No. 15-17253

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF AMADOR, California,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR;
RYAN ZINKE, Secretary of the United States Department of the Interior;
JOHN TASHUDA, Acting Assistant Secretary of Indian Affairs,
United states Department of the Interior,

Defendants-Appellees,

IONE BAND OF MIWOK INDIANS,

Intervenor-Defendan-Appellee.

Appeal from the United States District Court for the Eastern District of California
Case No. 2:12-cv-1710 TLN-CKD

FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION TO PETITION FOR REHEARING EN BANC

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GLOSSARY OF ACRONYMS & ABBREVIATIONS

Assistant Secretary..... Assistant Secretary-Indian Affiars

BIA.....Bureau of Indian Affairs

County.....County of Amador, California

FSER.....Federal Defendants' Supplement Excerpts of Record

IGRA..... Indian Gaming Regulatory Act

Interior .....Department of the Interior

IRA.....Indian Reorganization Act

NEPA ..... National Environmental Policy Act

INTRODUCTION

This appeal involves a May 24, 2012 decision ("2012 Decision") by the Department of the Interior ("Interior") to acquire approximately 228 acres of land in Plymouth, California ("Plymouth Parcels") in trust for the Ione Band of Miwok Indians ("Ione Band" or "Band"), and to declare the Plymouth Parcels eligible for gaming under the Indian Gaming Regulatory Act ("IGRA"). In an October 6, 2017 opinion, this Court unanimously rejected all claims by Plaintiff the County of Amador, California (the "County") that the 2012 Decision was arbitrary and capricious or contrary to law.[1]

In its petition for rehearing en banc, the County argues (Petition at 5-6): (1) that the 2012 Decision went beyond Interior's authority under the Indian Reorganization Act of 1934 ("IRA") as interpreted by *Carcieri v. Salazar*, 555 U.S. 379 (2009), and (2) that Interior's decision to "grandfather" its 2006 gaming-eligibility determination for the Plymouth Parcels from new regulations adopted in 2008 is contrary to this Court's en banc decision in *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2013). As the panel correctly determined, these arguments are unfounded. Nor has the County identified a question of "exceptional importance" warranting en banc review. *See* Fed. R. App. P. 35(a)(2). The County's petition should be denied.

[1] Published at *County of Amador v. U.S. Dept. of Interior*, 872 F.3d 1012 (2017).

BACKGROUND

A. Ione Band

In 1851, federal agents negotiated 18 treaties to reserve lands for California Indians. Slip Op. at 5. The Ione Band descends from Indians who signed "Treaty J," FSER 488, which would have reserved Indian rights to lands in Amador County, including the Plymouth Parcels. FSER 484. Due to opposition from the California legislature, however, the United States Senate did not ratify any of the treaties. *Id.*

In 1906, in recognition that many Indians remained on California lands in destitute conditions and without land title or rights, Congress appropriated funds for Interior to use, in its discretion, to purchase lands for Indians not then on reservations. *Id.* at 6 (citing Act of June 21, 1906, Pub. L. 59-258, 34 Stat. 325, 333). In 1915, a special agent for Indian affairs located a band of 101 Indians with an elected chief residing in a remote area near Ione, California. *Id.* The agent described the Ione Indians as "having stronger claims to their ancient Village" than any others he had visited. *Id.* at 7. Between 1915 and 1935, Interior officials repeatedly attempted to purchase the 40-acre parcel where the Band was living, but these efforts failed solely due to land-title issues. *Id.* at 7-8.

In 1972, members of the Ione Band still living on the 40-acre parcel filed a state-court action to quiet title to the land in their own names and for "other

members of the Ione Band of Indians." FSER 447-448. Around the same time, the Band asked Interior to take the land into trust. FSER 442-44. In a 1972 letter, the Commissioner of Indian Affairs stated that "Federal recognition was evidently extended to the Ione Band at the time that the Ione land purchase was contemplated." FSER 446. The Commissioner agreed to accept the 40-acre parcel in trust by relinquishment of title or gift, and directed the Bureau of Indian Affairs ("BIA") to assist the Band in organizing under the IRA. *Id.* Shortly thereafter, the state court issued a judgment quieting title to the "Plaintiffs, residents of the property in question." FSER 447.

BIA did not, however, immediately implement the Commissioner's directives. Slip Op. at 9-10. In 1978, Interior promulgated regulations to govern tribal acknowledgment. *See* 43 Fed. Reg. 39,361, 39,362 (Sept. 5, 1978); *see also* 25 C.F.R. Part 83 (current regulations). BIA advised the Ione Band to petition for recognition under this Federal Acknowledgment Process, FSER 449, and left the Band off of the Department's first list of federally-recognized tribes. *See* 44 Fed. Reg. 7235 (Feb. 6, 1979). In 1994, however, the Assistant Secretary-Indian Affairs determined that the Band need not undertake the acknowledgment process in light of the Commissioner's 1972 recognition of the Band, which the Assistant Secretary "reaffirm[ed]." FSER 458. The Assistant Secretary declared that Interior would "henceforth" include the Ione Band on the list of federally-

recognized tribes. *Id*. Interior has included the Ione Band on every list since 1994. *See* 82 Fed. Reg. 4915, 4916 (Jan. 17, 2017) (current list).

The Ione Band ultimately dropped its fee-to-trust request for the 40-acre parcel and instead submitted a fee-to-trust application for the Plymouth Parcels. In 2003, BIA initiated public notice-and-comment proceedings under the National Environmental Policy Act ("NEPA") to study the impacts of acquiring the Plymouth Parcels in trust for tribal gaming. FSER 525-27. Following NEPA review and review under Interior's land-into-trust regulations (25 C.F.R. Part 151), Interior issued the 2012 Decision to take the Plymouth Parcels into trust. FSER 530-597.

B. Trust Acquisition Authority

The IRA authorizes the Secretary of the Interior, "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . . for the purpose of providing land for Indians." 25 U.S.C. 5108. The IRA defines "Indian" to include: (1) "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction"; (2) "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation"; and (3) "all other persons of one-half or more Indian blood." 25 U.S.C. § 5129; *see also Carcieri*, 555 U.S. at 391-92 (noting "three discrete" definitions).

In *Carcieri*, the Supreme Court reviewed a 1998 decision by Interior, under IRA's first definition of Indian, to acquire land in trust for the Narragansett Tribe of Rhode Island. 555 U.S. at 388-96. Interior then interpreted "now under Federal jurisdiction" to mean at the time of the trust acquisition. *Id.* at 387 (quoting 25 U.S.C. § 5129). The Supreme Court disagreed, holding that "'now under Federal jurisdiction' . . . unambiguously refers to those tribes that were under . . . federal jurisdiction . . . when the IRA was enacted in 1934." *Id.* at 395. The majority did not, however, determine the meaning of "under Federal jurisdiction" or whether "now" modifies "recognized Indian tribe." *Id.* In a concurring opinion, Justice Breyer observed that a tribe could have been "under Federal jurisdiction" in 1934 without federal recognition, e.g., if Interior then mistakenly believed that a tribe to whom the United States owed treaty obligations "no longer existed." *Id.* at 398-399. Justice Breyer noted that "[t]he statute . . . places no time limit on recognition." *Id.* at 398; *accord id.* at 400 (Souter, J., concurring and dissenting in part).

In the 2012 Decision, Interior determined that the Ione Band is eligible for a trust acquisition because the Band is a federally-recognized tribe that was "under Federal jurisdiction" in 1934. Slip Op. at 13, 17. In making the latter determination, Interior applied a two-part test that asks: (1) whether, in or before 1934, the United States took any "action or series of actions" establishing or

reflecting "federal obligations, duties, responsibility for or authority over the tribe," and (2) whether such Federal-jurisdiction status "remained intact in 1934." *Id.* at 1024-25. Interior first adopted this test—now formalized in a 2014 "M-Opinion"—in a decision involving the Cowlitz Indian Tribe of Washington.[2] *See Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, 830 F.3d 552, 563-64 (D.C. Cir. 2016), *cert. denied sub nom. Citizens Against Reservation Shopping v. Zinke*, 137 S.Ct. 1433, (2017). That decision was recently upheld by the D.C. Circuit. *Id.* at 558-566. In its 2012 Decision, Interior determined that the two-part test was satisfied for the Ione Band, based on Interior's "continuous efforts" up to and through 1934 to purchase the 40-acre parcel for the Band. Slip Op. at 29-30.

C. Gaming Eligibility

Congress enacted IGRA in 1988 to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 966 (9th Cir. 2008) (quoting 25 U.S.C. § 2702(1)). IGRA recognizes the

[2] *See* https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf (M-37029). M-Opinions are binding on the Department unless overturned by the Solicitor, Secretary, or Deputy Secretary. *See* Interior 209 Departmental Manual 3.2A(11) (available at http://elips.doi.gov/elips/).

"exclusive right" of Indian tribes to conduct gaming on "Indian lands," subject to conditions. *See* 25 U.S.C. §§ 2701, 2710.

In Section 2719, Congress provided that no tribe may conduct gaming activities on lands acquired by the Secretary in trust after October 17, 1988 (IGRA's effective date), *id.* § 2719(a), unless in accordance with a specified exception, *id.* § 2719(b). Under the "restored-lands" exception, tribes may conduct casino gaming on after-acquired lands taken into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id.* § 2719(b)(1)(B)(iii). Under the "initial-reservation" exception, tribes may conduct casino gaming on after-acquired lands taken into trust as part of "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." *Id.* § 2719(b)(1)(B)(ii). Congress enacted these exceptions to "ensure" that tribes recognized or provided trust lands after IGRA's enactment would not be "disadvantaged relative to more established ones." *See City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003). Congress also provided an exception permitting any tribe to conduct gaming on after-acquired land, but only if Interior finds, after consultation with the tribe and State and local officials, that such gaming would be "in the best interest of the Tribe" and "not . . . detrimental to the surrounding community" and the governor of the relevant state concurs. *See* 25 U.S.C. § 2719(b)(1)(A).

As part of its fee-to-trust application, the Ione Band sought a legal opinion from the Office of the Solicitor that the Plymouth Parcels, if acquired in trust, would be gaming-eligible under IGRA's restored-lands exception. Slip Op. 11-12. The Associate Solicitor issued such an opinion in 2006. *Id.* at 12. The 2006 Opinion, confirmed by Interior's Associate Deputy Secretary, concluded that the Band's recognized status had been terminated at the time of IGRA's enactment and that the Assistant Secretary's 1994 reaffirmation of the Commissioner's 1972 position constituted a "restoration" of such status. *Id.*

In 2008, Interior promulgated regulations for implementing IGRA's exceptions for after-acquired lands. 73 Fed. Reg. 29,354, 29,376 (May 28, 2008) (adding 25 C.F.R. §§ 292.1-292.26). Under these regulations, to qualify for the restored-lands exception, a tribe must be restored to recognition: (a) by statute, (b) "through the administrative Federal Acknowledgment Process," or (c) by a "Federal court determination." 25 C.F.R. § 292.10. In adopting this rule, however, Interior included an express grandfathering provision, which provides that the 2008 regulations "shall not apply" to trust-acquisition decisions in cases in which Interior, "before the effective date of [the] regulations . . . issued a written opinion regarding the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment, provided that the Department . . . retains full discretion to qualify, withdraw or modify such opinions." 25 C.F.R. § 292.26. In the 2012

Decision, Interior relied on this grandfathering provision and on the 2006 Opinion, which determined that the Ione Band had been administratively restored to federal recognition outside of the Federal Acknowledgment Process. Slip Op. at 31-35.

ARGUMENT

I. THE PANEL'S INTERPRETATION OF 25 U.S.C. § 5129 DOES NOT CONFLICT WITH *CARCIERI* OR RAISE A QUESTION OF EXCEPTIONAL IMPORTANCE

A. The Panel Properly Construed "Under Federal Jurisdiction"

The County argues that the Ione Band was not "under Federal jurisdiction" in 1934, for purposes of the IRA, 25 U.S.C. § 5129, because the Ione Band did not then reside on a federal reservation, nor then have a formal treaty relationship with the United States. *See* Slip Op. at 27. As the panel correctly held, the County's interpretation is not compelled by the plain meaning of "federal jurisdiction," the structure and purpose of the IRA, or the Act's legislative history. *Id.* at 26-29. And the County's interpretation also has already been rejected by the D.C. Circuit. *See Confederated Tribes*, 830 F.3d at 563-66.

As the panel explained, the phrase "under Federal jurisdiction" as used in the IRA "does not have an obvious meaning." Slip Op. at 27. On the one hand, "under Federal jurisdiction" might apply to "all tribes that were actually tribes in 1934," given Congress's plenary power over Indian relations. *Id.* On the other hand, "under Federal jurisdiction" could be narrowly construed to apply only to

tribes then residing as "wards" on federal reservations. *Id.* The panel rejected both extremes, noting that the former interpretation would give virtually no effect to "under Federal jurisdiction," while the latter interpretation would give virtually no effect to "recognized." *Id.* at 27-28. The panel reasoned that any tribe residing on a reservation in 1934 "almost certainly" would be "recognized." *Id.* at 27.[3] The panel concluded that Interior's interpretation "fits the bill" by requiring a showing of "some sort of significant relationship with the federal government as of 1934." *Id.* The panel found it unnecessary to decide whether this interpretation is entitled to *Chevron* deference, because the panel would have reached the same conclusion on its own. *Id.* at 25; *cf. Confederated Tribes*, 830 F.3d at 563-66 (upholding Interior's interpretation under *Chevron*).

As grounds for rehearing en banc, the County primarily argues (Pet. at 5, 14) that the panel decision conflicts with *Carcieri*. The County contends (Pet. at 11-17) that Interior circumvented the "limitation" in *Carcieri* by adopting a "standardless" interpretation of "under Federal jurisdiction." As the panel held, however, Interior's two-part test requires "some . . . significant" jurisdictional relationship as of 1934. Slip Op. at 28. No party in *Carcieri* argued that there was *any* jurisdictional relationship between the Federal government and the

[3] The IRA's second definition of "Indian" specifically refers to persons "residing within . . . any Indian reservation," while the first definition refers instead to "Federal jurisdiction." *See* 25 U.S.C. § 5129.

Narragansett Tribe in 1934, 555 U.S. at 396, and the evidence before the Supreme Court showed "little Federal contact with the Narragansetts as a group" until the 1970s, *id.* at 399-400 (Breyer, J., concurring).[4] Thus, there is no conflict between the panel's holding and *Carcieri*.

Nor is the County correct (Pet. at 16) in relying on the *Carcieri* concurrence. When suggesting that a tribe's federal jurisdictional status might be evidenced by "a treaty with the United States . . . , a congressional appropriation, or enrollment with the Indian office," Justice Breyer provided *examples* of possible qualifying evidence, not an exclusive list. *See* 555 U.S. at 399. Moreover, Interior's jurisdictional finding for the Ione Band relied on evidence consistent with Justice Breyer's examples. Congress made appropriations for landless California Indians before 1934, *see* Slip Op. at 7, and Interior conducted a tribal census (not unlike an enrollment) of the Ione Band in 1915, after identifying the Band as a proper beneficiary of the appropriations. FSER 5. As the panel found, these factors, along with Interior's continuous efforts through 1935 to purchase the 40-acre parcel for the Band, are sufficient to show a significant jurisdictional relationship

[4] Rhode Island placed the Narragansett Tribe "under formal guardianship" in 1709. *Id.* at 383. When the Narragansett first sought federal aid in the early 20th century, Federal officials took the view that the tribe "was, and always had been" under the jurisdiction of the State "rather than the Federal Government." *Id.* at 384.

between the federal government and Ione Band as of 1934. *See* Slip Op. at 7-8, 30-31.

The County's petition for rehearing en banc also wholly disregards *Confederated Tribes*, 830 F.3d 552. The Cowlitz Tribe, like the Ione Band, had no reservation or treaty relationship with the United States in 1934. *Id.* at 564-65. The D.C. Circuit nonetheless concluded that the Cowlitz Tribe was under federal jurisdiction in 1934. *Id.* at 563-66. Although *Confederated Tribes* does not bind this Court, the County's argument for a different result for the Ione Band is not consistent with the goal of "maintain[ing] uniformity" of judicial interpretations. *Cf.* Fed. R. App. P. 35(a)(1). Nor does the County identify any issue of "exceptional importance" that warrants the creation of a circuit split. *See* Fed. R. App. P. 35(a)(2).

Instead, the County mistakenly relies (Pet. at 14) on the July 13, 2017 congressional testimony of one Interior official, Associate Deputy Secretary James Cason. Mr. Cason's testimony did not address the circumstances of the Ione Band or contend that the 2014 M-Opinion is contrary to law.[5] Given Interior's ability to modify the M-Opinion and Interior's discretion over any future fee-to-trust

[5] https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=402340 at 42:00-43:20, 53:30-55:00.

acquisitions, *see* 25 U.S.C. § 5108, the Department's own expressed concerns about the M-Opinion do not provide grounds for this Court's en banc review.

B. The Panel Properly Construed "Recognized Tribe"

The County fares no better in its argument (Pet. at 17-20) regarding the meaning of "recognized Indian tribe." The County argues (*id.*) that the term "now" in the phrase "any recognized Indian tribe now under Federal jurisdiction," 25 U.S.C. § 5129, unambiguously modifies "recognized . . . tribe" and requires proof that the Ione Band was federally recognized in 1934.[6] But this contention is belied by the statute's grammar. *Confederated Tribes*, 830 F.3d at 560. The placement of "now" after "recognized . . . tribe" "strongly signals that the term is limited to the "prepositional phrase" that follows. *Id.*

Moreover, Interior had no official list of recognized tribes until 1979 and Congress did not mandate the maintenance of such a list until 1994. *See* Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, § 104(a), 108 Stat. 4791 (Nov. 2, 1994) (adding 25 U.S.C. § 5131(a)) ("List Act"). As the panel explained, because there was, in 1934, no "comprehensive list of recognized tribes" and no "formal policy or process for determining tribal status," it is

[6] Because Interior construes 25 U.S.C. § 5129 as placing no time limit on recognition, FSER 587; *see also Carcieri*, 555 U.S. at 398 (Breyer, J., concurring), Interior's 2012 Decision did not consider whether the Ione Band was a "recognized tribe" in 1934, *e.g.*, as part of Interior's land-purchase efforts that began in 1915.

"unlikely that Congress meant for the statute's applicability to turn on whether [any particular] tribe happened to have been recognized" prior the statute's enactment. Slip Op. at 21. Considering the text, structure, purpose, and legislative history of the IRA, the panel determined that the "better" reading of 25 U.S.C. § `15129 is that Congress intended to require recognition of tribal status at any time before the delivery of services to the tribe or tribal member. Slip Op. at 17-24; *see also Confederated Tribes*, 830 F.3d at 559-563 (deferring to Interior's interpretation).

The County argues (Pet. at 18) that, "prior to *Carcieri* . . . every court to address the issue" held that "now" in § 5129 modifies "recognized tribe." But none of the cases cited by the County (Pet at 18-19) actually so held. In *United States v. John*, 437 U.S. 634 (1978), the Supreme Court quoted § 5129 as defining "Indian" to include "all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction." *Id.* at 650. The Supreme Court did not, however, explain the placement of the above parenthetical; nor did the parenthetical affect the Court's decision. When it later construed "now" to mean "in 1934," the Supreme Court did not even cite *John*. *See Carcieri*, 555 U.S. at 381-96. For these reasons, the panel correctly determined that *John* is not binding or persuasive authority regarding whether "now" modifies "recognized tribe." Slip Op. at 17, n.10; *accord Confederal Tribes*, 830 F.3d at 563.

The other cases cited by the County (Pet. at 18-19) are inapposite. In *United States v. State Tax Commission of Mississippi*, 505 F.2d 633, 642 (5th Cir. 1974), the Fifth Circuit noted that the IRA required a showing of "tribal status" "as of 1934," not that that federal officials actually had to have recognized such status in (or before) 1934. *See*. In *Maynor v. Morton*, 510 F.2d 1254, 1256 (D.C. Cir. 1975), the D.C. Circuit simply observed that persons of Indian descent without tribal status in 1934 could fall within the IRA based on blood quantum. At the time of the panel's ruling, the only opinion directly addressing the timing of recognition under 25 U.S.C. § 5129—other than the concurring opinions in *Carcieri* (*supra*, p. 5)—was the D.C. Circuit's opinion in *Confederated Tribes*, 830 F.3d at 859-863. As already explained, the panel's decision to follow *Confederated Tribes* maintains uniformity of judicial interpretations and does not raise an issue of "exceptional importance" warranting rehearing en banc. *See* Fed. R. App. P. 35(a)(1)-(2).

II. THE PANEL DECISION DOES NOT CONFLICT WITH CIRCUIT PRECEDENT ON "GRANDFATHERING"

There is also no merit to the County's final argument (Pet. 21-24) that Interior's decision to accept the Plymouth Parcels in trust for gaming is contrary to IGRA and "this Court's en banc precedents." Congress enacted the restored-lands exceptions to ensure that tribes restored to federal recognition after IGRA's

enactment would not be "disadvantaged" relative to more established tribes. *City of Roseville*, 348 F.3d at 1030. Because the Ione Band was restored to recognition after IGRA's 1988 enactment, the Band is squarely within the class of tribes that Congress intended to benefit. Further, although Congress limited the similar initial-reservation exception to tribes recognized under the "Federal acknowledgment process" (Part 83 regulations), *see* 25 U.S.C. § 2719(b)(1)(B)(ii), Congress placed no such limitation on the restored-lands exception. *Id.* § 2719(b)(1)(B)(iii). For these reasons, the County cannot show—and does not argue—that Interior contravened IGRA's plain text or purpose in applying the restored-lands exception to the Ione Band.

Instead, the County argues that Interior's 2012 Decision is inconsistent with 25 C.F.R. § 292.10, the 2008 regulation which limits IGRA's restored-lands exception, for administratively restored tribes, to those tribes that have gone through the Federal Acknowledgment Process. In promulgating this rule, however, Interior did not find it to be compelled by IGRA's terms. *See* 73 Fed. Reg. at 29,363.[7] And Interior included a grandfather clause for tribes that had already

[7] Interior cited the 1994 List Act. *See* 73 Fed. Reg. 29,354, 29,363 (May 20, 2008). That statute, enacted after IGRA, includes a congressional finding that "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations . . .; or by a decision of a United States court." Pub. L. 103-454, § 103(3), 108 Stat. at 4791.

received a formal opinion from the Department regarding proposed gaming on specified lands. 25 C.F.R. § 292.26. Thus, contrary to the County's argument (Pet. at 24), Interior did not simultaneously maintain two conflicting interpretations of IGRA. Rather, Interior simply declined to apply the 2008 rule for implementing the restored-lands exception, to an ongoing proceeding in which the Department had already issued (in 2006) a formal legal opinion on gaming eligibility.

In any event, there is no support for the County's argument (Pet. at 5, 23) that the panel's judgment affirming Interior's 2012 Decision contradicts this Court's en banc decision in *Garfias-Rodriguez*. That decision adopted the "framework" (or "five-factor" test) developed by the D.C. Circuit for determining when an agency, via administrative adjudication, may apply a new policy retroactively. *See* 702 F.3d at 518 (quoting *Retail Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)). The D.C. Circuit has looked to the same factors when reviewing the reasonableness of "grandfathering" rules. *See NRDC v. Thomas*, 838 F.2d 1224, 1244 (D.C. Cir. 1988). But the County does not even recite the relevant factors, much less show that the panel misapplied them.

The County merely contends (Pet. at 22-23) that Interior's grandfathering decision for the Ione Band contravenes Congress's clear intent in IGRA. As the panel correctly determined, this premise is fundamentally flawed. Slip Op. at 36-37. Interior cannot be found to have acted contrary to clear *congressional* intent

when "grandfathering" the Band from a *regulatory* requirement (25 C.F.R. § 292.10) that is not mandated by the plain statutory text (25 U.S.C. § 2719(b)(1)(B)(iii)). Moreover, given the unique circumstances of the Ione Band and the limited applicability of the grandfather provision—which is implicated only in cases where Interior issued a gaming-eligibility opinion before 2008, *see* 25 C.F.R. § 292.26—the panel's resolution of this fact-bound IGRA issue is unlikely to have any impact beyond the present case. For this reason and the others previously stated, the County has not demonstrated an issue of "exceptional importance" warranting rehearing en banc. *See* Fed. R. App. P. 35(a)(2).

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be denied.

Respectfully Submitted,

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December 22, 2017
DJ No. 90-6-21-00954/1

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Federal Defendants' Answering Brief* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on **December 22, 2017.**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ John L. Smeltzer

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Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 15-17253

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☒ Contains 4,117 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

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Signature of Attorney or Unrepresented Litigant: s/ John L. Smeltzer

Date: Dec 22, 2017

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