NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 20-5160

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES K. HUDSON,
Plaintiff/Appellee,

v.

DAVID BERNHARDT, et al.,
Defendants/Appellants.

Appeal from the United States District Court for the District of Columbia
No. 1:15-cv-01988 (Hon. Tanya S. Chutkan)

APPELLANTS' FINAL OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties who appear before this Court are:

1. Plaintiff/appellee: Charles K. Hudson.

2. Defendants/appellants: United States Department of the Interior; David Bernhardt, in his official capacity as Secretary of the Interior; and Tara Katuk Mac Lean Sweeney, in her official capacity as Assistant Secretary-Indian Affairs, Department of the Interior.

3. The following former officeholders were named as defendants in their official capacities before the district court: S.M.R. Jewell, in her official capacity as Secretary of the Interior; Ryan Zinke, in his official capacity as Secretary of the Interior; Kevin K. Washburn, in his official capacity as Assistant Secretary-Indian Affairs, Department of the Interior; and Michael S. Black, in his official capacity as Acting Assistant Secretary–Indian Affairs, Department of the Interior. Those former officeholders have been substituted by their successors. *See* Fed. R. Civ. P. 43(c)(2).

4. No amicus curiae participated in the district court proceedings. No entity has yet sought to leave to participate as amicus curiae in this Court.

B. Rulings Under Review

The rulings under review are the district court's April 10, 2020 memorandum opinion granting plaintiff's motion for summary judgment and denying defendants' motion for summary judgment, Joint Appendix (J.A.) 204, and the court's consequent order of the same date, J.A. 220.

C. Related Cases

There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Rachel Heron
RACHEL HERON

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INTRODUCTION

The Indian Reorganization Act of 1934, 25 U.S.C. §§ 5101 et seq., authorizes federally recognized Indian tribes to amend their tribal constitutions through special elections. The Act charges the Department of the Interior with administering these special elections (known as "Secretarial elections"). Interior determines whether an election satisfies the Act's quorum requirement and further determines whether the election satisfies any additional quorum requirement imposed by *tribal* law.

At issue in this appeal is Interior's approval of the results of a 2013 special election to amend the tribal constitution of the Three Affiliated Tribes of the Fort Berthold Reservation. That decision is challenged by the plaintiff, an individual member of the Tribe. Interior determined that the 2013 election met the federal quorum requirement and that the Tribe's constitution does not impose a different requirement. On the latter point, the district court disagreed. Despite declaring itself "hesitant" to interpret another sovereign's constitution, the court did just that—setting aside Interior's decision because it departed from the court's interpretation.

That was error. The meaning of laws enacted by federally recognized Indian tribes is foremost a matter for the tribes themselves, not for federal courts. Where, as here, a tribe has not conclusively interpreted a provision of tribal law that Interior must nevertheless apply to carry out its duties under a federal statute, it is *Interior's* job to determine in the first instance how the tribe would interpret its own law. Under the deferential standard of the Administrative Procedure Act ("APA"), a reviewing court

does not ask how it would interpret tribal law if it were drawing on a blank slate, but rather whether Interior's interpretation is reasonable.

Had the district court applied the appropriate standard here, it should have upheld Interior's conclusion that the quorum requirement contained in the Tribe's constitution mirrors the Indian Reorganization Act, as that Act has been consistently interpreted by Interior for the past fifty years. This Court should therefore reverse.

STATEMENT OF JURISDICTION

(A) The district court had jurisdiction under 28 U.S.C. § 1331, because the plaintiff's claims arise under a federal statute, namely, the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.* J.A. 84, 204.

(B) This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment. J.A. 219.

(C) That judgment was entered on April 10, 2020. J.A. 220. The federal defendants timely filed a notice of appeal on June 5, 2020, or 56 days later. J.A. 221; *cf.* Fed. R. App. P. 4(a)(1)(B).

(D) The appeal is from a final judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

1. Whether the district court, in reviewing agency action under the APA, should have asked whether Interior reasonably interpreted the Tribe's constitution in deciding to approve the results of a Secretarial election rather than interpreting the tribal constitution in the first instance.

2. Whether Interior's conclusion that the Tribe's constitution contains the same quorum requirement imposed by the Indian Reorganization Act, as consistently interpreted and applied by Interior since 1967, was reasonable.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum following this brief.

STATEMENT OF THE CASE

A. Secretarial elections to amend tribal constitutions under the Indian Reorganization Act

1. Interior's role in administering Secretarial elections

"Since the days of John Marshall, it has been a bedrock principle of federal Indian law that every tribe is 'capable of managing its own affairs and governing itself.'" *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831)). Since 1934, the Indian Reorganization Act has provided a process by which tribes may organize their own governments to do just that. *See* ch. 576, 48 Stat. 984 (1934). The Act entrusts the U.S. Department of the Interior with responsibility for overseeing that process.

Specifically, the Act authorizes federally recognized Indian tribes to adopt and amend their own constitutions and bylaws via Secretarial elections "authorized and called by" Interior, "under such rules and regulations as [Interior] may prescribe." 25 U.S.C. § 5123(a)(1). To carry out its duties under the Act, Interior will, upon

receiving from a tribe a request to hold a Secretarial election, establish an election board. J.A. 289-90 (regulations formerly codified at 25 C.F.R. §§ 81.5, 81.8(a)).[1] The election board—which shall include at least two representatives of the tribal government—is responsible for conducting the Secretarial election. J.A. 290 (formerly codified at 25 C.F.R. § 81.8(a)). Among the election board's duties is compiling the list of all members registered to vote in the election. J.A. 292 (formerly codified at 25 C.F.R. § 81.12).

After the Secretarial election is held, the election board is responsible for certifying the results, J.A. 291, 295 (formerly codified at 25 C.F.R. §§ 81.8(b)(5), 81.23)—including certifying that the required quorum of voters participated in the election, J.A. 295 (formerly codified at 25 C.F.R. § 81.23(b)). After the election results are posted, tribal members may challenge the results. *Id.* (formerly codified at 25 C.F.R. §§ 81.22, 81.23(a)). Based on the election results and its analysis of any challenges, the Department either approves or disapproves the proposed amendments to the tribal constitution. *Id.* (formerly codified at 25 C.F.R. §§ 81.22, 81.24).

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[1] Interior revised and reorganized its regulations governing Secretarial elections in 2015. The version of Interior's regulations that were in place at the time of the 2013 Secretarial election—and which accordingly govern this action—were reproduced in the administrative record below. *See* J.A. 287-95. This brief will cite the pre-2015 version of the regulations. For this Court's awareness, the post-2015 regulations governing the appointment of election boards, registration of voters, and certification of results in Secretarial elections appear at 25 C.F.R. §§ 81.19-81.45. Under the post-2015 regulations, Interior continues to interpret the Indian Reorganization Act's quorum requirement the same way that it did in 2013. *See id.* §§ 81.29, 81.39.

2. Federal and tribal quorum requirements for Secretarial elections

Secretarial elections conducted under the Indian Reorganization Act are subject to numerous procedural and substantive requirements. Pertinent to this appeal is the requirement that a sufficient percentage of voters participate in an election in order for a proposed constitutional amendment to take effect. As discussed below, the Indian Reorganization Act imposes its own quorum requirement. Interior has interpreted the Act to also allow a tribal constitution to impose its own quorum requirement.

a. The federal quorum requirement

The federal quorum requirement for Secretarial elections held under the Indian Reorganization Act has evolved since 1934. As originally enacted, the Act provided that tribal constitutions and amendments thereto would "become effective when ratified by a majority vote of the adult members of the tribe." Ch. 576, § 16, 48 Stat. at 987. Congress amended the statute one year later to state that an amendment will succeed if it receives "the vote of a majority of those actually voting," provided that "the total vote cast shall not be less than 30 per centum of those entitled to vote." Act of June 15, 1935, ch. 20, § 1, 49 Stat. 378 (codified at 25 U.S.C. § 5127); J.A. 307. The Act does not define who is "entitled to vote" for purposes of determining whether the statutory quorum requirement has been satisfied.

Interior's interpretation of that phrase has evolved over time. Initially, Interior interpreted the phrase "those entitled to vote" to refer to all adult members of a tribe.

J.A. 308-12 (1935 regulations). But that definition proved to be a barrier to tribes' ability to make changes to their constitutions—and thereby to effectively govern themselves—because of the difficulty of getting thirty percent of all adult members of a tribe to participate in a Secretarial election. *E.g.*, J.A. 332-33. The problem persisted after Interior clarified that tribal members living outside the reservation are eligible to participate in elections and therefore must be included in counting the total number of adult members of a tribe. *E.g.*, J.A. 322-23, 360 (documenting elections in which turnout was less than 30% of all adult tribal members); *see generally* 29 Fed. Reg. 14,359, 14,360 (Oct. 17, 1964) ("Any adult member regardless of residence shall be entitled to vote.").

Interior responded to the difficulty faced by tribes seeking to amend their constitutions by reconsidering its original interpretation of the phrase "entitled to vote"; in 1967, after public notice and opportunity to comment, the agency issued revised regulations. *See generally* 32 Fed. Reg. 11,777 (Aug. 16, 1967). Interior decided that to be *entitled* to vote in a Secretarial election, an individual must be both an adult member of the tribe and "duly registered" to vote in that election. *Id.* at 11,778. Thus, in order to satisfy the Act's quorum requirement, a Secretarial election must garner participation from at least thirty percent of all adult tribal members registered to vote in that election. *See id.* Interior has consistently adhered to that definition for more than fifty years and continues to do so today. J.A. 320-22; *see also* 25 C.F.R. §§ 81.29, 81.39.

b. The Three Affiliated Tribes of the Fort Berthold Reservation's constitutional quorum requirement

Tribal constitutions may impose their own conditions for amendment—including setting their own quorum requirements. Under Interior's regulations, a Secretarial election held under the Indian Reorganization Act for the purpose of amending a tribal constitution must satisfy any such quorum requirement imposed by the tribe's own constitution. *See* J.A. 289 (formerly codified at 25 C.F.R. § 81.5(d)); *see also* 25 C.F.R. § 81.2(b). Relevant to this appeal is the quorum provision contained in the tribal constitution of the Three Affiliated Tribes of the Fort Berthold Reservation.

The Tribe is a federally recognized Indian tribe whose reservation is located in North Dakota. The Tribe adopted its constitution through the Indian Reorganization Act's Secretarial election process in 1936, two years after the statute's enactment and one year after the statute was amended to impose a thirty percent quorum requirement. J.A. 329. The pertinent provision of the Tribe's constitution, Article X, remains unchanged today. Echoing the language of the federal statute, Article X provides that "[t]his Constitution and Bylaws may be amended by a majority vote of the qualified voters of the tribe voting at an election called for that purpose by [Interior], provided that at least thirty (30) percent of *those entitled to vote* shall vote in such election." J.A. 330 (emphasis added).

The Tribe's constitution provides no independent definition of the phrase "entitled to vote," which it borrows from the Indian Reorganization Act. *See id.*; J.A.

241-49. And although the Tribe's constitution was adopted during the period in which Interior interpreted that statutory phrase to refer broadly to all adult members of a tribe regardless of voter registration status, Article X does not cite, quote, or otherwise reference Interior's original regulatory definition. *See id.* Nor is Interior aware of any occasion, after it revised its interpretation of "entitled to vote" in 1967, on which the Tribe has stated that that change caused the meaning of the federal statutory requirement and the tribal constitutional requirement to diverge.

To the contrary, in every one of the six Secretarial elections held between 1967 and 2010, the number of ballots cast was greater than 30% of those *entitled* to vote by virtue of having registered, but less than 30% of the Tribe's total adult membership. J.A. 322-23, 360. The election board for each election—including the representatives of the tribal governing body—certified the results as consistent with the relevant quorum requirement. *See* J.A. 378-79, 386, 392, 396, 399, 403, 406, 412-14, 420, 423, 433, 436, 441. Interior then approved the results of those elections. J.A. 373, 381-82, 393, 397, 400, 405, 408, 418, 421, 434, 437, 442. No member of the Tribe's governing body (the Tribal Business Council) challenged either the election board's certification or Interior's decision approving the results in any of those elections. *See* J.A. 322-23.

B. Plaintiff's challenge to the 2013 Secretarial election to adopt amendments to the Tribe's constitution

1. The 2013 Secretarial election

In 2013, Interior called and held a Secretarial election under the Indian Reorganization Act to consider two proposed amendments to the Tribe's constitution: (1) to make certain structural changes to the governing Tribal Business Council (including changing the council's size from seven members to thirteen); and (2) to alter the process for filling vacancies on the council. J.A. 234-35, 237-39. Interior mailed notice to tribal members. J.A. 269, 272-76. That mailing informed members that anyone wishing to vote in the Secretarial election must first register, and it included a voter registration form with a self-addressed stamped envelope. J.A. 269, 271.

A total of 1,249 tribal members registered to vote in the 2013 Secretarial election. J.A. 233, 236, 360. When the election was held on July 30, 2013, 508 members (approximately 40.7% of the total number of registered voters) cast a vote on the proposed amendments. *Id.* In both cases, the majority of ballots cast was in favor of adopting the amendment. J.A. 233, 236. The election board accordingly certified that both proposed amendments were duly adopted. *Id.*

Following certification of the election, the sitting Tribal Business Council—the members of which were directly affected by adoption of the 2013 amendment to enlarge the Council's size and thereby dilute sitting members' power—sent a letter

to Interior asking it to "decertify" the 2013 Secretarial election results and call a new Secretarial election on the amendments approved in 2013. J.A. 367. Accompanying that letter was a Council resolution stating that the number of ballots cast was small compared to the total number of voting-age members of the tribe, such that the vote did not "adequately and fairly indicate the wishes for the enrolled membership." J.A. 22; *see also* J.A. 367. The Council's resolution nowhere disputed that the level of participation—although smaller than the Council wished to see—was sufficient to satisfy Article X of the Tribe's constitution. *See* J.A. 22-24. Indeed, the resolution did not mention Article X at all. *See id.*; *see also* J.A. 323. Nor did it request that Interior apply a quorum requirement different from what it applied in 2013 in any new election on the proposed amendments. *See* J.A. 22-24.

After Interior explained in a reply letter that the level of participation in the election satisfied the relevant quorum requirement and that the agency therefore could not disregard the results, the Council took no further action. *See* J.A. 323, 367-69.

2. Plaintiff's administrative challenge

Following certification of the 2013 Secretarial election results, Mr. Charles K. Hudson, an individual member of the Tribe who registered for and voted in the 2013 election, lodged an administrative challenge. J.A. 283-84. In his letter contesting the 2013 results, Mr. Hudson listed seven alleged "legal deficiencies, inconsistencies, and concerns" with the election; as relevant to this appeal, those included that the 2013 election failed to meet the quorum requirement contained in Article X of the Tribe's

constitution. *Id.* Mr. Hudson's letter did not dispute the election board's tally of the total number of ballots cast or its finding that more than 30% of the Tribe's 1,249 registered voters participated. *See* J.A. 283. Instead, Mr. Hudson argued that the constitutional requirement was not satisfied because the total number of ballots cast was less than 30% of the number of *all* adult tribal members. *Id.*

The Great Plains Regional Director of Interior's Bureau of Indian Affairs denied Mr. Hudson's challenge, and Mr. Hudson subsequently filed an administrative appeal to the Interior Board of Indian Appeals. J.A. 296. The Board affirmed the denial of Mr. Hudson's challenge. J.A. 223-32; *see also* 61 IBIA 253 (Sept. 15, 2015).

As to the quorum issue, the Board explained that federal law, like Article X of the Tribe's constitution, requires participation by 30% of those "entitled to vote." J.A. 228-30. Under Interior's longstanding interpretation of that phrase in federal law, "'entitled to vote' means those who are eligible *and* who register to vote," meaning that the quorum requirement is satisfied so long as 30% of registered voters cast ballots. J.A. 228. The Board disagreed with Mr. Hudson's contention that Article X of the Tribe's constitution is intended to enact a different, more stringent quorum requirement: Mr. Hudson had not provided "any support" for assuming that the tribal constitution had adopted language parallel to the federal requirement "but [had] assigned a different meaning to the specific term used to calculate whether the voter participation threshold had been met." *Id.* "In the absence of any evidence or legal argument in support of this proposition," the Board was "unwilling to infer in the

Tribes' Constitution a different legal meaning of the term 'entitled to vote' [from] that established by Federal regulation." *Id.*

3. Plaintiff's 2015 complaint and Interior's supplemental decision on remand

In 2015, Mr. Hudson filed a complaint in the district court challenging Interior's denial of his election contest. J.A. 12-21.[2] Interior responded by moving for a voluntary remand in order to give additional consideration to Mr. Hudson's quorum-related arguments. J.A. 28. The district court granted that motion. J.A. 73.

On remand, the Deputy Regional Director "incorporate[d] by reference all earlier [Bureau of Indian Affairs] and Department of the Interior determinations, records and analysis," and reaffirmed Interior's original conclusion that the 2013 Secretarial election satisfied federal and tribal quorum requirements. J.A. 320-28. Starting with the federal requirement, the remand decision traced the history of the Indian Reorganization Act's quorum provision and Interior's regulations interpreting that provision. J.A. 320-22. The decision explained that the agency has for fifty years consistently interpreted the statutory phrase "those entitled to vote" to refer to adult

[2] On the heels of filing his 2015 lawsuit, Mr. Hudson filed a second lawsuit, that time challenging a separate special election held in July 2016. Mr. Hudson again claimed that the special election did not satisfy the relevant quorum requirement. *See generally Hudson v. Jewell*, D.D.C. No. 1:16-cv-01747; J.A. 343-52. That second lawsuit has been administratively closed, with the option to move for the lawsuit's return to the district court's active docket, pending resolution of the instant case. Minute Order (July 6, 2017).

members who have duly registered to vote in that Secretarial election, not generically to all voting-age members of a tribe. *Id.*

The remand decision then considered whether the Tribe intends for Article X of its constitution to impose a "different standard for calculating the 30% quorum requirement," and concluded that it does not. J.A. 322 (capitalization omitted). The decision explained that its analysis "begins with the fact that Article X of the Tribal Constitution very specifically relates to the 30% quorum requirement" imposed by federal law "and uses the exact same term, 'entitled,' that is used in the governing Secretarial Election regulations." *Id.*

The remand decision acknowledged that the Tribe's constitution predates Interior's 1967 regulations interpreting the statutory phrase "those entitled to vote" to refer to registered voters; but it found "no substantiating information indicating" the Tribe had intended to crystallize an earlier regulatory construction of the phrase—or, in the remand decision's words, to treat the phrase as "a static term, with its application frozen in time based upon 1936 practices." *Id.* Instead, as the decision detailed, the Tribe's past practice suggests the opposite: in the six Secretarial elections held since 1967 (in 1974, 1975, 1985, 1986, 2008, and 2010), both the election board called to conduct the election and Interior found that a quorum was present because 30% of registered voters participated, even though the total number of participants was less than 30% of all adult tribal members. J.A. 322-23, 360. The Tribe never argued that its constitution requires otherwise. JA. 322-23. Although the affected

members of the Tribal Business Council did ask Interior to "decertify" the results of the 2013 Secretarial election, the Council likewise did not demonstrate that the Tribe had ever authoritatively interpreted Article X to the contrary. J.A. 323.

The remand decision accordingly concluded that the Tribe's "consistent acceptance of the federal regulations' definition of 'entitled to vote' since 1967" resolves any ambiguity left by the tribal constitution's text and shows "that the Tribe interprets its law as consistent with the federal definition." *Id.* Because the federal government "should accept a tribe's reasonable interpretation of ambiguities within tribal law," the decision reaffirmed Interior's previous conclusion. *Id.* (citing *Ransom v. Babbitt*, 69 F. Supp.2d 141, 150-51 (D.D.C. 1999)).

C. The district court's decision

After Interior's remand decision issued, Mr. Hudson filed an amended complaint in the district court, claiming that Interior's certification of the 2013 Secretarial election results violates both federal and tribal quorum requirements. J.A. 93-94. On cross-motions for summary judgment, the district court did not reach Mr. Hudson's challenge to Interior's long-standing interpretation of the Indian Reorganization Act's quorum requirement. J.A. 219. Instead, the court decided that Interior's "approval of the 2013 Election must be vacated," based solely on the court's own interpretation of tribal law. J.A. 218-19.

The district court acknowledged that Mr. Hudson's challenge to final agency action must be reviewed under the "highly deferential" APA standard, and that a

reviewing court is "not empowered to substitute its judgment for that of the agency." J.A. 211. But when it turned to the merits of the interpretive issue, the court did not articulate the question before it as whether Interior's judgment regarding how the Tribe would interpret Article X was reasonable. *See* J.A. 212-13. Instead, despite declaring itself "hesitant to interpret another sovereign's constitution, especially on an issue of first impression," the court deemed itself "obligated to undertake the task" of construing tribal law itself. J.A. 213. It went on to do just that.

In the district court's view, Article X's reference to those "entitled to vote" necessarily requires participation by 30% of all "adult members of the tribe," because that is how federal regulations interpreted the identical phrase used in the Indian Reorganization Act at the time that the Tribe that adopted its constitution. J.A. 218. The court dismissed Interior's reasons for finding that Article X instead intended to mirror—and evolve with—the federal requirement. J.A. 213-19. The court characterized Interior as contending that Interior's "changing interpretation of its governing statute or regulations necessarily affects the meaning of a separate sovereign's identical constitutional language," such that "whenever the federal government amends regulations that address the same concerns as a tribe's constitution, it also amends the tribe's constitution." J.A. 214. The court faulted Interior for citing no authority or "even a common-sense explanation" to support such a principle. *Id.*

Turning to the issue of the Tribe's own past practice, the court acknowledged that the Tribe historically did not object to the certification of Secretarial elections in which thirty percent of registered voters participated, but not thirty percent of all adult tribal members. J.A. 215-16. Nevertheless, the court ruled that Interior's conclusion—that the Tribe understands its constitution to be consistent with the post-1967 federal regulations—was "unsupported by the record." J.A. 218. Instead, the court asserted that "the Tribe's stance on Article X appears to either be in favor of Hudson's reading or ambiguous." *Id.* The court based that assertion in large measure on the Tribal Business Council's request that Interior decertify the results of the 2013 Secretarial election. *See* J.A. 217-18. The court also cited the fact that individual tribal members, like Mr. Hudson, have sometimes opposed certification of election results, plus a 2008 resolution of the Tribal Business Council that made no argument regarding Article X's quorum requirement. J.A. 216-17. The court ultimately concluded, however, that any evidence of the Tribe's treatment could not "overcome" the true meaning of Article X. J.A. 215-16.

The district court accordingly vacated Interior's decision approving the election results because it utilized a quorum requirement inconsistent with the court's own interpretation of Article X. J.A. 219. Interior timely appealed. J.A. 221.

SUMMARY OF ARGUMENT

The district court vacated the agency decision under review on a single ground: that Interior's interpretation of the tribal quorum requirement was different from the

interpretation the court would have adopted in the first instance. The district court applied the wrong standard of review, and this Court should therefore reverse. Under the appropriate standard, the district court should have upheld Interior's determination that the Tribe would interpret its constitution to impose the same quorum requirement as federal law, because that determination was reasonable.

1. As this Court well knows, judicial review of final agency action under the APA is deferential. It is a cardinal rule that the reviewing court may not substitute its judgment for that of the agency. That cardinal rule applies equally where, as here, the agency charged with administering the federal government's special relationship with Indian tribes makes a judgment that its own action conforms to a relevant provision of tribal law.

The proper interpretation of tribal law is, first and foremost, a question for the tribes themselves. Nevertheless, in carrying out its duties under federal law, Interior must sometimes apply a provision of tribal law that the relevant tribe has not yet conclusively interpreted. In that circumstance, Interior must make a reasoned decision regarding how the tribe would likely interpret its own law. Just as in myriad other administrative law contexts in which the agency brings its expertise to bear, the role of the reviewing court is to ask whether the agency reached a *reasonable* answer; the court's role is not to choose for itself between two plausible interpretations. That is precisely the approach this Court has taken with regard to the parallel question of how a court should review a federal agency's finding that its action conforms to state law.

In both scenarios, the reviewing court's job is not to definitively interpret another sovereign's law, but merely to ensure that the agency's construction of that law is reasonable. The district court overstepped its mark in ruling that it was "obligated" to interpret Article X of the Tribe's constitution for itself, and then faulted Interior for deviating from the court's interpretation.

2. Under the proper standard of review, Interior's decision to certify the results of the 2013 Secretarial election should be upheld, because Interior reasonably concluded that the Tribe would interpret the phrase "entitled to vote" in Article X of its constitution to mirror Interior's interpretation of the federal quorum requirement. Article X's quorum requirement uses the identical operative language—"those entitled to vote"—as that of the Indian Reorganization Act, and the constitution nowhere provides a separate definition of that phrase. At the time that the Tribe's constitution was adopted, federal regulations interpreted the statutory phrase to refer to all adult members of a tribe. But Article X does not state an intent to codify that particular regulatory definition for all time; to the contrary, Article X does not cite, quote, or otherwise reference that regulatory definition. It was therefore reasonable for Interior to conclude that the Tribe intended Article X instead to mirror—and to evolve with—the federal requirement, rather than to impose a static requirement keyed to the initial regulatory definition of the phrase. Likewise, it was reasonable for Interior to infer from the Tribe's actions—particularly, the Tribe's acceptance of six Secretarial elections held between 1967 and 2010 applying the federal regulatory definition of

"entitled to vote"—that the Tribe's interpreted its law to be consistent with the post-1967 regulations.

The district court's contrary reading of Article X is perhaps plausible, but it is certainly not compelled. To the contrary, that reading assumes—in the absence of any affirmative textual indication and in the face of the Tribe's contrary actions—that the Tribe intended to lock in a regulatory definition of quorum that *no* Secretarial election that the Tribe has held since 1967 could meet.

The district court's criticisms of Interior's reading, moreover, are unavailing. That reading does not, as the court assumed, give Interior blanket authority to alter tribal law without the tribe's consent. Rather, it simply recognizes that a tribe may, as a matter of its own sovereign prerogatives, choose to peg tribal law to a federal standard that might evolve over time. Nor is there merit to the court's criticism that Interior improperly weighed the available evidence of how the Tribe itself understands Article X. The court relied on facts that say nothing about how the Tribe reads its constitution, including objections from individual tribal members (who do not speak for the Tribe itself) and a 2008 resolution of the Tribal Business Council that does not discuss the meaning of Article X. The court also faulted Interior for giving insufficient weight to the Tribal Business Council's 2013 request to "decertify" the results of the 2013 election based on low voter turnout. But that request neither disputed that the 2013 election satisfied Article X nor offered any analysis of that provision. Moreover, even assuming that the Council's 2013 request is relevant to the question of how the

Tribe interprets Article X, how to weigh that lone request against the Tribe's long history of acceding to Secretarial elections in which 30% of registered voters (but less than 30% of all adult members) participated is a question for Interior, and the district court erred in substituting its view for that of the agency.

The district court's judgment should be reversed.

STANDARD OF REVIEW

This Court reviews a district court's grant or denial of summary judgment de novo. *Mayo v. Reynolds*, 875 F.3d 11, 19 (D.C. Cir. 2017). The Court likewise reviews de novo a district court's conclusion that agency action violates the APA, "which means that we review the agency's decision on our own." *Gresham v. Azar*, 950 F.3d 93, 99 (D.C. Cir. 2020) (quoting *Castlewood Productions, LLC v. Norton*, 365 F.3d 1076, 1082 (D.C. Cir. 1982)).

ARGUMENT

I. The district court applied the wrong standard of review.

The district court provided a single basis for setting aside Interior's decision certifying the results of the 2013 Secretarial election: that the decision was inconsistent with the court's own construction of Article X of the Tribe's constitution. J.A. 212-19. But this Court need not—and in fact *should* not—decide how it would interpret Article X in the first instance. As explained below, in the absence of a conclusive interpretation of Article X by the Tribe itself, the proper question for the reviewing federal court is whether Interior's judgment as to how the Tribe would interpret

Article X was reasonable. Because the district court departed from that standard of review, this Court should reverse as a matter of law.[3]

A. In an APA challenge to Interior's interpretation of tribal law, the reviewing court asks only whether Interior's interpretation was reasonable.

The APA authorizes federal courts to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That standard of review is "highly deferential." *Islamic American Relief Agency v. Gonzales*, 477 F.3d 728, 732 (D.C. Cir. 2007). Although the agency is required to "examine the relevant data and articulate a satisfactory explanation for its action," it is a touchstone principle of administrative law that the reviewing court "may not substitute [its] judgment" for that of the agency. *Id.* (quoting *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983)); *see also, e.g.*, *Mayo*, 875 F.3d at 19-20. As this Court has stated, the pertinent question for a reviewing court "is not what we would

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[3] As stated above, because the district court vacated Interior's decision on the tribal quorum issue alone, the court did not reach Mr. Hudson's arguments that Interior's decision conflicts with the Indian Reorganization Act's quorum requirement (and that Interior's long-standing interpretation of that requirement is inconsistent with the Act). J.A. 219. The district court would be free to consider Mr. Hudson's arguments regarding the federal requirement on a remand from this Court. As Interior explained below, those arguments are unavailing. There is no question that the 2013 election satisfies the statutory quorum requirement as interpreted in Interior's regulations. *See* J.A. 233, 236; 25 C.F.R. §§ 81.29, 81.39. That regulatory interpretation, both developed through notice-and-comment rulemaking and consistently applied for more than fifty years, is a reasonable interpretation of the Indian Reorganization Act. *See generally* J.A. 145-57, 183-94.

have done, nor whether we agree with the agency action. Rather, the question is whether the agency action was reasonable and reasonably explained." *Jackson v. Mabus*, 808 F.3d 933, 936 (D.C. Cir. 2015).

These guiding principles apply with no less force in a case like this one, where an APA plaintiff challenges Interior's determination that its action comports with tribal law. Interior is the agency responsible for overseeing many aspects of the federal government's political relationship with the hundreds of federally recognized Indian tribes. *See California Valley Miwok Tribe*, 515 F.3d at 1267 (recognizing Interior's "broad power to carry out the federal government's unique responsibilities with respect to Indians"). Sometimes, in carrying out its federal responsibility, Interior must construe tribal law. The agency responsibility at issue in this case—certifying the results of Secretarial elections to amend tribal constitutions under the Indian Reorganization Act—is one such example. There are others. *See, e.g.*, *Aguayo v. Jewell*, 827 F.3d 1213, 1222 (9th Cir. 2016) (Interior required to interpret tribal constitution and ordinance to respond to request to intervene in tribal enrollment dispute); *Baciarelli v. Morton*, 481 F.2d 610, 612 (9th Cir. 1973) (Interior required to determine who meets tribal-law membership criteria for purpose of distributing trust assets); *see also Alto v. Black*, 738 F.3d 1111, 1115 (9th Cir. 2013) (tribal law gives Interior final authority over tribal membership decisions). In such instances, Interior has long maintained it has "both the authority and the responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe." *Reese v. Minneapolis Area*

Director, 17 IBIA 169, 173 (1989); *see also United Keetoowah Band of Cherokee Indians v. Muskogee Area Director*, 22 IBIA 75, 80 (1992).

When Interior is called upon to interpret tribal law, it asks how the relevant tribe, which is the primary authority on its own laws, would interpret the provision at issue. *See United Keetoowah Band*, 22 IBIA at 80*; see generally Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 16 (1987) ("tribal courts are best qualified to interpret and apply tribal law"). Where tribal law is unambiguous, Interior's role will presumably be straightforward. Likewise, where the tribe itself has already interpreted the relevant provision of tribal law—for example, through an authoritative ruling by the tribal courts—Interior's role is relatively simple: it will apply the tribe's own reasonable construction of that law. *United Keetoowah Band*, 22 IBIA at 80; *see also Ransom*, 69 F. Supp. 2d at 150-51. Interior's role is more complex where the tribe has not clearly spoken to the meaning of some ambiguous provision of tribal law. In that situation, Interior must make its own judgment regarding how the tribe would likely interpret the provision of tribal law at issue.

Accordingly, Interior's judgment regarding how a tribe would interpret an ambiguous provision of tribal law reflects the agency's application of its unique expertise over Indian affairs. When such a judgment is challenged under the APA, the reviewing court should ask the same question that it would ask of any exercise of an agency's expert decision-making: whether the agency came to a *reasonable* conclusion,

not whether the court would have come to that conclusion in the first instance. *See Jackson*, 808 F.3d at 936.

Indeed, the principle that a reviewing court should ask whether agency action was reasonable, even if not the court's preferred interpretation, carries special force when an agency applies tribal law. Federal courts are not the primary authority on what tribal law means; the tribes themselves are. *See LaPlante*, 480 U.S. at 16. Thus, federal courts are not inherently any better positioned than Interior to determine how a given tribe would interpret its own laws. To the contrary, this Court has recognized that Interior's expertise in tribal relations may give the agency a better claim than the courts to mediate disputed questions of tribal governance—which is why this Court defers to the executive branch regarding what individuals or entities have authority to speak on behalf of a tribe. *See Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 938-39 (D.C. Cir. 2012).

Moreover, a tribe or a tribal member may not directly invoke the jurisdiction of federal courts to decide internal disputes about the meaning of tribal law. *E.g.*, *Cayuga Nation v. Tanner*, 824 F.3d 321, 327-28 (2d Cir. 2016); *Runs After v. United States*, 766 F.2d 347, 352-53 (8th Cir. 1985). To be sure, federal courts *do* have jurisdiction under the APA to hear aggrieved parties' claims that final agency action is arbitrary, capricious, or contrary to law, subject to certain exceptions. That jurisdiction exists even where the APA challenge turns in part on whether the agency permissibly interpreted tribal law—as other courts of appeals have recognized. *Alto*, 738 F.3d at 1123-25;

Runs After, 766 F.2d at 351; *Goodface v. Grassrope*, 708 F.2d 335, 338-39 (8th Cir. 1983); *cf. Shenandoah v. U.S. Department of Interior*, 159 F.3d 708, 712-13 (2d Cir. 1988). But when federal courts are called on to review agency action that turns on a construction of tribal law, they are "careful, however, to limit the scope of federal jurisdiction to the propriety of the [agency's] action under the APA, not the soundness of the [agency's] decision under tribal law." *Alto*, 738 F.3d at 1123 n.9 (citing *Runs After*, 766 F.2d at 352); *see also Goodface*, 708 F.2d at 338-39 (holding that district court had jurisdiction to hear APA challenge to Interior's decision to refrain from intervening in a tribal election dispute, but "overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute").

The Ninth Circuit expounded on precisely how a federal court should thread this needle in *Aguayo v. Jewell,* 827 F.3d at 1226. The plaintiffs in *Aguayo* challenged Interior's decision that it lacked authority to intervene in a tribal membership dispute. *Id.* Interior had reached that decision by consulting the applicable tribal law and concluding that it did not authorize federal involvement in the dispute. *Id.* Plaintiffs argued that Interior had erred. The Ninth Circuit, citing the well-established principles that APA review is "highly deferential" and that the court "may not substitute [its] judgment for that of the agency," rejected plaintiffs' argument, holding that Interior's action was reasonable. *Id.* As that court explained, under the APA's standard of review, "we decide only whether [Interior's] decision was based on a clear error of judgment." *Id.* at 1227-28. It concluded that Interior's interpretation of the relevant

tribal laws contained no such error. *Id.* In other words, the Ninth Circuit asked not whether it would have arrived at Interior's interpretation of tribal law in the first instance but whether Interior's choice among plausible interpretations was reasonable.

Although this Court has never squarely addressed how a federal court should review an agency's interpretation of *tribal* law, it has followed the very same approach as *Aguayo* in addressing the parallel question of how a federal court should review an agency's interpretation of *state* law. Federal courts are not the primary authority on state law, any more than they are the primary authority on tribal law. *Cf. Washington State Dep't of Licensing v. Cougar Den*, 139 S. Ct. 1000, 1010 (2019).

Yet state law—like tribal law—might become relevant in an APA challenge over which the federal court *does* have jurisdiction, to the extent that an APA plaintiff argues that agency action is arbitrary, capricious, or contrary to law because it conflicts with a relevant provision of state law. This Court considered just such an argument in *Detroit International Bridge Co. v. Government of Canada*, 883 F.3d 895 (D.C. Cir. 2018). This Court ultimately concluded that the federal agency defendant in that case was under no obligation to ensure that its action conformed to state law. *Id.* at 899. The Court nevertheless went on to explain that "even assuming the state-law inquiry was required, . . . the question for this court would be whether the [agency] made a 'clear error of judgment,'" not whether the agency's interpretation of state law was correct. *Id.* (quoting *State Farm*, 463 U.S. at 43).

For all these reasons, this Court's precedent (like that of its sister circuits) shows that when a federal court hears an APA challenge to a decision by Interior interpreting tribal law, the court's job is not to reach its own conclusion about the correct meaning of tribal law. Instead, the reviewing court's role is to ask whether Interior's interpretation was reasonable.

B. The district court erred by interpreting Article X of the Tribe's constitution in its own right.

The district court overstepped its proper role in reviewing Interior's decision to certify the 2013 Secretarial election. Although Interior explained in its summary judgment brief that the deferential APA standard of review should apply, J.A. 141-42, and although the district court cited that standard, J.A. 211-12, the court nevertheless decided that it was "obligated" to interpret Article X of the Tribe's constitution itself in order to resolve Mr. Hudson's claims. J.A. 213. The court believed itself to be so obligated, notwithstanding its "hesitan[ce] to interpret another sovereign's constitution, especially on an issue of first impression," for two reasons: (1) the Tribe itself had never issued an authoritative interpretation of Article X's quorum requirement; and (2) the court had no method for certifying that question to a tribal court in order to obtain an authoritative interpretation. *Id.*

The district court erred as a matter of law. For all the reasons stated above, the court's role in this APA challenge was not to decide its preferred reading of Article X, but only to determine whether Interior's interpretation was *reasonable*. Because that is

not the question that the court asked, this Court should reverse on that ground alone. *See Fitts v. FNMA*, 236 F.3d 1, 2 (D.C. Cir. 2001).

Moreover, even if this Court has some doubt regarding what standard the district court applied, this Court should nevertheless reverse. It is true that, in addition to declaring itself obligated to interpret tribal law for itself, the district court noted and rejected Interior's reasons for interpreting tribal law differently, referring to Interior's explanation as "unavailing, unsupported by the record, and counter to the purpose" of the Tribe's constitution. J.A. 213; *see also* J.A. 213-19. But disagreeing with Interior's explanation is not the same as concluding that that explanation is unreasonable. *See Jackson*, 808 F.3d at 936. The district court's failure to specify which standard it was applying, combined with its erroneous declaration that it was obligated to interpret tribal law, means that this Court cannot "assure [itself] that the District Court discerned and applied the proper legal standard." *Cuddy v. Carmen*, 762 F.2d 119, 123 (D.C. Cir. 1985). Reversal is therefore appropriate. In any event, even assuming that the district court intended to apply the proper standard, its ruling cannot be squared with proper application of that standard, for the reasons elaborated below.

II. Under the appropriate standard of review, Interior's conclusion that Article X imposes a quorum requirement consistent with the federal regulations should be upheld as reasonable.

For the reasons discussed, in resolving whether Interior's decision to certify the 2013 election conflicts with Article X of the Tribe's constitution, the district court's

task was to determine whether Interior's construction of Article X was reasonable. Under the proper standard, the district court should have upheld the certification of the 2013 Secretarial election results. Interior's conclusion that the Tribe would interpret Article X to impose a quorum requirement consistent with federal law is supported by both Article X's text and the Tribe's past practice. The court's rationales for reading Article X differently do not show that Interior's reading was unreasonable.

A. Interior's interpretation of Article X is reasonable in light of the provision's text and the Tribe's past practice.

As discussed above, where (as here) Interior must interpret tribal law in order to carry out its federal responsibilities, respect for tribal sovereignty and self-government compel the agency to defer to a tribe's reasonable construction of its own laws. *Reese*, 17 IBIA at 173; *United Keetoowah*, 22 IBIA at 80. When the tribe itself has not conclusively interpreted an ambiguous provision, Interior will discern in the first instance how the tribe would likely interpret the provision. Here, Interior determined that the Tribe would interpret the quorum requirement of Article X of the tribal constitution to be consistent with the identically worded requirement of the Indian Reorganization Act, as interpreted by federal regulations controlling Secretarial elections. That conclusion was reasonable, in light of Article X's text and the Tribe's historic treatment of the quorum requirement.

Turning first to the text, Article X provides that the Tribe's constitution may be amended "by a majority vote of the qualified voters" in an election in which "at least

thirty (30) percent of those *entitled to vote*" participate. J.A. 330 (emphasis added). That provision uses the exact same operative language as the Indian Reorganization Act, which likewise requires participation by at least "30 per centum of those *entitled to vote*." 25 U.S.C. § 5127 (emphasis added).

Even without a specific citation to the Indian Reorganization Act, Article X's adoption of the same language as the federal statute can readily be understood as intended to incorporate the federal requirement. *Cf. New York v. EPA*, 413 F.3d 3, 19 (D.C. Cir. 2005) (explaining that the Court looks for "indications in the statutory language or history" in deciding whether Congress intended to incorporate by reference a regulatory definition into a statute). The Indian Reorganization Act is not merely a statute relevant to the amendment of tribal constitutions; it is the very statute under which the Tribe adopted its constitution—including Article X. J.A. 331. Moreover, the Tribe adopted Article X just a year after the federal quorum requirement was enacted. J.A. 329. In that context, the fact that Article X uses the same operative language as the Indian Reorganization Act in describing how the constitution shall be amended strongly suggests that the Tribe intended to mirror federal law. The fact that the Tribe's constitution nowhere provides a separate definition of that phrase further suggests that the Tribe intended to echo the federal requirement rather than impose its own independent requirement on top of the federal requirement. *See* JA. 241-52.

Recognizing that Article X intends to borrow the phrase "those entitled to vote" from federal law, Interior then considered whether Article X intended to codify

into tribal law the particular interpretation of the federal phrase contained in Interior's regulations at the time the Tribe adopted Article X in 1936, or whether Article X instead intended to adopt a tribal requirement that parallels and evolves with the federal requirement. *See* J.A. 322-23. On that question, the language of Article X is inconclusive. Nonetheless, as Interior stated in its decision on remand, "a review of the language of the Tribal Constitution . . . supports a finding that the meaning of the term 'entitled' has evolved over time from both the BIA and Tribal perspectives" more than it suggests that the Tribe intended to freeze the early regulatory definition in place. J.A. 232. As stated above, as of 1936, Interior's regulations interpreted the statutory phrase "those entitled to vote" to refer to all adult, voting-age members of the Tribe. J.A. 308-12. Yet Article X does not quote or even paraphrase those early regulations. J.A. 330. Nor does it cite or otherwise refer to the regulations. *Id.* While the absence of any reference to the early regulations might not *prove* that Article X intended to adopt a quorum requirement that would evolve with federal law, it does not suggest to the contrary that the Tribe had a particular interest in crystallizing that early regulatory definition. *See id.*

Lacking a definitive answer in the tribal constitution's text, Interior turned to the available evidence of how the Tribe itself understands Article X. Specifically, Interior looked to the Tribe's actions surrounding the seven Secretarial elections that occurred—at the Tribe's request—between 1967 and 2013. J.A. 322-23. The agency concluded that such actions provide "clear evidence" that the Tribe interprets Article

X to evolve with the federal definition of "those entitled to vote." J.A. 323. Interior's parsing of the Tribe's historical actions was reasonable and supported by the record.

At the outset, the Tribe's constitution does not explicitly address where within the tribal government lies the ultimate authority to declare the meaning of the Tribe's constitution. Article VI, Section 3 of that constitution delegates to the Tribal Court "such jurisdictional power and authority as may be necessary to realize the jurisdiction granted by the people in Article I of this Constitution." J.A. 247. That same provision also grants the Tribal Business Council "all necessary sovereign authority—legislative and judicial—for the purpose of exercising the jurisdiction granted by the people in Article I of this Constitution." J.A. 246. As relevant to this case, there is no contention that the Tribal Court has ever issued an opinion declaring the meaning of Article X. With regard to the Tribal Business Council, the Tribe's constitution provides that the Council has the power to adopt resolutions, "subject to popular referendum." J.A. 247-48. The Council has not enacted any resolution setting forth its interpretation of Article X. *See* J.A. 323.

Lacking an authoritative judicial opinion or a tribal resolution to which it could defer, Interior turned to the Tribe's unbroken history of participating in the certification of Secretarial elections that apply a quorum requirement based on the number of registered voters rather than on the Tribe's total adult membership. *See* J.A. 322-23. As Interior explained, the agency narrowed its reading of the statutory phrase "those entitled to vote" in 1967, concluding that the phrase does not encompass all adult

members of a tribe, but only those who have actually registered to vote in the Secretarial election. J.A. 321; *see also* 32 Fed. Reg. at 11,778. In the five decades following that regulatory change, Interior certified the results of seven Secretarial elections— in 1974, 1975, 1985, 1986, 2008, and 2010, plus the 2013 Secretarial election at issue in this case. J.A. 322-23. In each of those Secretarial elections, at least 30% of *registered members* participated—but less than 30% of *all adult members*. J.A. 322-23, 360, 372-442. And in each of those elections, the election board called to administer the election—which, in addition to the Chair appointed by Interior, contained at least two representatives of the Tribe itself, *see supra* p. 4—has certified that the level of participation satisfied the relevant quorum requirement. J.A. 233, 236, 378-79, 386, 392, 396, 399, 403, 406, 412-14, 420, 423, 433, 436, 441.

If the Tribe understood Article X to codify the early regulatory definition (rather than mirror and evolve with the federal statutory phrase), then it would have deemed each of those elections to fail the tribal quorum requirement. Yet the Tribe's representatives on the election board certified that the elections *satisfied* the relevant quorum requirement. There is no evidence that, at any point since 1967, the Tribal Business Council has ever instructed the Tribe's representatives appointed to the election board to certify the passage of a constitutional amendment only if 30% of all eligible voters vote in favor of the amendment. Nor, as Interior noted, is there any evidence that the Council objected after the election board certified the results in 1974, 1975, 1985, 1986, 2008, or 2010. *See* 322-23.

Interior acknowledged that the Tribal Business Council's request to "decertify" the results of the 2013 Secretarial election results could be said to create a wrinkle in the historical record of tribal acquiescence in election results that satisfy the post-1967 federal quorum requirement. J.A. 323. But only a very minor one: the results of the 2013 election were, like the results of the six other Secretarial elections held since 1967, certified by an election board composed of not only the Interior-appointed chair but also two members representing the Tribe, who evidently understood the level of turnout in 2013 to satisfy the requirements. *See* J.A. 233, 236.

To the extent that the Council's post hoc request suggests a different reading of Article X's requirement, Interior found that such request was not dispositive in light of the sitting Council's interest in the outcome of the 2013 Secretarial election and its failure to provide "any definitive documentation of the Tribe's interpretation of the Constitutional provisions at issue." J.A. 323. On balance, Interior found that the Tribe's "consistent acceptance of the federal regulations' definition of 'entitled to vote' since 1967 is clear evidence that the Tribe interprets its law as consistent with the federal definition." *Id.* That kind of weighing of the record evidence is within the agency's discretion to perform. *Cf. United Steel Workers v. Pension Benefit Guaranty Corp.*, 707 F.3d 319, 325 (D.C. Cir. 2013).

Because Interior's construction of Article X was consistent with both the text of that provision and with the historic evidence of the Tribe's actions, it was reasonable and should have been upheld.

B. The district court's critiques of Interior's interpretation do not establish that the agency's conclusion was unreasonable.

The district court interpreted Article X differently from how the agency did. According to that court, "Article X's quorum provision has been unchanged since its enactment and continues to require a 30% quorum of . . . adult members of the tribe." J.A. 218. In other words, the court concluded that by quoting the language of the Indian Reorganization Act in its own quorum definition, the Tribe intended to lock in the federal regulatory definition of that language that existed in 1936 rather than adopt a requirement that would evolve with the federal requirement. *See id.*

That reading of Article X might be plausible—although it is far from perfect. As discussed, Article X's text does not quote, cite, or otherwise invoke the early regulatory definition that the district court believed the Article locked in place. *See supra* pp. 29-31. The court's reading is also difficult to square with the above-documented long history of the Tribe's not objecting to elections that satisfied the post-1967 federal quorum definition (but would not have satisfied the early regulatory definition). As Interior explained, it would be odd to assume, in the absence of affirmative indication in the text or history, that Article X intended to quote the federal quorum requirement yet enact a separate requirement that comes to conflict with the federal standard. *See* J.A. 230, 322-23. That assumption is particularly untenable given that the regulatory definition that the district court believed that Article X silently froze in place is one that the federal government abandoned in favor

of a definition that affords tribes greater freedom to amend their constitutions and thus to govern themselves. *See supra* pp. 5-6. Indeed, the district court's reading of Article X would impose a quorum requirement so strict that *none* of the post-1967 Secretarial elections to amend the Tribe's constitution could meet it—including the 2016 Secretarial election held while this litigation has been pending. *See* J.A. 322-23, 343-52, 360. The court's interpretation would therefore predictably thwart, not foster, tribal self-determination.

Regardless, even assuming that the district court's preferred reading of Article X is a plausible reading of that provision, it does not follow that the court was free to choose that interpretation over Interior's interpretation. Instead, the court was bound to defer to the agency's judgment, so long as the judgment "was reasonable and reasonably explained." *Jackson*, 808 F.3d at 936. Interior's interpretation of Article X meets that threshold, for the reasons already discussed in Part II.A (pp. 29-34). The district court's critiques of Interior's analysis do not show otherwise.

Initially, the district court faulted Interior for focusing on the evolving meaning of the federal regulations in its remand decision, asserting that the remand decision "included no analysis of the Tribal Constitution itself." J.A. 214. Not so. The remand decision *begins* with an explanation of how the federal standard has evolved. J.A. 320-22. It then quotes the specific language of Article X and proceeds to ask whether that language imposes a quorum requirement different from that imposed by the federal regulations since 1967, ultimately concluding that it does not. J.A. 322.

The district court evidently believed that changes to the federal regulations simply have no bearing on how the Tribe understands its constitution, deeming "untenable" Interior's conclusion that "Article X's 'entitled to vote' meant one thing (any adult member) when the Tribal Constitution was enacted in 1936, but it 'evolved' and meant something else (members registered to vote) when the BIA promulgated regulations in 1967." J.A. 214.[4] But there is nothing untenable in recognizing that a Tribe may, as a matter of its own sovereign prerogatives, choose to pattern provisions of its constitution after federal law and then interpret those provisions to evolve as the meaning of the corresponding federal law changes. Indeed, that is precisely how some states have chosen to interpret provisions of their own state constitutions that echo federal constitutional provisions. *See, e.g.*, *People v. Caballes*, 221 Ill. 2d 282, 292 (2006) (explaining the "lockstep doctrine" under which state courts may choose to follow decisions of the U.S. Supreme Court interpreting the federal constitution when interpreting corresponding provisions of a state constitution).

The district court nevertheless characterized Interior's conclusion that the Tribe similarly understands Article X to mirror—and to evolve with—federal law as

[4] The district court characterized Interior's summary judgment briefs as "back[ing] away from" the argument that the meaning of Article X evolved after Interior's interpretation of the federal quorum requirement changed. J.A. 214. To the contrary, Interior maintained below that the "crux of this litigation is whether the phrase 'entitled to vote' in Article X of the Tribe's Constitution continued to refer to adult tribal members, whether or not registered to vote, or, following the 1967 amendments to the BIA's regulations, referred to adult members who registered to vote." J.A. 158; *see also* J.A. 157-60, 199-201.

a "staggering" attack on tribal self-government. J.A. 213-15. Specifically, the district court accused Interior of arguing that a change in federal regulations "*necessarily* affects the meaning of a separate sovereign's identical constitutional language," such that "*whenever* the federal government amends regulations that address the same concerns as a tribe's constitution, it also amends the tribe's constitution." J.A. 214 (emphasis added). According to the court, Interior cited no authority or "even a common-sense explanation" to support that position. *Id.* Indeed it has not—because that is not the position that Interior has taken.

Interior does not contend that it has inherent authority to alter the meaning of tribal law without tribal consent, simply by altering its regulatory definition of phrases that appear in both a tribal constitution and a federal statute. To the contrary, Interior has recognized that tribes *themselves* have the authority to interpret their constitutions to mirror and evolve with federal law, and it concluded based on the specific evidence before it that the Tribe has so interpreted Article X. That finding works no offense to the principle of tribal self-government, especially because if the Tribe disagrees with Interior's reading of Article X, it is free to issue an authoritative interpretation of that provision, which Interior would then be bound to follow. *United Keetoowah Band*, 22 IBIA at 80; *see also Ransom*, 69 F. Supp. 2d at 150. As Interior noted, the Tribe has never done so, despite the fact that Interior for decades has treated Article X's quorum requirement as equivalent to the post-1967 federal requirement. *See* J.A. 322-23.

The district court also took issue with Interior's record-based conclusion that the Tribe itself understands Article X to impose the same quorum requirement imposed by the post-1967 federal regulations. The court acknowledged that election boards certified and Interior approved the results of Secretarial elections based on the post-1967 standard without objection from the Tribe in "some" elections, but concluded that that history could not "overcome the agreed-upon meaning of the Tribe's constitution." J.A. 215-16.[5] The court further argued that Interior had given too little weight to evidence that (in the court's view) the Tribe understands Article X to impose a different—and more stringent—quorum requirement. *See id.* None of these critiques shows that Interior's reading of the historical record was unreasonable.

At the outset, Interior was not required to present sufficient historical evidence to "overcome the agreed-upon meaning" of Article X, for the simple reason that there is no single meaning of Article X upon which everyone agrees. J.A. 216. Instead, as explained above, the text of that provision is potentially amenable to at least two interpretations, one of which assumes that the Tribe intended to lock in place Interior's initial regulatory definition of the statutory phrase "those entitled to vote," and the other of which assumes that the Tribe instead intended its use of that phrase to mirror and evolve with the federal standard. The district court opined that the second of those

[5] The district court described the results as being certified by the "Tribe's Election Board." J.A. 215. As discussed above, the election boards include tribal representatives, but they are convened by Interior and are chaired by an Interior official. *See supra* pp. 3-4.

meanings was "untenable," J.A. 214, but that opinion was incorrect for the reasons already discussed.

Turning to Interior's weighing of the historical evidence, the district court significantly understated the record when it recounted that the Tribe had accepted a registered-voter-based quorum requirement in "some" elections. J.A. 214-16. In fact, the record shows that results were certified based on that standard in *every* Secretarial election held since 1967, and that none of those elections would have satisfied a quorum standard based on total adult membership in the Tribe. J.A. 322-23, 360. And yet, as Interior explained, there is no record that the Tribe objected to certification of any of the Secretarial elections prior to 2013. J.A. 322-23. Indeed, there is no record that the Tribe has *ever* argued that the meaning of "entitled to vote" in Article X of the Tribe's Constitution differs from the meaning of the identical statutory phrase as it has been interpreted in the federal regulations. The district court's suggestions to the contrary are not borne out by the record.

First, the district court's reference to protests to Secretarial elections lodged by individual tribal members (including the plaintiff here) is uninformative. J.A. 216. The views of an individual member of the Tribe do not reveal the Tribe's own reading of tribal law, for the same reasons that the views of an individual United States citizen do not represent the conclusions of the federal government or the U.S. Supreme Court. Therefore, the existence of those protests sheds no light on how the Tribe interprets its constitution.

Second, the district court cited a 2008 resolution of the Tribal Business Council, requesting that amendments adopted in the 2008 Secretarial election be subjected to a second Secretarial election process "[d]ue to the low number of tribal members voting" in the 2008 Secretarial election. J.A. 375. That resolution is more important for what it does *not* say than for what it does. Specifically, that resolution does not dispute that 2008 turnout, while "low," was sufficient to satisfy the relevant quorum requirement. *See* J.A. 374-76. Instead, the resolution argued only that the issues on the ballot in 2008 (which related to the criteria for membership in the Tribe) were sufficiently important to support holding an additional vote "to ensure that the will of the eligible voters of the Tribes is pursued." J.A. 375. If the Council believed that the 2008 turnout was constitutionally deficient, it presumably would have listed that deficiency as another reason for calling a second election. But it did not do so. Nor did it suggest that the second Secretarial election process there requested should be conducted under any quorum standard different from that applied in 2008. *See* J.A. 375-76. In light of those significant omissions, the 2008 resolution in fact *reinforces* Interior's conclusion that the Tribe understands its constitutional requirement to impose no different quorum requirement.

Third, the district court's final critique concerns Interior's analysis of the Tribal Business Council's request to decertify the results of the 2013 Secretarial election. On that issue once again, the court's analysis falls short of showing that Interior's analysis was unreasonable. At the outset, the Council's 2013 resolution asking that the results

be decertified, like its 2008 resolution, takes issue with low turnout in a Secretarial election, but it does not dispute that the level of turnout satisfied the constitutional quorum requirement. J.A. 22-24. To the contrary, the 2013 resolution makes no mention of Article X's quorum requirement at all. *See id.* And also like the 2008 resolution, the 2013 resolution includes a request that Interior conduct a second Secretarial election on the proposed amendments in question—without any suggestion that that second election be conducted under a different quorum standard. *See id.*

Moreover, even assuming that the Tribal Business Council's 2013 request could be viewed to be in tension with the Tribe's consistent history of treating Article X's quorum requirement as equivalent to the federal requirement, Interior's weighing of the competing evidence was adequate. Interior considered the Tribal Business Council's 2013 request, as the district court itself acknowledged. J.A. 216-18. As discussed, Interior ultimately determined that the Council's 2013 request did not outweigh the Tribe's history of accepting Secretarial election results certified based on the number of registered voters, particularly in light of the sitting councilmembers' vested interest in the outcome of the 2013 Secretarial election and the fact that the Council did not support its request with any proof that the Tribe had ever interpreted the tribal constitution differently. *See supra* pp. 31-34; J.A. 322-23. The district court acknowledged Interior's reasons for concluding that the Council's request was not dispositive, and in fact it agreed with the agency "that the views of those with a vested

interest in the outcome might not be entitled to great deference." J.A. 217-18. This is not, therefore, a case in which an agency "ignore[d] evidence that undercuts its judgment" or "minimize[d] such evidence without an adequate explanation." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018). Nor, as the court went on to suggest, can Interior be fairly characterized as having "discarded entirely" the Council's views. J.A. 218.

What Interior did instead was weigh the Tribal Business Council's 2013 request against the other record indicia of how the Tribe has interpreted Article X—including the conduct of the Tribe's own election board representatives. *See* J.A. 323. Had the district court been the one to weigh the historical evidence, it evidently would have reached a different conclusion. But as this Court has explained, "in judicial review of agency action, weighing the evidence is not the court's function." *United Steel*, 707 F.3d at 325. Instead, "the question for the court is whether there is such relevant evidence as a reasonable mind might accept as adequate to support the agency's finding." *Id.* (internal quotation marks omitted). Interior's weighing of the historical evidence regarding the Tribe's interpretation of Article X met that threshold.

In sum, in asking how the Tribe would interpret Article X of its constitution, Interior consulted the language of that provision as well as the available historical evidence of how the Tribe has treated that provision in practice. The conclusion drawn by the agency is consistent with the text and is supported by a reasonable weighing of the available evidence of the Tribe's understanding of that provision.

Under the proper standard of review, the fact that another decision maker could have read the text or weighed the historical evidence differently is not sufficient grounds to disturb the agency's judgment. Accordingly, the district court decision nevertheless to vacate Interior's decision was error.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order granting judgment to the plaintiff.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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ADDENDUM

25 U.S.C. § 5127

§ 5127 Procedure

In any election heretofore or hereafter held under the Act of June 18, 1934 (48 Stat. 984), on the question of excluding a reservation from the application of the said Act or on the question of adopting a constitution and bylaws or amendments thereto or on the question of ratifying a charter, the vote of a majority of those actually voting shall be necessary and sufficient to effectuate such exclusion, adoption, or ratification, as the case may be: *Provided, however*, That in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote

25 C.F.R. § 81.5(d) (2013)

§ 81.5 Request to call election

(d) The Secretary shall authorize the calling of an election on the adoption of amendments to a constitution and bylaws or a charter when requested pursuant to the amendment article of those documents. The election shall be conducted as prescribed in this part unless the amendment article of the constitution and bylaws or the charter provides otherwise, in which case the provisions of those documents shall rule where applicable.

25 C.F.R. § 81.6 (2013)

§ 81.6 Entitlement to vote

(a) If the group is a tribe, or tribes, of a reservation and is acting to effect reorganization under a Federal Statute for the first time:

(1) Any duly registered adult member regardless of residence shall be entitled to vote on the adoption of a constitution and bylaws.

(2) Duly registered adult nonresident members and ill or physically-disabled registered adult resident members may vote by absentee ballot (see § 81.19).

(b) If the group is composed of the adult Indian residents of a reservation:

(1) Any adult duly registered member physically residing on the reservation shall be entitled to vote.

(2) Absentee voting shall be permitted only for duly registered residents temporarily absent from the reservation, ill, or physically disabled.

(c) If the group is a tribe or tribes, without a reservation as defined in this part, any duly registered member shall be entitled to veto on the adoption of a constitution and bylaws by either arriving at a polling place or by requesting, properly completing, and timely casting an absentee ballot as determined by the election board pursuant to the relevant Federal Statute; provided, that outside of Alaska and Oklahoma, a reservation shall be established for the tribe before it becomes entitled to vote on the adoption of a constitution.

(d) For a reorganized tribe to amend its constitution and bylaws, only members who have duly registered shall be entitled to vote; provided, that registration is open to the same class of voters that was entitled to vote in the Secretarial election that effected its reorganization, unless the amendment article of the existing constitution provides otherwise.

(e) For a reorganized tribe to revoke its constitution and bylaws, only members who have duly registered shall be entitled to vote; provided, that registration is open to the same class of voters as was entitled to vote in the Secretarial election that effected its reorganization, unless the amendment article of the existing constitution provides otherwise.

(f) For reorganized tribe to ratify a charter or to adopt a charter amendment, any adult member who has duly registered shall be entitled to vote, provided that if the tribe is of a reservation, only duly registered members physically residing on the reservation shall be entitled to vote.