No. 17-1330

IN THE
Supreme Court of the United States

SHARP IMAGE GAMING, INC.,
Petitioner,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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June 5, 2018

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INTRODUCTION

The opposition confirms that review is warranted. The Tribe does not seriously dispute that the decision below rejects the Second Circuit's analysis in *Catskill Development L.L.C. v. Park Place Entertainment*, 547 F.3d 115 (2d Cir. 2008), and the subsequent federal decisions uniformly applying that analysis. Instead, the Tribe asserts that the decision below is "more rigorous[]" than the Second Circuit's "cursory analysis" in *Catskill Development* (an opinion authored by then-Judge Sotomayor). Opp. 2–3. While the Tribe is certainly entitled to defend the decision below on the merits, such a defense in no way negates the existence of a conflict. In any event, on the merits, the Tribe's attack on *Catskill Development* is misplaced: the regulation on which that case relied is directly on point, and the Tribe argues otherwise only by ignoring the statutory language that the regulation clarifies. Finally, the Tribe's attempts to downplay the importance of the question presented and to cast doubt upon this case as a vehicle for considering it are equally unavailing. The Court should grant certiorari to dispel the conflict and confusion created by the decision below.

ARGUMENT

I. RESPONDENT DOES NOT SERIOUSLY DISPUTE THAT THE DECISION BELOW CONFLICTS WITH *CATSKILL DEVELOPMENT* AND OTHER FEDERAL DECISIONS

Although the Tribe denies that the decision below creates any conflict with *Catskill Development* and other federal decisions, Opp. 2, it does not—and cannot—deny that the decision below expressly rejected the interpretation of the IGRA that *Catskill Develop-*

ment adopted and subsequent federal decisions have followed. Nor does the Tribe dispute the petition's demonstration (at 13–15) that the holding in the decision below conflicts with the holdings in *Wells Fargo Bank, National Association v. Lake of the Torches Economic Development Corp.*, 658 F.3d 684, 701 (7th Cir. 2011), and *Stifel, Nicolaus & Co. v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 203 (7th Cir. 2015), that a collateral agreement that does not provide for management of a gaming activity does not require approval by the National Indian Gaming Commission. The Tribe merely asserts that the analysis in *Catskill Development* is "cursory" and that the decision below analyzed the question presented "more rigorously." Opp. 2–4.

These criticisms—which, as shown below, are unfounded (*see infra* pp. 4–8)—have no bearing on the existence of a conflict. Certainly, the rigor of the analysis in *Catskill Development* and other federal decisions affects their persuasiveness and, thus, implicates the merits of the question presented. But it does not affect the existence of a conflict between those decisions and the decision below because that conflict depends on the holdings in those decisions, not their correctness.

The Tribe's assertion that the Note qualifies as a management contract under any standard (Opp. 8) is equally unavailing. The Tribe observes that the Note references gaming activity in making payment obligations commence on installation of gaming machines and in allowing certain reduced payments set at a percentage of operating revenues. Opp. 8; *see also* Pet. App. 126a–127a (containing provisions). But "the mere reference to a related management contract does not render a collateral agreement subject to the

[IGRA's] approval requirement." *Wells Fargo*, 658 F.3d at 701. Moreover, the Tribe does not explain how the references here confer any authority to "manage" gaming activity—neither triggering repayment dates on gaming operations, nor pegging reduced payment amounts to gaming revenues confers authority to "manage" those activities—and, thus, fails to offer any colorable basis for finding that the Note qualifies as a "management contract" under *Catskill Development*.

Finally, the Tribe asserts that the conflict created by the decision below does not warrant review because conflicts between intermediate state appellate court and federal court of appeals decisions are not mentioned in the rule describing the considerations governing review. Opp. 4 (discussing Sup. Ct. R. 10). That rule, however, does not "fully measur[e]" the Court's discretion. Sup. Ct. R. 10. In fact, this Court routinely reviews judgments from the California Court of Appeal, *see, e.g., DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Riley v. California*, 134 S. Ct. 2743 (2014); *Prado Navarette v. California*, 134 S. Ct. 1683 (2014); *Fernandez v. California*, 134 S. Ct. 1126 (2014); *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011), and it has expressly recognized that review may be granted to resolve conflicts between intermediate state appellate court and federal court of appeals decisions, *see DirectTV, Inc.*, 136 S. Ct. at 467–468 (granting review of petition showing that "the Ninth Circuit had reached the opposite conclusion on precise-

ly the same interpretive question decided by the California Court of Appeal").[1]

Thus, the conflict between the decision below and *Catskill Development* and other federal decisions warrants review.

II. RESPONDENT FAILS TO OFFER ANY PLAUSIBLE INTERPRETATION OF THE IGRA

The Tribe fails to offer any persuasive defense of the decision below. Although the Tribe accuses *Catskill Development* of ignoring the language of the IGRA, it is the Tribe that distorts the plain language of the statute and ignores the restriction that the statute imposes on the National Indian Gaming Commission's authority.

The Tribe contends that the *Catskill Development*'s interpretation is based on the egregious blunder of ignoring the language of Section 11(a)(3), Opp. 3, and relying instead on a regulation that "says nothing about how to interpret" the section, Opp. 13. That is nonsense. The implementing regulation invoked by *Catskill Development* is plainly relevant and does exactly what a regulation is supposed to do: it clarifies the statute it implements. As the petition showed (at 15–17), the IGRA requires the Chairman of the Na-

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[1] The Tribe asserts (at 5) that the decision below creates no confusion because intermediate California appellate court decisions are not binding on other California appellate panels. That fact, however, heightens the confusion created by the decision below by forcing subsequent California appellate panels to choose between the decision below and the now-uniform view of the federal courts.

tional Indian Gaming Regulatory Commission to approve any "management contract" for certain gaming activity, *see* 25 U.S.C. 2711(a)(1), and Section 11(a)(3) defines the scope of the Commission's approval authority by stating that a management contract "shall be considered to include all collateral agreements to such contract that relate to the gaming activity." *Id.* § 2711(a)(3). The implementing regulation invoked by *Catskill Development* clarifies how a collateral agreement must "relate to the gaming activity" to satisfy Section 11(a)(3) by defining "management contract" to cover only collateral agreements that "provide[] for the management of all or part of a gaming operation." 25 C.F.R. 502.15. Thus, as *Catskill Development* recognized, a collateral agreement is deemed included in a management contract and subject to the Commission's approval authority "only if it 'provides for the management of all or part of a gaming operation.'" 547 F.3d at 130 (quoting 25 C.F.R. 502.15).

The National Indian Gaming Commission, which issued the regulation in question, has adopted this straightforward understanding of the regulation and the scope of its approval authority. *See, e.g.,* National Indian Gaming Comm'n, Notice of No Action, 76 Fed. Reg. 63324, 63325 (Oct. 12, 2011) ("IGRA does not require approval of management agreements collateral to management contracts unless those agreements also provide for management."); *see also* Kevin Washburn, *The Mechanics of Indian Gaming Management Contract Approval*, 8 GAMING L. REV. 333, 345 (2004) (former Commission general counsel) ("The NIGC has authority to approve a collateral agreement only if it also meets the definition of 'management contract,' that is,

it provides for the 'management of all or part of a gaming operation.'").

The Tribe contends the implementing regulation imposes no restriction on the Commission's approval authority and "just provides a definition of 'management contract.'" Opp. 13. The Tribe purports to base this contention on Section 11(a)(3), which it asserts provides that "all requirements for approval of a management contract shall also apply to 'all collateral agreements to such contract that relate to the gaming activity.'" Opp. 12–13 (quoting 25 U.S.C. 2711(a)(3)). That is not what the statute states. Section 11(a)(3) does not *apply* Section 11(a)(1)'s approval requirements to collateral agreements relating to gaming activity. Section 11(a)(3) states that, for purposes of Section 11(a)(1), a management contract "shall be considered to *include* all collateral agreement to such contract that relate to the gaming activity." 25 U.S.C. 2711(a)(3) (emphasis added). Thus, the plain language of Section 11(a)(3) subjects collateral agreements to the Commission's approval authority by including them in management contracts—which is precisely why the implementing regulation invoked by *Catskill Development* defines when a collateral agreement constitutes part of a management contract.

Contrary to the Tribe's suggestion, the IGRA does not subject all collateral agreements to the Commission's approval authority. Under Section 11(a)(3) a collateral agreement is subject to the Commission's approval authority only if the agreement "relate[s] to the gaming activity." Noticeably absent from the opposition is any recognition of this restriction, much less an attempt to define its scope. Instead, the Tribe implicitly asserts that any collateral agreement in any way re-

lated to a management contract—as, by definition, all collateral agreements are (*see* 25 C.F.R. 502.5)—is included in a management contract and is subject to the Commission's approval authority. The Tribe offers no reason why Congress would have granted the Commission such expansive approval authority, much less why it would have chosen to do so by the awkward and counterintuitive method of deeming all collateral agreements to be management contracts.

Section 11(a)(3) and the scope of the Commission's approval authority is more reasonably interpreted as restricted to collateral agreements that provide for management of gaming activity. As the petition demonstrated, Section 11(a)(3)'s requirement that collateral agreements "relate to the gaming activity" is reasonably interpreted to require management of gaming operations, Pet. 16–17, and that requirement is consistent with the Section 11(a)(3)'s function (at 17), the IGRA's stated policies (at 17–19), and the overwhelming weight of judicial and administrative authority (at 19–21). The Tribe fails to dispute any of these points.

Instead, the Tribe relies on a canon of construction, arguing that *Catskill Development*'s interpretation renders Section 11(a)(3) meaningless because it construes the section to apply only to collateral agreements that independently qualify as management contracts. Opp. 13. That is wrong. *Catskill Development* does not apply Section 11(a)(3) only to collateral agreements that qualify as full-fledged management contracts. As the petition explained (at 22), a contract is not a valid management contract simply because it provides for management of gaming activity. Under the IGRA a management contract is valid only if it also

satisfies various requirements concerning duration, accounting, tribal access to records, and other matters. *See* 25 U.S.C. 2711(b). Thus, under *Catskill Development*'s interpretation, the Commission's approval requirement extends beyond agreements that satisfy all the IGRA's requirements for a management contract to cover collateral agreements providing for management of gaming activity. Pet. 22–23.

Finally, the Tribe observes that the Commission needs to review financial arrangements such as those in the Note in determining whether management contracts are valid. Opp. 7–8. While that is correct, it does not follow that the Note is independently subject to Commission approval as well as review. As already shown (Pet. 23), the IGRA requires submission of all collateral agreements *whether or not* those agreements require Commission approval. *See* Nat'l Indian Gaming Comm'n, Notice of Inquiry, 75 Fed. Reg. 70680, 70683 (Nov. 18, 2010); Washburn, *supra*, 8 GAMING L. REV. at 345–346. The Commission's authority to approve contracts need not extend to all collateral agreements to ensure review of such agreements.

Thus, the Tribe fails to offer any persuasive criticism of *Catskill Development*'s interpretation of the IGRA or any plausible alternative interpretation of the restrictions that the statute imposes on the Commission's approval authority.

III. RESPONDENT'S ATTEMPTS TO MINIMIZE THE IMPORTANCE OF THE QUESTION PRESENTED ARE UNAVAILING

The Tribe tries to downplay the importance of the question presented by asserting that this case involves a "*sui generis* dispute about an outdated form of con-

tract" (Opp. 1) that is a "relic of a bygone era" (Opp. 2) and "far out of step with contemporary practice" (Opp. 11–12). In making these assertions, however, the Tribe points to examples of consulting agreements concerning the development and operation of gaming enterprises. *See, e.g., United States ex rel. Maynard Bernard v. Casino Magic Corp.*, 293 F.3d 419, 421 (8th Cir. 2002); Dave Palermo, Walking Before Running, GLOBAL GAMING BUSINESS MAGAZINE, May 2016, *available at* https://ggbmagazine.com/article/walking-before-running/. This petition, however, concerns the Note, a collateral agreement, and there is nothing *sui generis* or outdated about promissory notes and other collateral agreements. Promissory notes are ordinarily executed separately from the broader agreements to which they relate, and many tribes choose to execute other collateral agreements in order to commence time-sensitive aspects of casino development projects while the often lengthy process of Commission approval of management contracts proceeds. Pet. 18–19. The Tribe does not suggest that promissory notes and other such collateral agreements are no longer used. To the contrary, as demonstrated by the many letters requesting guidance whether such agreement require approval, *see* Pet. 25–26 & n.7, collateral agreements continue to be used and questions concerning when they are subject to Commission approval continue to arise.

The Tribe points to the practice of requesting informal guidance on whether collateral agreements require Commission approval. Opp. 11. But it fails to explain how this practice diminishes the importance of the question presented. As the petition showed, prior to its *amicus* brief in this case the Commission repeatedly—and sometimes explicitly—followed *Catskill De-*

velopment's interpretation. *See* Pet. 20–21 & n.6. Combined with the decision below, that *amicus* brief casts doubt upon this practice, creating confusion over the standard that will be used in providing informal guidance. Thus, far from undermining the importance of the question presented, the informal guidance process underscores its continuing importance.

IV. RESPONDENT'S VEHICLE ARGUMENTS ARE UNAVAILING

The vehicle arguments to which the Tribe devotes much of its opposition (Opp. 5–10) are unpersuasive. The Tribe contends that this case is not a good vehicle for considering the question presented because the Note is not a "plain-vanilla" promissory note but instead is "inextricably linked" to the Equipment Lease Agreement. Opp. 5–9. As noted above, however, *all* collateral agreements are in some way linked to a management contract—which is why they are "collateral" in the first place. *See supra* p. 7. Even more important, the Tribe is unable to show how the Note's links in this case affect the question presented, which is whether Commission approval of a collateral agreement is required when the agreement does not provide for management of gaming activity. While the Tribe observes that the Note references gaming activity and asserts that it defines a key part of the financial relationship between the parties, Opp. 6–7, those links are irrelevant to the question presented because, as shown above, they do not confer authority to manage gaming activity. *See supra* pp. 2–3.

The Tribe also asserts that this case is a poor vehicle because the decision below did not reach all its arguments for reversal. Opp. 9–10. Such alternative ar-

guments, however, are routinely left for the lower court to decide in the first instance on remand. *See, e.g., Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 469–470 (1999).

In any event, the Tribe has failed to show that any of its alternative arguments have merit. Most of the arguments are simply identified without elaboration, *see* Opp. 10 n.4, and while the Tribe asserts that the Agreement and the Note are treated as one contract under California law, Opp. 3, 9 (citing Cal. Civ. Code 1642), it fails to explain why this state-law treatment makes the Agreement and the Note one contract under the IGRA, much less to reconcile that position with the integration clause stating that the Agreement constitutes "the entire agreement of the parties with respect to the subject matter hereto." Pet. App. 124a. In addition, far from supporting the Tribe, the one federal district decision it cites declined to reach the Tribe's argument. *See New Gaming Sys. v. Nat'l Indian Gaming Comm'n*, 896 F. Supp. 2d 1093, 1104 (W.D. Okla. 2012) ("[A]s the lease, by itself, is a management contract, the court does not have to characterize or even consider the impact of the note on the analysis.").

Thus, the Tribe's vehicle arguments are unavailing.

CONCLUSION

For the foregoing reason, and those set for the petition, review should be granted.

Respectfully submitted,

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