," pursuant to 25 U.S.C. § 2719(b)(1)(A) and IGRA regulations.

2. Whether the D.C. Circuit correctly upheld the Department's determination that it had authority to acquire land in trust for North Fork pursuant to 25 U.S.C. § 5108 based on the historical evidence in the administrative record.

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INTRODUCTION

For years, Stand Up for California! ("Stand Up") has engaged in a "scorched earth effort," Pet. App. 262, through multiple overlapping lawsuits, to derail respondent North Fork's plans to build a gaming facility to support its economic development and provide for its members' urgent needs. After nearly seven years of review, which generated an administrative record spanning more than 40,000 pages, the Department concluded that North Fork was eligible to have land taken into trust for it under the IRA and—with the Governor of California's concurrence—that the gaming project would be in North Fork's best interest and not detrimental to the surrounding community, under IGRA.

The District Court for the District of Columbia rejected Stand Up's challenges to the Department's determinations in a 170-page opinion. The D.C. Circuit affirmed, admonishing Stand Up, "Enough is enough!" Pet. App. 17. Undeterred, Stand Up now asks this Court to review issues as to which no split of authority exists and that the D.C. Circuit decided correctly. This Court should decline that request.

Stand Up argues that the D.C. Circuit erred in upholding the Department's determination under IGRA that North Fork's proposed gaming project "would not be detrimental to the surrounding community," 25 U.S.C. § 2719(b)(1)(A). In Stand Up's view, *any* unmitigated negative impact from a gaming establishment—however minor—precludes a finding of no detriment and therefore forecloses gaming, even where the project will provide substantial benefits and its overall effect on the community is therefore not detrimental. Stand Up also challenges the D.C. Circuit's holding that the Department had the authority to acquire land in trust for North Fork under the IRA. Stand Up argues that the Department improperly relied on an election held at the North Fork reservation in 1935, under section 18 of the IRA, as a basis to determine that North Fork was an Indian tribe under federal jurisdiction in 1934, when the IRA was enacted. These issues do not warrant this Court's review, for three reasons.

1. No case from any court conflicts with the D.C. Circuit's decision. As to the first question presented, Stand Up identifies no other court of appeals that has even considered a determination that a gaming establishment would not be detrimental to the surrounding community under IGRA—let alone any court of appeals that has disagreed with the D.C. Circuit's approach. As to the second question presented, Stand Up conspicu-

ously ignores the Ninth Circuit's decision "agree[ing]" with the D.C. Circuit that the Department may rely on a section 18 election held at a reservation to find that the residents of that reservation were an Indian tribe for which land can be taken into trust under the IRA. *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty.* v. *Zinke*, 889 F.3d 584, 594-596 (9th Cir. 2018). Strikingly, Stand Up ignores *Cachil Dehe* even though it was a party to that consolidated litigation. Far from there being any conflict among the courts of appeals on the IRA issue, the only two circuits that have considered the issue are expressly in accord.

2. Stand Up also fails in its effort to identify errors in the D.C. Circuit's decision. Its challenge to the D.C. Circuit's IGRA analysis is unsupported by the statutory text and ignores the Department's implementing regulations, which prescribe the very method of analysis that Stand Up contends was improper. Stand Up never challenged the validity of those regulations below and cannot use review in this Court to cure its failure to bring a timely challenge to the regulations under the Administrative Procedure Act. And Stand Up's criticism of the D.C. Circuit's IRA analysis fails under the plain text of the statute, which makes clear that "the Indians residing on one reservation" are, by definition, an Indian tribe for which land may be taken into trust. *See* 25 U.S.C. § 5129.

3. Finally, this case is a poor vehicle to decide either of the questions presented. Because Stand Up never challenged the governing IGRA regulations, its arguments regarding detriment to the surrounding community reduce to a contention that, under those regulations, the Department's determination is not supported by the record. That fact-bound, case-specific question does not warrant this Court's review. This

case also presents no occasion to resolve Stand Up's IRA question because other record evidence—which Stand Up does not challenge—independently supports the conclusion that North Fork was an Indian tribe under federal jurisdiction in 1934 (and well before that). Thus, even if this Court were to agree with Stand Up that the section 18 election is insufficient by itself to support that conclusion, the D.C. Circuit's decision and the Department's trust determination would still stand.

The petition should be denied.

STATEMENT

A. The North Fork Rancheria Of Mono Indians

North Fork is a federally recognized Indian tribe based in Madera County, California. Its roughly 2,000 citizens are the descendants of Mono Indians who used and occupied the lands in the Sierra Nevada foothills and the San Joaquin Valley for countless generations. *See* C.A.J.A. 3927-3933; Pet. App. 41-42.

North Fork has historically been deprived of lands and resources necessary for economic development and tribal self-determination. In the 1850s, the United States military drove North Fork and other tribes out of their homes in the Sierra Nevada foothills, which were rich in resources and could be mined for gold. Pet. App. 42. Congress then passed a statute extinguishing Indian title to land in California, leaving North Fork and other tribes landless—without legal rights to their homelands and without formal reservations. Pet. App. 43.

In 1916, the federal government acquired an 80-acre parcel near the town of North Fork to be North Fork's reservation. Pet. App. 43. That reservation, known as the North Fork Rancheria, was "'poorly lo-

cated,'" "'absolutely worthless as a place to build homes on,'" and "essentially uninhabitable." Pet. App. 43-44. Nonetheless, as of June 1935, when the Department held an election on the Rancheria pursuant to section 18 of the then-recently enacted IRA (to determine whether the tribe wanted to opt out of the IRA), at least six adult Indians were living on the Rancheria. Pet. App. 44; C.A.J.A. 4614. Those individuals were eligible to participate in the election, and four of them voted. C.A.J.A. 4614.

Some two decades later, however, Congress passed the California Rancheria Act (the "CRA"), which, in keeping with the federal assimilation policy prevalent at the time, authorized the Secretary of the Interior to terminate the trust relationship with North Fork and other tribes and to transfer tribal lands from federal trust ownership to individual fee ownership. Pet. App. 44; *see* Pub. L. No. 85-671, 72 Stat. 619 (1958).

The federal government reversed course in 1983. To resolve a case challenging the termination of trust relationships under the CRA, the federal government entered into a stipulated judgment in which it agreed to restore and confirm the Indian status of persons who had lost such status under the CRA and to recognize tribes, including North Fork, "as Indian entities with the same status as they possessed" prior to the CRA's enactment in 1958. C.A.J.A. 550 (*Hardwick* v. *United States*, No. C-79-1710-SW (N.D. Cal.)). The Department listed North Fork as a federally recognized Indian tribe shortly thereafter. Pet. App. 45-46; 50 Fed. Reg. 6,055, 6,057 (Feb. 13, 1985). North Fork has retained that status ever since.

Today, most of North Fork's citizens live below the poverty line, and their unemployment rate far exceeds

the state and federal rates. *See* C.A.J.A. 3924. Aside from the gaming project that Stand Up has long sought to block, North Fork has no economic development activities or revenue sources other than government grants. C.A.J.A. 3925. As a result of the transfer of ownership that occurred under the CRA, North Fork's Rancheria is held in trust for individual tribal members, not for the Tribe. C.A.J.A. 4049-4050. Its only other trust land is ineligible for gaming under federal law and, in any event, is in a remote, mountainous, and environmentally sensitive area unsuitable for commercial development. *See* C.A.J.A. 3876-3877, 3881-3882, 4044-4045, 4049-4050. Without the planned gaming project, North Fork will not be able adequately to support its tribal government, its citizens' needs, and cultural initiatives preserving the Mono heritage. C.A.J.A. 3925.

B. The IRA And IGRA

1. In 1934, Congress enacted the IRA to "'promote economic development among American Indians, with a special emphasis on preventing and recouping losses of land caused by previous federal policies.'" *Confederated Tribes of Grand Ronde Cmty. of Or.* v. *Jewell*, 830 F.3d 552, 556 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1433 (2017); *see also* Pub. L. No. 73-383, 48 Stat. 984, 984 (1934); *Cohen's Handbook of Federal Indian Law* § 1:05, at 81 (2012 ed.) ("The IRA was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains."). Accordingly, the IRA authorizes the Department to acquire land in trust for "Indians," 25 U.S.C. § 5108, including when the Department "determines that the acquisition of the land is necessary to

facilitate tribal self-determination, economic development, or Indian housing," 25 C.F.R. § 151.3(a)(3).

The statute defines "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 5129. This definition limits the Department's authority to acquire land in trust to "tribes that were under federal jurisdiction at the time the IRA was enacted" in 1934, *Carcieri* v. *Salazar*, 555 U.S. 379, 391 (2009), but requires only that the tribe "be 'recognized' as of the time the Department acquires the land," *Confederated Tribes*, 830 F.3d at 561; *accord County of Amador* v. *U.S. Dep't of Interior*, 872 F.3d 1012, 1024 (9th Cir. 2017), *cert. denied*, 2018 WL 1785280 (Oct. 1, 2018). The IRA provides that "[t]he term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 5129.

Section 18 of the IRA directed the Department to hold an election at each reservation within a year of the IRA's passage to allow adult Indians residing on that reservation to opt out of the statute's coverage if they so wished. 25 U.S.C. § 5125. The results of section 18 elections, however, do not affect the Department's trust authority, meaning that the Department may acquire land in trust even for Indians who voted to opt of the IRA. *See Carcieri*, 555 U.S. at 394-395; C.A.J.A. 4095.

2. In 1988, Congress enacted IGRA to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Although IGRA generally prohibits gaming on lands acquired into trust after its

enactment, *id.* § 2719(a), it contains multiple exceptions that authorize gaming on such lands in certain circumstances. As relevant here, IGRA authorizes gaming on lands acquired after 1988 if the Department makes a two-part determination that "a gaming establishment on newly acquired lands [1] would be in the best interest of the Indian tribe and its members, and [2] would not be detrimental to the surrounding community," and "the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's [two-part] determination." *Id.* § 2719(b)(1)(A).

IGRA regulations promulgated in 2008 provide that the Department will consider multiple factors in determining whether a gaming project would be detrimental to the surrounding community. *See* 25 C.F.R. §§ 292.18, 292.21(a); *see also* 73 Fed. Reg. 29,354 (May 20, 2008). Those factors include: (1) "[a]nticipated impacts on the economic development, income, and employment of the surrounding community"; (2) "[a]nticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them"; (3) "[a]nticipated cost[s], if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment"; and (4) "[a]ny other information that may provide a basis for" the Department's determination. 25 C.F.R. § 292.18(c)-(e), (g).

C. The Department's Two-Part And Trust Determinations

In 2005, North Fork submitted a fee-to-trust application requesting that the Department acquire in trust a 305-acre parcel of unincorporated and mostly vacant land in Madera County (the "Madera Site") pursuant to the IRA. C.A.J.A. 3881, 4049. North Fork also sought

a two-part determination under IGRA to authorize gaming on the site. C.A.J.A. 4118. Madera County's government supported North Fork's request to authorize gaming. C.A.J.A. 3951.

The Department's review lasted nearly seven years, resulting in an administrative record of more than 40,000 pages. In September 2011, the Department issued a favorable two-part determination, finding that North Fork's gaming project "is in the best interest of the Tribe and its citizens" and "would not result in detrimental impact on the surrounding community." C.A.J.A. 3956-3957. The Department based its conclusion on North Fork's application materials, an environmental impact review, the administrative record, and comments received from various interested parties. C.A.J.A. 3873. The Department also considered factors set forth in IGRA regulations, including the mitigation measures that would reduce any potential negative impacts from the project, before determining that the project would not be detrimental to the surrounding community. C.A.J.A. 3933-3951, 3957. The Governor of California formally concurred in the two-part determination in August 2012. C.A.J.A. 4014.

In November 2012, the Department decided to acquire the Madera Site in trust for North Fork, concluding that acquiring the site for gaming would "promote the long-term economic vitality and self-sufficiency, self-determination and self-governance of the Tribe." C.A.J.A. 4101. The Department determined that it had authority to take land in trust for North Fork because "[t]he calling of a Section 18 election at the Tribe's Reservation conclusively establishes that the Tribe was under Federal jurisdiction for *Carcieri* purposes" in 1934. C.A.J.A. 4095. The Department also indicated that the reservation was "the Tribe's" because the fed-

eral government had previously purchased the Rancheria to be North Fork's "tribal land." *Id.* The Department acquired the Madera Site in trust for North Fork in February 2013.

D. District Court Proceedings

Stand Up brought suit in the District Court for the District of Columbia challenging the Department's two-part and trust decisions in December 2012. Pet. App. 55-56. In January 2013, North Fork intervened as a defendant, and that same month, the district court consolidated Stand Up's suit with a similar suit brought by the Picayune Rancheria of the Chukchansi Indians. *See id.*

After nearly four years of litigation, the district court denied Stand Up's motion for summary judgment, granted the federal defendants' and North Fork's motions in part, and dismissed Stand Up's remaining claims. Pet. App. 55-264.

In a 170-page decision, the district court upheld the Department's determination under IGRA that the proposed gaming project would not be detrimental to the surrounding community. The court rejected Stand Up's argument that IGRA requires "'a new gaming development [to] be completely devoid of any negative impacts'" to meet the "not … detrimental to the surrounding community" test. Pet. App. 120-121. The district court also upheld the Department's authority to acquire land in trust for North Fork under the IRA. It reasoned that the section 18 election held on the North Fork Rancheria in 1935 evidenced that North Fork was a tribe under federal jurisdiction when the IRA was enacted. Pet. App. 170-184. The court also noted that other record evidence supported North Fork's exist-

ence as a tribe under federal jurisdiction in 1934, namely the federal government's 1916 purchase of the Rancheria to be North Fork's reservation. Pet. App. 184-189.

E. The D.C. Circuit Decision

Stand Up appealed, and the D.C. Circuit affirmed in a unanimous decision. Pet. App. 1-31.

Rejecting Stand Up's reading of IGRA as "'cramped,'" the D.C. Circuit held that "nothing in IGRA … forecloses the Department, 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." Pet. App. 20. The court added, "Stand Up never even challenge[d] IGRA regulations that expressly allow the Department to consider '[a]ny … information that may provide a basis for a … [d]etermination whether the proposed gaming establishment would or would not be detrimental to the surrounding community.'" Pet. App. 20 (quoting 25 C.F.R. § 292.18(g)) (emphasis omitted). The court of appeals agreed with the district court that Stand Up's reading would foreclose any new gaming establishment under 25 U.S.C. § 2719(b)(1)(A), contrary to IGRA. *Id.*

The D.C. Circuit also upheld the Department's determination that North Fork was an Indian tribe under federal jurisdiction in 1934, holding that "a section 18 election on a reservation establishes that the Indian residents qualify as a tribe subject to federal jurisdiction." Pet. App. 9-10. The court rejected Stand Up's argument that North Fork was not a "tribe," stating that the argument "ignore[d] the IRA's plain text." Pet. App. 8. The court explained that, because the

statutory definition of "tribe" includes "Indians residing on one reservation," the Indians residing on the North Fork Rancheria who participated in the section 18 election in 1935 were a "tribe." Pet. App. 8-9 (emphasis omitted). Moreover, the IRA does not require a "tribe" as defined in the statute to be "single, unified, or comprised of members of the same historically cohesive or ethnographically homogenous tribe." Pet. App. 11 (internal quotation marks omitted). As did the district court, the D.C. Circuit concluded that the federal government's purchase of the North Fork Rancheria in 1916 independently supports the conclusion that North Fork was an Indian tribe under federal jurisdiction in 1934. Pet. App. 11-12.

Stand Up petitioned for rehearing en banc. The D.C. Circuit denied the petition, with no member of the court requesting a vote. Pet. App. 265-266.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT AMONG THE LOWER COURTS

The Court should deny the petition because there is no split of authority on either of the questions presented—as Stand Up does not dispute.

As to the first question presented, Stand Up identifies no other court of appeals that has even reviewed a determination under IGRA that a gaming establishment would not be detrimental to the surrounding community. Stand Up also does not argue that the D.C. Circuit's analysis conflicts with any court of appeals decision. The D.C. Circuit's decision to uphold the Department's IGRA determination thus does not warrant this Court's review.

Nor is there any split of authority on the second question presented. No court has disagreed with the

D.C. Circuit's application of the IRA. To the contrary, the only other circuit to have considered the effect of a section 18 election under the IRA has expressly "agree[d]" with the D.C. Circuit's analysis here. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty.* v. *Zinke*, 889 F.3d 584, 594-596 (9th Cir. 2018). Stand Up does not even mention the Ninth Circuit's decision in its petition—even though it was one of the named plaintiffs in that consolidated litigation.

The agreement between the D.C. and Ninth Circuits on the IRA question is particularly notable because the two decisions had a "nearly identical" posture. *Cachil Dehe*, 889 F.3d at 595. In deciding to acquire land in trust for the Estom Yumeka Maidu Tribe of the Enterprise Rancheria ("Enterprise"), the Department concluded that a section 18 election held at Enterprise's reservation conclusively established Enterprise's existence as a tribe under federal jurisdiction in 1934. *Id.* Stand Up and other plaintiffs argued that the individuals who voted in the election may have had multiple tribal affiliations or no affiliation at all, so they could not constitute a single tribe for IRA purposes. *Id.* at 589 n.1, 595. The Ninth Circuit rejected that argument as "irrelevant" under the plain text of the IRA, much as the D.C. Circuit rejected Stand Up's argument in this litigation. *Id.* at 595; *see* Pet. App. 10-11.

The Ninth Circuit also expressly "agree[d]" with the D.C. Circuit that a pre-1934 land acquisition by the Department on behalf of a tribe demonstrates that the tribe existed and was under federal jurisdiction in 1934. *Cachil Dehe*, 889 F.3d at 596 & n.8 (considering the Department's 1915 land acquisition for Enterprise). Again, there is no conflict warranting this Court's review, and Stand Up does not even attempt to argue otherwise.

II. THE DECISION BELOW IS CORRECT

Certiorari should also be denied because Stand Up fails to identify any fault in the D.C. Circuit's decision, which was correct in all respects.

A. The D.C. Circuit Correctly Upheld The Department's Determination That The Proposed Gaming Project Would Not Be Detrimental To The Surrounding Community

1. The Department properly applied IGRA and its implementing regulations

IGRA requires the Department to determine that a proposed gaming establishment "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). In Stand Up's view (Pet. 9-12), *any* unmitigated detrimental effect, however minor, is fatal to a project—even if the gaming project as a whole is beneficial to the surrounding community and, as here, the project enjoys the support of the local government and the State's governor. C.A.J.A. 3951, 4014. Both the district court and court of appeals rejected what they characterized as Stand Up's "'cramped reading'" of IGRA, which they explained "'would result in barring any new gaming establishments'" under section 2719(b)(1)(A), "given that '[a]ll new commercial developments are bound to entail *some* [unmitigated] costs.'" Pet. App. 20 (quoting Pet. App. 120-121). That assessment was correct.

First, the text of the statute does not support Stand Up's reading. Contrary to Stand Up's contentions, "not … detrimental to the surrounding community" is most naturally read to mean not detrimental *overall*, even if there are some unmitigated detrimental effects. *See* Pet. App. 20, 125. Indeed, that is precisely

how the Department interpreted the statute in promulgating the operative regulations. Those regulations recognize that a gaming establishment may benefit "State and local government, nearby businesses, and local economic conditions," as well as the tribe seeking to develop a gaming project, 73 Fed. Reg. at 29,374, and that such benefits may not always directly mitigate specific negative impacts; accordingly, the regulations accept that the "cost of impacts that are not significant *will be borne by the surrounding community*," *id.* (emphasis added). The statute does not say or suggest anywhere that a project's benefits to a surrounding community should be ignored, or that any detrimental impact that could not be specifically mitigated is *per se* fatal to a project.

Second, Stand Up's contrary reading of the statute defies common sense. It would foreclose *any* gaming under section 2719(b)(1)(A) because, as both courts below observed, any new casino development is bound to have some costs that cannot be fully mitigated—e.g., construction noise, traffic delays, or, as Stand Up emphasizes (Pet. 9-10, 12), problem gamblers who refuse to seek treatment. The D.C. Circuit properly rejected that absurd outcome. IGRA's stated purpose, after all, is to "provide a statutory basis for the operation of gaming by Indian tribes" in order to promote tribal self-determination. 25 U.S.C. § 2702(1); C.A.J.A. 3874; *cf. Citizens Exposing Truth About Casinos* v. *Kempthorne*, 492 F.3d 460, 469-470 (D.C. Cir. 2007) ("IGRA was designed primarily to establish a legal basis for Indian gaming as part of fostering tribal economic self-sufficiency, not to respond to community concerns about casinos[.]").

Third, Stand Up's reading fails under the governing regulations, which expressly authorize the Depart-

ment to consider both the costs and the benefits of a gaming project on the surrounding community, including: "[a]nticipated impacts on the economic development, income, and employment of the surrounding community"; "[a]nticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them"; "[a]nticipated cost[s], if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment"; and "[a]ny other information that may provide a basis" for the Department's determination. 25 C.F.R. §§ 292.18(c)-(e), (g); *see also id.* § 292.21(a). Stand Up did not challenge the validity of those regulations below and does not even cite them in its petition; it cannot now argue that either the Department or the D.C. Circuit erred in relying on them. *Cf.* Pet. App. 20 (deferring to Department's reasonable construction of its regulations under basic principles of administrative law); *see generally Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

Finally, Stand Up's contention (Pet. 9-12) that the D.C. Circuit's interpretation of IGRA would unduly spread new mega-casinos is equally baseless. It rests on the flawed premise that, in the Department's view, "any detriment to the surrounding community, no matter how large, may be offset by an economic payout," Pet. 11. That is simply not how the Department conducts its analysis. Instead, the Department considers the "net effects [of a gaming project] holistically," Pet. App. 23, giving due consideration to each factor set forth in IGRA regulations, including any significant unmitigated detriments. *See* 25 C.F.R. §§ 292.18, 292.21(a); *see also* C.A.J.A. 3933-3951. Moreover, the two-part determination process is "not widely used by tribes seeking to conduct gaming." S. Rep. No. 114-199,

at 6 n.32 (2015). In the 30 years since IGRA's enactment, there have been only 47 requests by tribes, including North Fork, seeking a two-part determination. *See* Response by the Defendants-Appellees in Opposition to Rehearing En Banc 12 n.1, *Stand Up for California!* v. *U.S. Dep't of Interior*, Nos. 16-5327, -5328, Doc. 1723158 (D.C. Cir. Mar. 20, 2018). Of those, only ten resulted in a favorable determination in which a governor concurred. *Id.*

2. Stand Up's emphasis on problem gambling is misguided and raises a fact-bound question unworthy of review

Stand Up argues (Pet. 9-10, 12) that the Department should have found that North Fork's proposed gaming project would be detrimental to the surrounding community because of "social ills" arising from problem gambling or costs associated with gamblers who refuse to seek treatment. But that argument—like Stand Up's other IGRA arguments—is foreclosed by the unchallenged IGRA regulations. The regulations require the Department to consider "[a]nticipated cost[s], 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) (emphasis added)—which the Department did, C.A.J.A. 3911-3912, 3942, 3949. In contrast, as explained in the regulations' preamble, the Department is not required to consider "'*social costs* attributable to compulsive gamblers enrolled and *not enrolled in treatment programs*.'" 73 Fed. Reg. at 29,369 (emphases added).

Stand Up's alternative argument (Pet. 12) that the Department "never analyzed whether … problem gambling services could … be[] employed" at North Fork's

project raises an entirely fact-bound, case-specific question unworthy of review—and in any event mischaracterizes the record. The environmental impact statement in the administrative record noted that North Fork would pay for the entire estimated cost of counseling for problem gambling attributable to the proposed gaming project—$50,000 annually for the Madera County Behavioral Health Services' counseling services and an additional $13,600 to Madera County to cover the remaining cost of counseling services. C.A.J.A. 680-681, 711-713, 719. North Fork also agreed to take numerous other mitigation measures that studies had found effective, including training staff, implementing voluntary self-exclusion procedures, and displaying treatment information. *See, e.g.*, C.A.J.A. 680-681, 719. Based on these measures, the environmental impact statement concluded that the impact of problem gambling would be "less than significant." C.A.J.A. 710-711. The Department reasonably relied on that evidence. C.A.J.A. 3911-3912, 3942, 3949.

B. The D.C. Circuit Correctly Held That The Department Had Authority To Take Land In Trust For North Fork

The D.C. Circuit also correctly concluded that the Department had authority to acquire land in trust for North Fork because North Fork was an Indian tribe under federal jurisdiction in 1934.

1. Under the plain text of the IRA, North Fork's section 18 election establishes its existence as a tribe under federal jurisdiction

The IRA authorizes the Department to acquire land in trust for "Indians," 25 U.S.C. § 5108, which the

statute defines to include "all persons of Indian descent who are members of any recognized Indian *tribe* now under federal jurisdiction," *id.* § 5129 (emphasis added). The statute then states that "[t]he term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or *the Indians residing on one reservation*." *Id.* (emphasis added). By definition, the Indians residing on the North Fork reservation in 1935 were therefore a "tribe" under the IRA. And the federal administration of a section 18 election at the reservation means that the tribe was under federal jurisdiction.[1] The Department therefore correctly determined that the election "conclusively establishes that the Tribe was under Federal jurisdiction" at the time of the IRA's enactment. C.A.J.A. 4095; *see* Pet. App. 8-11.

Stand Up's contrary arguments are meritless. First, Stand Up contends (Pet. i, 15-16) that under the IRA, the Department may exercise its trust authority only on behalf of an "Indian tribe" under federal jurisdiction in 1934, and that, while the IRA defines the term "tribe" to include "the Indians residing on one reservation," an "Indian tribe" is something different from either. In support of this novel argument, Stand Up notes that the IRA's definition of "tribe" includes "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 5129. It then contends—invoking the presumption against surplusage—that because they are enumerated separately

[1] Although Stand Up argues (Pet. 13) that the Department should have engaged in a "fact-intensive inquiry" to determine whether North Fork was under federal jurisdiction before and in 1934, that argument is waived. Stand Up conceded below that "a section 18 election[] is, for IRA purposes, sufficient to establish federal jurisdiction over a participating tribe." Pet. App. 8.

as part of the definition of "tribe," an "Indian tribe" cannot be the same thing as "the Indians residing on one reservation."

Simply put, Stand Up's argument makes no sense. Even a quick glance at the IRA shows that it treats the terms "tribe," "Indian tribe," and "Indians residing on one reservation" (along with "band" and "pueblo") as synonymous. Indeed, that is the entire point of the IRA's definition of "tribe"—not to set out separate, mutually exclusive categories of entities that fall under the general rubric of "tribe," but to make clear that the various terms used to refer to tribal entities are all "tribe[s]" subject to the IRA's jurisdiction.[2] *Cf. Cohen's Handbook of Federal Indian Law* § 3.02[2], at 132-133 (2012) ("[F]ederal law ordinarily uses the term 'Indian tribe' to designate a group of native people with whom the federal government has established some kind of political relationship[.]").

Accordingly, the IRA elsewhere also uses the terms "tribe" and "Indian tribe" without making any substantive distinction between them. Section 16 of the IRA originally provided that "[a]ny *Indian tribe*, or *tribes*, *residing on the same reservation*, shall have the

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[2] A broad definition involving the terms "Indian tribe," "tribe," "band," and "pueblo" is not uncommon in federal Indian law. For example, the Indian Land Consolidation Act—which "ensures that tribes may benefit from" the Department's trust authority "even if they opted out of the IRA pursuant to" a section 18 election, *Carcieri*, 555 U.S. at 394-395—defines "'Indian tribe' *or* 'tribe'" as "any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust." 25 U.S.C. § 2201(1) (emphasis added). Similarly, the Federally Recognized Indian Tribe List Act of 1994 defines "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." *Id.* § 5130.

right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of *the tribe*, or of *the adult Indians residing on such reservation*, as the case may be[.]" Pub. L. No. 73-383, § 16, 48 Stat. 984, 987 (1934) (emphases added). The current language of that section similarly states that "[a]ny *Indian tribe* shall have the right to organize" and may adopt an appropriate constitution and bylaws, which shall become effective when "ratified by a majority vote of the adult members of *the tribe or tribes* at a special election." 25 U.S.C. § 5123(a)(1) (emphases added).

The canon against surplusage, like all canons of statutory interpretation, "must be applied with judgment and discretion, and with careful regard to context." Scalia & Garner, *Reading Law* 176 (2012). It should not be used to create artificial distinctions among terms that are obviously overlapping or synonymous because Congress at times "'enacts provisions that are superfluous,'" *Microsoft Corp.* v. *I4I Ltd. P'ship*, 564 U.S. 91, 107 (2011), including in definitional provisions. *See* Scalia & Garner, *supra*, at 177-179 (surplusage canon is inapplicable when statute "string[s] out synonyms and near-synonyms"). Moreover, "the canon against superfluity assists only where a competing interpretation gives effect 'to every clause and word of a statute,'" *Microsoft*, 564 U.S. at 106, and Stand Up offers no such competing interpretation. It does not even attempt to explain how such terms as "Indian tribe," "band," and "pueblo" could be given entirely distinct meanings. The canon against surplusage thus does not support Stand Up's bizarre contention that, under the IRA, an "Indian tribe" is something different from, and narrower than, a "tribe." *Cf. Freeman*

v. *Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) ("Congress sought to invoke the words' common 'core of meaning'" by stating three similar words together despite the redundancies that result).

Second, Stand Up argues (Pet. 16-17) that certain Department memoranda issued at the time the IRA was enacted recognize that "some reservations are occupied by Indians of differing tribal affiliations," which, in Stand Up's view, means that "'Indians residing on one reservation'" are not a "tribe." But as the D.C. Circuit noted, those memoranda cannot overcome the plain statutory text. Pet. App. 10. Under the plain text of the IRA, the Indians residing on the North Fork reservation who participated in the section 18 election were a "tribe," even if some of them also had other tribal affiliations. 25 U.S.C. § 5129. Notably, Stand Up does not argue that the Indians living on the North Fork Rancheria in 1935 actually had "differing tribal affiliations." Pet. 16. But even if they did, "nothing in the text of [the IRA] requires a tribe within the meaning of the statute to be single, unified, or comprised of members of the same historically cohesive or ethnographically homogenous tribe." Pet. App. 11 (internal quotation marks omitted).

In any event, the memoranda are "fully consistent" with the Department's determination. Pet. App. 10-11. For example, the Solicitor's memorandum that Stand Up relied on below states that the IRA "authorizes the residents of a single reservation (*who may be considered a tribe for purposes of this act, under section 19*) to organize without regard to past tribal affiliations." C.A.J.A. 319 (emphasis added). Thus, even according to the evidence Stand Up cites (Pet. 16), the residents of the North Fork Rancheria who participated in the section 18 election were a "tribe."

Third, Stand Up argues (Pet. 17-18) that the D.C. Circuit's interpretation of the IRA "improperly intrude[s] on tribal autonomy" because "the decision to associate as an Indian tribe has to be made by the group of Indians themselves." That argument conflates the affirmative act of *organizing* under the IRA—which is indeed a decision that must be made by the group of Indians themselves—with the statutory definition of "tribe," which must be satisfied before a particular group of Indians can organize. In other words, whether and how to organize under the IRA are matters of tribal choice and autonomy, but an entity can organize only if it is already a "tribe" under the IRA's definition. *See* 25 U.S.C. § 5123(a) ("Any Indian *tribe* shall have the right to organize[.]" (emphasis added)). In addition to misconstruing the statute, Stand Up's invocation of tribal autonomy is more than a little perverse. Stand Up's fundamental argument is that North Fork is not a real Indian tribe because it has not proven that its members were all ethnographically or culturally identical in 1934. It is that argument—not the D.C. Circuit's decision—that fails to respect North Fork's autonomy and right to define its membership.

Finally, Stand Up's invented fear (Pet. 15) that the D.C. Circuit's interpretation of the IRA would provide "almost no limit on the Secretary's authority at all" is baseless. The Department may exercise its trust authority for a tribe only if the tribe was under federal jurisdiction in 1934 *and* is "'recognized as of the time the Department acquires the land into trust.'" *Confederated Tribes*, 830 F.3d at 559-561; *accord County of Amador* v. *U.S. Dep't of Interior*, 872 F.3d 1012, 1024 (9th Cir. 2017), *cert. denied*, 2018 WL 1785280 (Oct. 1, 2018). Even setting aside the "federal jurisdiction" requirement, the recognition requirement, by itself, is

demanding. *See, e.g.*, 25 C.F.R. § 83.11. It is simply not true that, under the D.C. Circuit's decision, the Department could "take land into trust for the descendants of any Indian living on a reservation in 1934," Pet. 15.

2. The 1916 purchase of the North Fork Rancheria independently supports North Fork's longstanding existence as a tribe

While the section 18 election alone is sufficient, the Department's trust authority is independently supported by the federal government's purchase of the North Fork Rancheria in 1916. *See* Pet. App. 11-12. As the D.C. Circuit noted, the Department's statement—that the section 18 election held "at the Tribe's Reservation" establishes federal jurisdiction—presupposes the reservation was North Fork's, based on the 1916 purchase establishing North Fork's "'tribal land.'" Pet. App. 12 (quoting C.A.J.A. 4095); *accord Cachil Dehe*, 889 F.3d at 596 n.8. And "[a]mple record evidence" indicates that the federal government purchased the land for North Fork as a "cohesive tribal entity," meaning that North Fork existed as a tribe well before 1934. Pet. App. 12 (citing, among others, C.A.J.A. 527 (authorizing the purchase of the land for the "'use of the North Fork band of landless Indians'")). Stand Up does not challenge that conclusion, which is independently sufficient to support the D.C. Circuit's judgment.

III. THIS CASE IS A POOR VEHICLE TO DECIDE EITHER OF THE QUESTIONS PRESENTED

Certiorari should be denied because this case is a poor vehicle to decide either of the questions Stand Up presents.

As to the first question presented, Stand Up never challenged the validity of the IGRA regulations that governed the Department's analysis of whether North Fork's project would be detrimental to the surrounding community. Those regulations expressly authorized the Department to consider all relevant factors, without requiring (or, arguably, permitting) it to find detriment solely because a single adverse impact such as problem gambling is not completely mitigated. Because Stand Up cannot challenge those regulations for the first time in this Court (and does not even cite them in its petition), it cannot argue that the Department erred in following them. And if the regulations are valid, Stand Up's objection to the Department's determination reduces to nothing more than a quarrel over whether that determination was supported by sufficient record evidence—an issue that is entirely fact-bound. In short, this case does not permit the Court to decide the broadly worded question that Stand Up claims is presented (Pet. i).

As to the second question presented, the D.C. Circuit held that the Department's purchase of the North Fork Rancheria in 1916 independently supports North Fork's "longstanding tribal existence." Pet. App. 11; *see supra* II.B.2. Stand Up does not challenge that holding, and there is no reason to disturb it. Accordingly, however the Court decided the second question presented, it would not affect either the Department's trust determination or the D.C. Circuit's decision upholding it because they would still be supported by the 1916 purchase of the Rancheria.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2018