No. _____

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**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the following exceptionally important questions of federal law:

1. Subject to certain exceptions, the Indian Gaming Regulatory Act ("IGRA," 25 U.S.C. §§ 2701 et seq.) expressly prohibits casino gaming on land acquired by the Secretary of the Interior into trust for Indian tribes after 1988 (so-called "off-reservation" land). 25 U.S.C. § 2719(a). Under the exception applicable here, a tribe may conduct gaming on off-reservation land if, among other requirements, the Secretary determines that gaming "would be in the best interest of the Indian tribe and its members," and "would not be detrimental to the surrounding community. . . ." 25 U.S.C. § 2719(b)(1)(A).

This case presents the question whether the Secretary may conclude that a casino "would not be detrimental to the surrounding community" despite uncontroverted evidence the casino will have unmitigated detrimental impacts to the community.

2. The Indian Reorganization Act of 1934 ("IRA," 25 U.S.C. §§ 5101 et seq.) authorizes the Secretary to take land into trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. As relevant here, the IRA defines "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Ibid.*

This case presents the question whether multiple Indians residing on the same reservation are, per se, an "Indian tribe" irrespective of the individual Indians' tribal affiliations, if any.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners are Stand Up for California!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God—Madera, and Dennis Sylvester.

Respondents are the North Fork Rancheria of Mono Indians; the U.S. Department of Interior; Ryan Zinke, in his official capacity as Secretary of the U.S. Department of Interior; the Bureau of Indian Affairs; John Tahsuda, in his official capacity as Acting Assistant Secretary of the Bureau of Indian Affairs; and the United States of America.

Appellant Stand Up for California! is a non-profit 501(c)(4) corporation organized under the laws of the State of California, and serves as a community watchdog group that focuses on gambling issues affecting California citizens, including tribal gaming, card clubs, horse racing, satellite wagering, charitable gaming, and the state lottery.

Stand Up for California! and the other individual Stand Up plaintiffs and appellants have no parent companies. Nor do any publicly-held companies have a 10% or greater ownership interest in any of the Stand Up plaintiffs and appellants.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Stand Up for California!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God—Madera, and Dennis Sylvester respectfully petition for a writ of certiorari to review the judgment of the D.C. Circuit in this case.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at *Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d 1177 (D.C. Cir. 2018), and is reproduced at App. 1-31. The District Court's opinion is reported at *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212 (D.D.C. 2016), and is reproduced at App. 32-264.

JURISDICTION

The D.C. Circuit issued its decision on January 12, 2018, and denied the petition for rehearing en banc on April 10, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

25 U.S.C. § 2719(a), (b)(1)(A), provides in relevant part:

> **(a) Prohibition on lands acquired in trust by Secretary.** Except as provided in subsection (b), gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988. . . .
>
> **(b) Exceptions**
>
> (1) Subsection (a) will not apply when—
>
> (A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and 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. § 5108 provides in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be

> living or deceased, for the purpose of providing land for Indians.
>
> **25 U.S.C. § 5129 provides:**
>
> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The 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. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

STATEMENT

A. Statutory Background

Congress has erected a number of obstacles to keep Indian tribes from developing casinos on land acquired into trust after 1988, so-called "off-reservation gaming." One such obstacle is the Indian Gaming Regulatory Act ("IGRA"), which creates a general prohibition against gaming on trust land acquired after

1988. 25 U.S.C. § 2719(a). That prohibition is subject to several exceptions, however, including the "two-part determination" exception relevant here. Under that exception, a tribe may conduct gaming on newly acquired land if, after consulting with the tribe and state officials, the Secretary determines that (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).

Section 5 of the Indian Reorganization Act ("IRA") provides another check on the Secretary's authority to take land into trust for Indian tribes, as it authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. To acquire the land, the Secretary must determine whether the applicant qualifies as an "Indian," a term that is specifically defined in the statute to include several categories of persons. As relevant here, Section 19 defines Indian to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id*. § 5129. To qualify as "Indian" under this section, the applicant tribe must have been "under federal jurisdiction when the IRA was enacted in June 1934." *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009). Thus, absent some other statutory basis, the Secretary only has authority under the IRA to take land into trust for recognized Indian tribes under federal jurisdiction in 1934.

B. Factual Background

In 2004, the North Fork Rancheria of Mono Indians (the "North Fork Tribe" or "Tribe") applied to the Department of Interior requesting that an approximately 305-acre parcel near the City of Madera, California ("Madera site") be placed in trust to allow the Tribe to construct a casino. The proposed development included a Las Vegas-style casino with an 83,065-square foot gaming floor, restaurant and retail facilities, a 200-room hotel tower, and 4,500 parking spaces.

The Secretary approved the project in two separate decisions.

First, in September 2011, the Secretary determined that gaming would be permissible on the Madera site under IGRA, if the Secretary were to acquire the land in trust for the Tribe (the "Two-Part Determination Decision"). The Secretary acknowledged that development of the proposed casino would have significant detrimental impacts on the surrounding community, including a dramatic increase in problem gamblers and associated social ills ranging from bankruptcy and divorce to suicide. The Secretary ignored these acknowledged detriments, however, by adopting an analysis that allowed him to offset those detriments based on the anticipated economic benefits of the casino and mitigation measures identified in the Final Environmental Impact Statement ("EIS"). The Secretary thus concluded "[t]he weight of evidence in the record strongly indicates that the Tribe's proposed

gaming facility in Madera County would not result in detrimental impact on the surrounding community."

Second, in November 2012, the Secretary approved North Fork's application to take the land into trust for the purpose of conducting gaming (the "Trust Decision"). The Secretary concluded that he had authority to take land into trust for the North Fork Tribe because the Tribe qualifies as Indian under Section 19 of the IRA because the Tribe was under federal jurisdiction in 1934. The Secretary based his decision on an election held at the North Fork Rancheria in 1935, when six adult Indians at the Rancheria voted pursuant to IRA Section 18 on whether to accept application of IRA.[1] See 25 U.S.C. § 5125 ("This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application."). According to the Secretary, "[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."

Under IGRA, the Governor of California was required to concur in the two-part determination before the Secretary could take land into trust for gaming, and the Governor purported to do so. In a decision that is currently on review in the California Supreme Court (Case No. S239630), however, the California court of appeal held that as a matter of state law the Governor had no authority to make this concurrence. *Stand Up*

[1] Four of the six voted to reject application of the IRA.

for California! v. State, 6 Cal. App. 5th 686, 697, 211 (2016); *Stand Up for California! v. State*, 390 P.3d 781 (2017) (granting petition for review).

Further, the Governor negotiated a tribal-state gaming compact with the North Fork Tribe, which the legislature ratified. Before the ratification went into effect, however, the voters of California overwhelmingly rejected the legislature's ratification.

C. Proceedings Below

Stand Up filed the underlying action in December 2012 against the Department, the Secretary, the Bureau, and the assistant Secretary to the Bureau (collectively, the "federal defendants"). The initial complaint challenges, among other things, the Trust Decision and the Two-Part Determination Decision.

In January 2013, North Fork Tribe was allowed to intervene as a defendant. That same month, the district court consolidated Stand Up's action with a similar action commenced by the Picayune Rancheria of the Chukchansi Indians ("Picayune").

In September 2016, the district court denied Stand Up's motion for summary judgment and granted in part and denied in part the federal defendants' and North Fork Tribe's cross motions for summary judgment.

Stand Up and Picayune separately appealed to the D.C. Circuit, which affirmed the district court's order. As to the first question raised by this petition, the D.C.

Circuit reasoned that although IGRA required the Secretary to find that gaming "would not be detrimental to the surrounding community," 25 U.S.C. § 2719(b)(1)(A), nothing in that statute foreclosed the Secretary from "considering the casino's community benefits, even if those benefits do not directly mitigate a specific cost imposed by the casino." [App. 20.] The court further reasoned that an actual requirement of "no detriment"—as the plain language of the statute requires—would effectively bar all gaming establishments, which "are bound to entail some [unmitigated] costs." [*Ibid.* (quoting district court decision).] The court's conclusion in this regard was not the Secretary's conclusion, and is not supported by any evidence in the administrative record. To the contrary, the Secretary found that "problem gambling may be attenuated, or possibly reversed, through the expansion of problem gambling services."

As to the second question, the D.C. Circuit affirmed the Secretary's finding that the Section 18 election established that the North Fork Tribe was under federal jurisdiction in 1934. The court acknowledged that the election was held only for the *reservation*, and not for any particular tribe, but held this was sufficient because 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*." [App. 8-9 (quoting 25 U.S.C. § 5129, emphasis provided by the court).] Thus, according to the court, any Indian adults who voted in the

1935 election were necessarily a "tribe" under federal jurisdiction.

Stand Up petitioned the D.C. Circuit for rehearing en banc. Although the court requested a response from the Department and the North Fork Tribe, it ultimately denied the petition on April 10, 2018.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Erroneously Eliminates IGRA's Requirement that a Casino "Not Be Detrimental to the Surrounding Community" and Will Encourage Proliferation of Off-Reservation Megacasinos

The panel's opinion incorrectly decided an issue of exceptional importance—the contours of an exception to IGRA's general prohibition against gaming on trust land acquired after 1988. 25 U.S.C. § 2719(a). As explained above, under the relevant statutory exception, the Secretary was required to determine that gaming on the North Fork Tribe's off-reservation land "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). The Secretary purported to make such a finding, despite acknowledging that the proposed casino would cause: (1) a 50% boom of problem gamblers in the surrounding community, the vast majority of whom would go untreated; and (2) as a result, the surrounding community would suffer a host of social ills, including increased likelihood of bankruptcy, suicide, and divorce. Despite these admittedly

unmitigated harms, the Secretary determined that the casino would not be detrimental to the surrounding community because the economic benefits of gaming, some of which the North Fork Tribe agreed to share with local municipalities, outweighed the detriments.

The decision below affirmed this approach. The court acknowledged the undisputed, and unmitigated, detrimental impacts associated with the North Fork Tribe's casino, but held that those detrimental impacts didn't matter because "Stand Up has failed to show that any residual harms the North Fork's mitigation efforts leave unaddressed will be so substantial that the Department, permissibly viewing the casino's net effects holistically, was obliged to find that the casino would be detrimental." [App. 23.]

The court's decision is directly contrary to IGRA's plain language and undermines the statutory mandate limiting off-reservation gaming to circumstances where the surrounding communities will not suffer harm.

Importantly, the statutory test allowing the Secretary to make an exception for off-reservation gaming is not whether the casino would be in the "best interests" of both the tribe and surrounding community. Rather, the statute uses different language for each part of the two-part determination. It not only requires the Secretary to find that the gaming "would be in the *best interest* of the Indian tribe and its members," but also requires the Secretary to also conclude that gaming "*would not be detrimental* to the surrounding

community." 25 U.S.C. § 2719(b)(1)(A) (emphasis added). The D.C. Circuit's decision here collapses those two separate and distinct inquiries into a single "best interests" test.

This approach is not only contrary to the statute's plain language, it also threatens to expand the two-part determination exception to swallow the general rule prohibiting off-reservation gaming. Allowing the Secretary to view the casino's net effects "holistically" means that any detriment to the surrounding community, no matter how large, may be offset by an economic payout, which avoids any real scrutiny of the extent of the undisputedly unmitigated detriments to the surrounding community from casino gaming. Economic payouts that are not connected to and will not mitigate the casino's undisputed detrimental impacts cannot simply cancel out those detrimental impacts. Indeed, if such nonmitigation payouts can be balanced against the harm caused by a gaming establishment, proposed casinos will always be able to meet the two-part determination. The bigger more profitable the casino, the more detriment becomes acceptable. This cannot be what Congress intended when it created an exception to allow gaming on off-reservation land only if the Secretary determined that the proposed gaming facility "would not be detrimental to the surrounding community."

Finally, it is worth noting that the D.C. Circuit's concern that interpreting the statute according to its terms would effectively bar all gaming establishments is unwarranted. The Department's environmental

impact statement in this case acknowledged that "[a]ccording to Office of Problem Gambling study, problem gambling may be attenuated, or possibly reversed, though the expansion of problem gambling services." The problem is the Secretary never analyzed whether those problem gambling services could have been employed at the North Fork Tribe's proposed casino to ensure that the surrounding community did not suffer unmitigated detrimental impacts. Although the Secretary noted that funding will enable the County of Madera to offset its projected costs of providing counselling to the 10-20% of new gamblers who will seek treatment, the secretary did not even consider whether the project could have mitigated the other 80-90% of problem gamblers who will not seek treatment.

In short, this court should grant review in order to ensure that the D.C. Circuit's decision is not used to undermine the statutory protections for the surrounding communities near proposed casino developments and to enforce the Congressional mandate that any proposed casino "not be detrimental to the surrounding community."

B. The Circuit Court's Misreading of IRA Impermissibly Expands the Pool of Tribes Eligible for Off-Reservation Gaming

The Circuit Court's holding that any Indians living on the same reservation in 1934 constitute an "Indian tribe" for whom the Secretary can take land into trust dramatically expands the Secretary's authority.

The IRA authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. Before taking any land into trust, the Secretary was required to determine that the North Fork Tribe met the definition of "Indian" in Section 19, which for purposes of this appeal is "all persons of Indian descent who are members of any recognized Indian tribe" that was "under Federal jurisdiction" in 1934 when the IRA was enacted. 25 U.S.C. § 5129; see also *Carcieri*, 555 U.S. at 382 (Congress intended to "limit[] the Secretary's authority to taking into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934").

Here, rather than undertaking a fact-intensive inquiry into (1) whether the North Fork Tribe was under federal jurisdiction prior to 1934, and (2) whether the Tribe's jurisdictional status remained intact in 1934, the Secretary asserted that the holding of an election pursuant to Section 18 of the IRA at the North Fork Rancheria in 1935 obviates the need for any inquiry. The Circuit Court agreed with the Secretary's conclusion that the mere fact that an election was held in 1935 "conclusively establishes" that the North Fork Tribe was under federal jurisdiction in 1934.

Even ignoring the temporal disconnect between the current North Fork Tribe and any Indians residing on the Rancheria at the time of the election, the Section 18 election was held only for the *reservation* and not for any particular Indian *tribe*. Section 18 provides that "[t]his Act shall not apply to *any reservation*

wherein a majority of the *adult Indians*, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 5125 (emphasis added). Section 18 does not require the Indians voting at a particular reservation be part of an Indian tribe, and after the election the IRA either does or does not apply to the reservation itself, not to any particular tribe. Thus, the fact that a Section 18 election was held for adult Indians residing on the North Fork Rancheria in 1935 does not itself evidence that the North Fork Tribe—or any other Indian tribe—existed on the reservation at that time.

Nonetheless, the D.C. Circuit affirmed the Secretary's decision to take land in trust for the North Fork Tribe, holding that the Section 18 election was sufficient because 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." [App. 8-9 (quoting 25 U.S.C. § 5129, emphasis provided by the court).] Thus, according to the D.C. Circuit, the Section 18 election showed that there were Indians residing on the North Fork Rancheria in 1934, and, under the IRA, those Indians were necessarily part of an Indian tribe.

The Circuit Court's decision improperly expands the Secretary's authority to take land into trust, is wrong as a matter of statutory interpretation, and is inconsistent with long-standing principles of tribal sovereignty recognized by both the Supreme Court and Congress.

Under the panel's interpretation of the IRA, any tribe organized by descendants of Indians who resided on a reservation in 1934 would be eligible for land under the IRA, even if those Indians were not members of a formal tribe under federal jurisdiction in 1934. This is directly contrary to the Congressional intent to "limit[] the Secretary's authority to taking into trust for the purpose of providing land to member of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Carcieri*, 555 U.S. at 382. Interpreting the statute to allow the Secretary to take land into trust for the descendants of any Indian living on a reservation in 1934 provides almost no limit on the Secretary's authority at all. This court should grant review to determine whether the panel's expansion of the Secretary's authority was justified.

The panel's decision is wrong. First, it is wrong as a matter of statutory interpretation. Section 5129 defines the word "tribe" to include "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." The language itself thus makes clear that an "Indian tribe" is only one subset of groups that can be considered a "tribe" when that term is used standing alone. And an "Indian tribe" must mean something different than a band, pueblo, or Indians residing on one reservation, otherwise the statutory language is redundant. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (declining to adopt interpretation that would render term "insignificant, if not wholly superfluous").

Here, the secretary was required to find that the North Fork Tribe was an "Indian tribe" under Federal

jurisdiction in 1934, not merely a "tribe" as defined elsewhere in the statute. Such a reading makes sense of the entire statute and is consistent with the limitations Congress intended to place on the Secretary's authority.

Second, the Circuit Court's decision is inconsistent with the Department's contemporary interpretations of the IRA. Memoranda prepared by the Department's Solicitor in 1934 recognize that some reservations are occupied by Indians of differing tribal affiliations, and indicate that the Department understood at the time of the IRA's enactment that "the Indians residing on one reservation" do not, per se, constitute an Indian tribe. Rather, the Department understood the statutory provision defining "tribe" to mean only that Indians may choose to organize as a tribe under the statutory procedures for doing so.

The D.C. Circuit held that these memoranda "are fully consistent with the proposition that the residents of a single reservation constitute a tribe under the IRA" because, according to the panel, an Indian can "hold[] dual tribal identities, one based on cultural or genealogical ties and another on residency." [App. 10.] The panel cited only the 1964 amendment to the California Rancheria Termination Act as authority for this unprecedented conclusion. [*Id*. at 10-11.]

But the panel misread that amendment, which does not recognize that an Indian may simultaneously belong to multiple tribes, but only that a dependent member of an Indian's immediate family may be a

member of a different tribe—i.e., an in-law from another tribe who becomes part of the family through marriage. See California Rancheria Act of August 18, 1958, Pub. L. No. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, Pub. L. No. 88-419, 78 Stat. 390 ("the Indians who receive any part of [distributed] assets, and the dependent members of their immediate families who are not members of any other tribe or band of Indians, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians").

Third, by interpreting the IRA to allow the Secretary to take land into trust for "tribes" and defining "tribes" merely as any Indians living together on a reservation, the panel's decision undermines the "inherent sovereign power" held by "Indian tribe[s]" under the IRA. 25 U.S.C. § 5123(h). It is well established that whether to organize as an Indian tribe is a matter of tribal choice and autonomy, and there is statutory method for doing so. See 25 U.S.C. § 5123. Congress itself cannot create Indian tribes and bring them under Federal jurisdiction simply by declaring a group of Indians residing together an Indian tribe; the decision to associate as an Indian tribe has to be made by the group of Indians themselves. See, e.g., *Carcieri*, 555 U.S. at 412 (Stevens, J., dissenting) ("This Court has long made clear that Congress – and therefore the Secretary – lacks constitutional authority to 'bring a community or body of people within [federal jurisdiction] by arbitrarily calling them an Indian tribe.'" (quoting *United States v. Sandoval*, 231 U.S. 28, 46 (1913)));

Williams v. Gover, 490 F.3d 785 (9th Cir. 2007) (Descendants of those on 1935 tribal voter list at the Mooretown Rancheria not entitled to membership in the modern Mooretown Rancheria tribe); see also *U.S. v. State Tax Commission of State of Miss.*, 535 F.2d 300, 306 (5th Cir. 1976) ("We see nothing in the Acts of Congress conferring authority upon the Secretary of the Interior to create Indian tribes where none had theretofore existed."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1997) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.").

This alone justifies this court's review to ensure that the courts do not interpret the IRA in ways that improperly intrude on tribal autonomy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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