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 Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Petitioners Stand Up for California!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God—Madera, and Dennis Sylvester ("Stand Up") reply to the oppositions of respondents United States Department of Interior (the "Department") and North Fork Rancheria of Mono Indians ("North Fork Tribe" or "Tribe").

WHY REVIEW IS WARRANTED

A. This Court Should Grant Review to Determine Whether the Secretary May Balance Undisputed Detriment Against Benefits to Conclude a Casino "Would Not Be Detrimental to the Surrounding Community"

As explained in the petition, Congress provided that for a tribe to conduct gaming on off-reservation land, the Secretary must conclude *both* (i) gaming "would be in the best interests of the Indian tribe and its members," *and* (ii) gaming on the off-reservation land "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A).

Notably, respondents do not deny—because the Secretary explicitly found—the proposed casino would result in unmitigated detriment to the surrounding community, including (1) a 50% boom of problem gamblers, the vast majority of whom would go untreated, and (2) a host of resulting social ills, including increased likelihood of bankruptcy, suicide, and divorce.

Respondents' strained arguments to justify the Secretary's decision allowing off-reservation gaming despite this undisputed detriment illustrate why this court should grant review.

1. Respondents' arguments are contrary to the plain statutory language

The Tribe argues that when Congress required the Secretary to determine that proposed gaming "would not be detrimental to the surrounding community," Congress meant "not detrimental *overall*, even if there are some unmitigated detrimental effects." [NF Opp. at 14 (emphasis in original).] The Department similarly claims there is "nothing in IGRA that prohibits the Secretary from considering a casino's community benefits . . . for determining whether a proposed casino would be detrimental to the surrounding community," even if the casino causes unmitigated harm to that community. [DOI Opp. at 14.]

As the petition explained, however, these arguments are contrary to the statute's plain language, as they conflate the "no detriment" requirement with a "best interests" test. Under the two-part determination, the Secretary determines whether the casino would be in the "best interests" of the applicant tribe, but the Secretary must separately conclude the casino "would not be detrimental to the surrounding community." Of course, the "best interest" analysis necessarily involves the weighing of benefits against harms to determine what is "best" for the tribe. Had Congress

wanted the Secretary to similarly balance benefits and harms when analyzing the casino's impact on the surrounding community, Congress could have required the Secretary to determine the casino would be in the best interests of the tribe *and* the surrounding community.

Congress did not do so. Instead, Congress imposed two separate tests and required the Secretary to determine that the casino "would not be detrimental to the surrounding community." This plain language is clear: the proposed gaming cannot result in detriment to the surrounding community. The Secretary was not free to disregard the statute's language to approve the Tribe's casino despite undisputed and unmitigated detriments. *See, e.g.*, *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018) (where statutory language carries a plain meaning, the administrative agency must "follow its commands as written, not to supplant those commands with others it may prefer"); *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018) (looking to the plain text reading of statute).

2. The federal regulations cannot justify the Secretary's decision

Respondents rely heavily on the federal regulations, which the Tribe describes as "expressly authoriz[ing] the Department to consider both the costs and the benefits of a gaming project on the surrounding community." [NF Opp. at 15-16.] And, as the Department emphasizes, "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.'" [DOI Opp. at 12.] Respondents' reliance on the regulations cannot justify the Secretary's decision.

First, to the extent the regulations allow the Secretary to ignore unmitigated, detrimental impacts the Tribe's casino will have on the surrounding community—either because the casino will also provide offsetting benefits to some of the community or because the Secretary considers certain detrimental impacts to be "social costs"—those regulations are not entitled to this court's deference because they are inconsistent with the plain statutory language. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *see also*, *e.g.*, *SAS*, 138 S. Ct. at 1358 ("Even under *Chevron*, we owe an agency's interpretation of the law no deference unless after employing traditional tools of statutory construction, we find ourselves unable to discern Congress's meaning." (internal quotation marks omitted)). Here, Congress's command is clear—the Secretary can approve a Tribe's off-reservation gaming only if it will

"not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A).[1]

Second, respondents mischaracterize the regulations. The Tribe cites 73 Fed. Reg. 29,374, for the proposition that the Secretary may properly consider a casino's benefits even when those benefits do not directly mitigate the detrimental impacts the casino has elsewhere. [NF Opp. at 14-15.] But this regulation simply recognizes that the application process imposes costs, and then explains that the costs of the process are outweighed by the benefits. 73 Fed. Reg. 29,374 ("This rule establishes regulations that will impose costs on the tribe, the Bureau of Indian Affairs, State and local governments, and the public in expectation that gaming revenues will increase for the benefit of the tribe, employees, and the surrounding community."). Thus, the regulations advise "[e]ach applicant tribe" to "evaluate the high cost of applying to game on off-reservation after-acquired trust land against the expected net gaming revenue to determine whether to incur the cost of complying with this rule." *Ibid.* This part of the regulation says nothing about the statutory requirement that the Secretary find the proposed

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[1] The Tribe contends that review of the IGRA issue is somehow precluded because Stand Up did not "bring a timely challenge to the regulations under the Administrative Procedure Act." [NF Opp. at 3.] But Stand Up does not contend that the regulations were improperly promulgated. Rather, Stand Up contends the clear statutory language itself governs, not any conflicting regulations.

casino will not be detrimental to the surrounding community.

According to the Department, under the regulations, the Secretary is only required to consider the costs "of treatment programs for compulsive gambling," but "the Secretary does not consider the social costs attributable to problem gamblers." [DOI Opp. at 11-13.] The Department ignores, however, the regulations requiring a tribe's application to include the "[a]nticipated impacts on the social structure . . . of the surrounding community," and to identify any sources of revenue to mitigate those impacts. 25 C.F.R. §§ 292.18(b), (e). And while it's true the Department rejected a more specific rule that explicitly required the Secretary to analyze the social costs attributable to compulsive gamblers, the detrimental impacts of the casino here fall plainly within the "impacts on social structure" the Secretary is to consider.[2] Indeed, the Secretary here considered the increase in problem gamblers, found that it "may be attenuated, or possibly reversed," but then approved the casino without analysis or evidence as to what mitigation measures are

[2] The Department's conclusory statement that addressing social problems like "bankruptcy, suicide, and divorce" would "entail federal involvement in traditionally state matters" [DOI Opp. at 13] is perplexing. Bankruptcy is, of course, a federal matter. Beyond that, Congress is not intruding on any state matters when it requires a federal agency to ensure the federal government's own action—authorizing a large casino project—does not detrimentally impact people in the state.

necessary to attenuate or reverse the detrimental impacts.

3. The detriment here is not "minor," and petitioners' interpretation of the statute does not foreclose all gaming on off-reservation land

In their oppositions, respondents characterize the detriments that would be imposed by the Tribe's casino here as insubstantial, and argue that under Stand Up's interpretation of IGRA "*any* unmitigated negative impact from a gaming establishment—however minor—precludes a finding of no detriment and therefore forecloses gaming. . . ." [NF Opp. at 2, 14; *see also* DOI Opp. at 10.] For at least three reasons, this argument should not dissuade this court from granting review.

First, the detrimental impact of the Tribe's proposed casino cannot reasonably be viewed as "minor." The Secretary's own analysis concluded that the casino will cause 531 new problem gamblers, 80% of whom will not seek treatment. And the Secretary acknowledged those problem gamblers will cause a host of problems for the casino's surrounding community, including increased likelihood of bankruptcy, suicide, and divorce. These devastating impacts on families in the surrounding community cannot be brushed off as minor or insubstantial. Indeed, California citizens deemed the Tribe's casino so problematic they overwhelmingly passed a proposition rejecting the state legislature's approval of a compact with the Tribe.

Second, respondents' fear that Stand Up's interpretation would foreclose all gaming under Section 2719(b)(1)(A) is hyperbole belied by the Secretary's own conclusion that the detrimental impacts here could be "attenuated, or possibly reversed, through the expansion of problem gaming services." Nonetheless, the Secretary failed to evaluate what problem gambling services could be implemented here to mitigate the undisputed detriment created by the casino, instead placing that detriment directly on the surrounding community. That is contrary to the express statutory language. Stand Up is not seeking to foreclose all possible gaming establishments under IGRA, but is merely asking the Secretary to follow the statute to ensure the surrounding community is not harmed.

Finally, to the extent respondents believe the Tribe's casino should go forward despite detrimental impacts on the surrounding community, their dispute is with Congress. While respondents are correct that IGRA was intended to promote tribal self-determination [NF Opp. at 15], Congress also ensured that, absent some other applicable exception to the prohibition against gaming on post-1988 lands, such self-determination would not come at the expense of the surrounding community. The decision below undermines this careful legislative balance by allowing the Tribe to build a casino that will indisputably cause detrimental impacts to the surrounding community.

4. This case is a good vehicle to review the question presented

In an attempt to undermine the need for review, respondents point out that IGRA's two-part determination exception has not been widely used by tribes seeking to conduct gaming. [NF Opp. at 16-17; DOI Opp. at 15.] This is, of course, consistent with the general prohibition on off-reservation gaming. The opinion below threatens to change that. Allowing the Secretary to use a "holistic" approach by weighing benefits against a casino's harm to the surrounding community not only flouts IGRA's plain language, it will make it substantially easier for a tribe to obtain approval. An applicant tribe need not attempt to ameliorate the detrimental impacts of the casino on the surrounding community if the tribe agrees to share the monetary benefits.

The Department also claims that because the Secretary's decision was "supported by substantial evidence" that "factbound decision does not warrant this Court's review." [DOI Opp. at 11.] Stand Up's petition does not, however, challenge the Secretary's factual findings, but only the Secretary's legal conclusion that IGRA allows the Tribe's casino development despite undisputed and unmitigated detriment to the surrounding community. The proper construction of IGRA is well within the bailiwick of this court. *See*, *e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018).

In short, this petition squarely presents a straightforward and important legal issue regarding IGRA's requirements. The court should grant review.

B. The D.C. Circuit's Interpretation of the IRA Impermissibly Expands the IRA and Infringes Tribal Autonomy and Sovereignty

The Indian Reorganization Act ("IRA") permits the Secretary to acquire land "for Indians," defined as "all persons of Indian descent who are members of any recognized Indian tribe" that was "under Federal jurisdiction" in 1934. 25 U.S.C. §§ 5108; 5129; *see Carcieri v. Salazar*, 555 U.S. 379 (2009); *see* App. 7.

The D.C. Circuit's holding that "a section 18 election on a reservation establishes that the Indian residents qualify as a tribe subject to federal jurisdiction" vastly expands the scope of the IRA beyond its plain text. [App. 10.] Its holding is based on the unprecedented conclusion that the government may impose on Indians "dual tribal identities," based on the Indians' residency. [App. 10.]

By conflating residency and tribal identity, the court violated long-standing principles of tribal sovereignty, recognized by both the Supreme Court and Congress, and improperly discounted two 1934 opinions by the Department of Interior's Solicitor. The Solicitor's opinions recognize "[a] tribe is not a geographical but a political entity," that Indians having different tribal affiliations may reside on the same reservation, and that such Indians may organize as a tribe under

Section 16 of the IRA *if they choose to do so*. In other words, the U.S. has long recognized that a tribe and a reservation are two different things. That an Indian lives on a tribe's reservation does not make him a member of that tribe. He may be a member of another tribe, or not a member of any tribe. Indeed, Section 18 did not require that the Indians voting at a particular reservation be part of any Indian tribe.[3] Rather, the decision is one of their own tribal autonomy, and not one that can be imposed by the government. Thus, the D.C. Circuit's (and Secretary's) reliance on a 1935 Section 18 election on the North Fork Rancheria as definitive evidence that the North Fork Tribe was under federal jurisdiction in 1934 is fatally flawed.[4]

Stand Up does not contend, as the North Fork Tribe suggests, 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." [NF Opp. at 23.] There is no evidence, however, that the six individual Indians who voted in the Section 18

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[3] The North Fork Tribe notes that Stand Up does not argue that the Indians voting in the Section 18 election at the North Fork Rancheria in 1935 had "differing tribal affiliations." [NF Opp. at 22.] But the Secretary's record contains no information about who those six individual Indians were, much less their tribal affiliations.

[4] Stand Up does not dispute that a Section 18 election is an indicia of federal jurisdiction. In this case it is indicia of federal jurisdiction over the individual Indians who voted in the Section 18 election at the North Fork Rancheria. But the Section 18 election is not evidence that the applicant tribe (or any tribe) existed on the date of the election.

election at the North Fork Rancheria in 1935 were a tribe—much less this applicant North Fork Tribe.

Respondents point to the federal government's purchase of the North Fork Rancheria in 1916. [NF Opp. at 24; DOI Opp. at 16.] But they cannot now justify the Secretary's decision based on conclusions and evidence on which the Secretary did not rely. *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Moreover, the record indicates the North Fork Rancheria was purchased for landless Indians in the area of North Fork. The courts below erred in interpreting isolated references to "the North Fork and vacinity (sic) band" as evidence of the existence of a *tribe*. Importantly, the Secretary did not draw this same conclusion.[5]

The Department's reliance (Opp. at 20) on *United States v. McGowan*, 302 U.S. 535 (1938), is unavailing, because in that case this court repeatedly and

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[5] The North Fork Tribe misstates the record to create the impression that it has existed since the 19th and early 20th centuries. [NF Opp. at 4.] But the Secretary's record consistently refers to the Indians of that period as "ancestors" and "predecessors" of the North Fork Tribe. Similarly, the North Fork Tribe asserts that the California Rancheria Act of 1958 authorized the Secretary to "terminate the trust relationship with North Fork and other tribes. . . ." [NF Opp. at 5; *see also* DOI Opp. at 7.] Not true. The California Rancheria Act terminated the federal trust relationship with the land (i.e., the rancherias) and the individual distributees of that land—not tribes. Pub. L. No. 85-671 (Aug. 18, 1958), §§ 10, 11, 72 Stat. 619-621, amended in 1964, Pub. L. No. 88-419 (Aug. 11, 1964), 78 Stat. 390-391.

consistently refers to the Indians of the Reno Indian Colony as "Indians"—not a tribe.

Moreover, the other tribes referenced by the Department provide no precedent to justify the D.C. Circuit's holding. [DOI Opp. at 20-21.] The Tulalip Tribes organized under the IRA and approved a constitution and bylaws in 1936. www.tulaliptribes-nsn.gov/Home/WhoWeAre/History.aspx. The Auburn Indian Band was restored to recognition by act of Congress. *City of Roseville v. Norton*, 348 F.3d 1020, 1021 (D.C. Cir. 2003). And the Secretary's decision to take land into trust for the Ione Band of Miwok Indians in *County of Amador v. United States Dep't of the Interior*, 872 F.3d 1012 (9th Cir. 2017) was based on the Secretary's analysis of its unique history. *Id*. at 1017-19. In none of these cases was the tribe considered a tribe merely by the members' residence on a single reservation.

The D.C. Circuit's conclusion that Congress may define tribes based purely on the members' residence is not only unprecedented, but interferes with tribal autonomy and sovereignty. Interpreting the IRA's definition of "tribe" as the Solicitor did in 1934—i.e., as enabling the "Indians residing on one reservation" to organize as a tribe under Section 16 if they choose to do so—would be entirely consistent with the IRA's objectives while avoiding the impingement upon tribal autonomy and sovereignty caused by the D.C. Circuit's interpretation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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