No. 14-340

In the Supreme Court of the United States

FRIENDS OF AMADOR COUNTY, ET AL., PETITIONERS

v.

SALLY JEWELL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

JENNIFER A. MACLEAN
PERKINS COIE LLP
700 Thirteenth St., N.W.
Washington, D.C. 20005
(202) 654-6200
jmaclean@perkinscoie.com

ERIC D. MILLER
Counsel of Record
PERKINS COIE LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101
(206) 359-8000
emiller@perkinscoie.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes, regulations, and rule:

In the Supreme Court of the United States

No. 14-340

FRIENDS OF AMADOR COUNTY, ET AL., PETITIONERS

v.

SALLY JEWELL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The Ninth Circuit has held that a putative Indian tribe may insulate from judicial review a decision of the Secretary of the Interior to recognize that tribe simply by invoking the tribal sovereign immunity created by the Secretary's decision. Even when a plaintiff alleges that the Secretary acted unlawfully in recognizing the tribe, the Ninth Circuit permits the tribe to block judicial review of that decision by asserting immunity—a right the court cannot know the tribe legitimately possesses without undertaking the analysis that the plaintiff's claims would require.

The Ninth Circuit's decision is directly contrary to a decision of the District of Columbia Circuit, which has held that tribal sovereign immunity is "inappropriately invoked when tribal sovereignty is the ultimate issue." *Cherokee Nation* v. *Babbitt*, 117 F.3d 1489, 1499 (1997). In the District of Columbia Circuit, courts retain the ability to inquire whether a tribe has been lawfully recognized and, thus, whether the tribe enjoys sovereign immunity. In the Ninth Circuit, by contrast, courts may not look behind a putative tribe's "status as a federally recognized tribe in the Federal Register." Pet. App. 5a.

Respondent Buena Vista Rancheria of Me-Wuk Indians attempts to explain away the circuit conflict by arguing that a recognition decision is subject to review when a plaintiff challenges tribal status directly, but not when the tribe introduces the question itself by asserting its alleged immunity to block a challenge to a different agency action. That distinction finds no support in either *Cherokee Nation* or the decision below. And Me-Wuk's position would yield the perplexing result that a recognition decision would be subject to review only *before* it was applied, or in other words, only before any party could assert a ripe challenge to it.

The decision below divests courts of jurisdiction to review the Secretary's decision to recognize a tribe—as well as any subsequent decisions made on behalf of the tribe—upon recognition. Once the tribe is recognized, it is an indispensable party under Federal Rule of Civil Procedure 19 in any challenge to the Secretary's decision, and it may assert tribal sovereign immunity to bar that challenge. That contravenes the fundamental requirement of the Administrative Pro-

cedure Act (APA), 5 U.S.C. 551 *et seq.*, that agency actions be subject to judicial review, and Me-Wuk barely attempts to defend it. 5 U.S.C. 702. Instead, Me-Wuk suggests that the question presented was not properly raised below. That is incorrect, as the Ninth Circuit's decision makes plain by directly addressing the question on the merits.

This case would be an excellent vehicle for resolving the conflict between the circuits and ensuring the availability of judicial review of the Secretary's recognition decisions, which are of vital importance to the administration of federal statutes governing Indians. This Court's review is warranted.

A. The Ninth Circuit and the District of Columbia Circuit disagree about whether a putative Indian tribe may invoke sovereign immunity to bar judicial review of the Secretary's decision to recognize it as a tribe

The Ninth Circuit has held that once the Secretary recognizes a group as an Indian tribe, that group may invoke sovereign immunity in order to bar judicial review of the Secretary's recognition decision. As explained in the petition (at 10-13), the District of Columbia Circuit has adopted a contrary rule. Me-Wuk attempts (Br. in Opp. 6-9) to distinguish that court's decision in *Cherokee Nation*, but its efforts are unavailing.

In *Cherokee Nation*, the District of Columbia Circuit held that the Delaware Tribe was an indispensable party to an APA action challenging the Secretary's decision to recognize the tribe. 117 F.3d at 1497. The court then considered whether the tribe could assert

sovereign immunity, which would have prevented the action from proceeding. Noting that "[n]ot all groups * * * are 'tribes' that are entitled to claim sovereign immunity," the court stated that "this is *generally* a matter for the other two branches of government to determine." *Id.* at 1498 (emphasis added). But because the plaintiff had challenged the validity of the tribe's federal recognition, the court declined to follow that general rule. Instead, observing that the plaintiff "allege[d] that recognition of the Delawares is contrary to federal law," the court reasoned that "[i]f the Department acted contrary to law, the Final Decision [recognizing the tribe] would be owed no deference." *Id.* at 1499. In other words, because sovereign immunity "is available only when a group of Indians has been recognized as a sovereign by Congress, the Executive Branch, or the courts," it is "inappropriately invoked when tribal sovereignty is the ultimate issue." *Ibid.* In reaching that conclusion, the court emphasized that allowing the tribe's assertion of immunity to bar review of its status would mean that "the Department's recognition decisions would be unreviewable, contrary to the presumption in favor of judicial review of agency action." *Ibid.*; accord *Shenandoah* v. *United States Dep't of the Interior*, 159 F.3d 708, 715 (2d Cir. 1997) (endorsing that proposition in dicta).

According to Me-Wuk (Br. in Opp. 7), the decision in *Cherokee Nation* turned on the fact that the challenge to tribal recognition was brought "directly following the [tribe's] placement on the Federal Register list" of recognized tribes. This case is different, Me-Wuk says, because petitioner did not bring an APA action as soon as the Secretary made the recognition

decision; instead, petitioner is challenging the recognition decision in the context of a challenge to subsequent agency actions allowing gaming on Me-Wuk's land. That argument lacks merit.

Nothing in *Cherokee Nation* suggests that the availability of immunity in a case where plaintiffs "allege[] that recognition of the [Tribe] is contrary to federal law" should turn on whether the recognition decision was made in the order that is directly under review, or instead in a separate order that is properly subject to collateral attack. 117 F.3d at 1499. In this case, petitioner is challenging both the Secretary's decision to allow a gaming compact to go into effect and the National Indian Gaming Commission (NIGC)'s determination that Me-Wuk's land is eligible for gaming. The tribal recognition decision is a necessary predicate for those determinations: if Me-Wuk was not validly recognized as a tribe, then Me-Wuk's land is not "Indian land" on which gaming may occur, 25 U.S.C. 2703(4), and the agencies' determinations are "contrary to law," 5 U.S.C. 706(2)(A). For that reason, petitioner may permissibly challenge the recognition decision in this action.

Me-Wuk suggests (Br. in Opp. 8) that petitioner's challenge to the Tribe's recognition is "decades out of time," but that is incorrect. While a challenge to a recognition decision, like any other APA action, is subject to a six-year statute of limitations, the statute does not begin to run until "the right of action first accrues," which does not happen until a challenge becomes ripe. 28 U.S.C. 2401(a); *Federal Express Corp.* v. *Mineta*, 373 F.3d 112, 119 (D.C. Cir. 2004); see *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 913

(D.C. Cir. 1985) (statute of limitations does not bar review when "events occur or information becomes available after the statutory review period expires that essentially create a challenge that did not previously exist"). Me-Wuk does not attempt to argue that petitioner—a community organization concerned about gaming—would have had a ripe challenge to the recognition decision at the time it was made, when its effect had not been "felt in [any] concrete way" and petitioner had not yet suffered any injury. *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967). Petitioner's challenge ripened only when the Secretary applied the recognition decision in allowing the gaming compact to take effect and the NIGC applied it in declaring Me-Wuk's land eligible for gaming. Once those actions were taken, petitioner could challenge them *and* the recognition decision underlying them. Because tribal sovereignty has thus become "the ultimate issue" in the case, *Cherokee Nation* establishes that tribal sovereign immunity "is inappropriately invoked." 117 F.3d at 1499.

Tellingly, the Ninth Circuit did not so much as hint at the reasoning that Me-Wuk now advances. It rejected petitioner's claim not because Me-Wuk's recognition was announced in an agency decision separate from the decisions under review, but simply because, in the court's view, the federal recognition was dispositive, and the court could not "turn a blind eye to the Tribe's status as a federally recognized tribe in the Federal Register." Pet. App. 5a. That holding is directly contrary to *Cherokee Nation.*

B. The Ninth Circuit's decision is contrary to fundamental principles of administrative law

To the extent it addresses the merits of the question presented, Me-Wuk advances the question-begging argument (Br. in Opp. 11) that "a Tribe that has been indisputably federally-recognized for over thirty years" must be able to assert sovereign immunity. Although Me-Wuk appears on the Secretary's list of federally recognized tribes, the underlying question in this case is whether it has been *validly* recognized, or whether, as petitioner contends, the recognition decision was made in violation of 25 C.F.R. Part 83 and is therefore unlawful. The Ninth Circuit's decision means that a federal court is prohibited from answering that question. That result is contrary not only to the rule that a court always has jurisdiction to determine its own jurisdiction but also to the APA's guarantee that "[a] person suffering legal wrong because of agency action * * * is entitled to judicial review thereof." 5 U.S.C. 702; see 5 U.S.C. 704.

Me-Wuk expresses concern (Br. in Opp. 11) that a party could circumvent tribal sovereign immunity merely by "alleging in the complaint—however speciously—that the tribe is not a tribe." But a party cannot defeat immunity merely by *alleging* that a tribe's recognition is invalid; it must demonstrate that fact. If it fails to do so, the tribe's immunity will be undisturbed. The possibility that some parties might bring meritless challenges to tribal recognition is not a reason to bar courts from hearing any such challenges.

Me-Wuk also suggests (Br. in Opp. 12) that allowing courts to consider challenges such as this one would "have a deeply destabilizing effect for tribes, the fed-

eral government, and all who interact with tribes." Most tribes, of course, do not face serious challenges to their status, either because their historic recognition under federal treaties or legislation is so well established as to be practically unassailable, or because it is apparent that they have satisfied the requirements of the recognition regulations. As explained in the petition, however (at 19-20), the Secretary has not always followed the regulations, instead choosing to "reaffirm" tribes without undertaking the acknowledgment process or simply adding groups that resided on trust land, without determining whether they constitute "tribes" as this Court has defined that term in cases such as *Montoya v. United States*, 180 U.S. 261, 266 (1901), and *United States v. Candelaria*, 271 U.S. 432, 441-442 (1926). Proposed changes to the acknowledgment procedures are likely to make that problem worse. Recognition can have significant consequences for both Indians and non-Indians because of its effects on gaming, land use, taxation, and even tribal criminal jurisdiction. Parties suffering those consequences have a right under the APA to obtain review of the Secretary's recognition decisions. The decision of the Ninth Circuit erroneously denies them that right, and it warrants review and correction.[*]

---

[*] The government has not responded to the petition, and its filings below did not address the question presented. But despite its lack of participation, the government is not merely a bystander to this case. To the contrary, the ultimate question in the litigation is the validity of the government's actions, which petitioner seeks to set aside. The Court may wish to direct the government to respond to the petition so that it will have the benefit of the government's views on whether, consistent with the APA,

C. This case would be a good vehicle for resolving the question presented

As explained in the petition (at 21), the facts of this case dramatically demonstrate the importance of the question presented. The federal actions that petitioner seeks to challenge have allowed a group of individuals lacking any apparent historical connection to the land they now own to be designated a tribe, allowing them to operate a casino that will generate millions of dollars in revenue while harming petitioner and others in the community. And petitioner has strong arguments that those actions were unlawful. In recognizing Me-Wuk, the Secretary did not follow her own regulations, and it is doubtful whether she could have done so because the evidence does not support the findings that the regulations would require. Specifically, on the present record, Me-Wuk appears not to have had "a substantially continuous tribal existence" or to have "functioned as [an] autonomous entit[y] throughout history until the present." 25 C.F.R. 83.3(a). In the District of Columbia Circuit, petitioner would be able to have its challenge to the Secretary's actions heard on the merits; in the Ninth Circuit, as a result of the tribal sovereign immunity summoned into existence by those very actions, it cannot.

Me-Wuk barely attempts to defend the Secretary's recognition decision on the merits, addressing the issue only in a footnote (Br. in Opp. 7 n.2). Instead, it argues (Br. in Opp. 12-14) that petitioner's challenge

---

the government's actions may be immunized from review in the circumstances of this case.

to Me-Wuk's recognition was forfeited below because it was not raised in the complaint. That is incorrect.

Petitioner's complaint sought relief from the Secretary and the NIGC but did not name Me-Wuk as a defendant. Compl. ¶¶ 4-5. Because Me-Wuk was not a party to the case, its sovereign immunity was not at issue, and therefore it was not necessary for petitioner to question the validity of Me-Wuk's recognition. As soon as Me-Wuk sought to intervene in the case and the district court concluded that it was an indispensable party, however, petitioner argued that Me-Wuk should not be able to invoke sovereign immunity because there was "a proper challenge under the APA on the issue of the unlawful organization and acknowledgment of the tribe." Pet. Dist. Ct. Mot. for Recons. 47 (emphasis omitted). Petitioner can hardly be faulted for not having raised an argument against intervention in its complaint, which was filed before Me-Wuk had even sought to intervene.

In the court of appeals, petitioner again raised its challenge to Me-Wuk's recognition. Pet. C.A. Br. 61-62 ("Before claiming a right to sovereign immunity this putative tribe should have been required to establish their lawful existence under * * * 25 C.F.R. part 83 and all mandatory criteria for lawful recognition."). Far from determining that the argument was forfeited, the court of appeals addressed it on the merits in its opinion. Pet. App. 5a. While Me-Wuk is correct (Br. in Opp. 13) that this Court generally does not consider arguments neither pressed nor passed upon below, that principle provides no basis for denying review in this case, where the question presented was fully considered by the court of appeals.

Me-Wuk also mentions (Br. in Opp. 9-10) that the Ninth Circuit's decision is unpublished and not precedential. Me-Wuk does not deny, however, that the decision correctly states the law of the Ninth Circuit, nor could it do so. The decision in this case is consistent with prior Ninth Circuit decisions holding categorically that "[f]ederally recognized Indian tribes enjoy sovereign immunity from suit." *Pit River Home & Agric. Coop. Ass'n* v. *United States*, 30 F.3d 1088, 1100 (1994); see *Native Vill. of Tyonek* v. *Puckett*, 957 F.2d 631, 635 (9th Cir. 1992) ("An Indian community constitutes a tribe if it can show that * * * it is recognized as such by the federal government[.]"). That proposition cannot be reconciled with *Cherokee Nation*, and this case would be an appropriate vehicle for resolving the conflict.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

JENNIFER A. MACLEAN
PERKINS COIE LLP
700 Thirteenth St., N.W.
Washington, D.C. 20005
(202) 654-6200
jmaclean@perkinscoie.com

ERIC D. MILLER
Counsel of Record
PERKINS COIE LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101
(206) 359-8000
emiller@perkinscoie.com

NOVEMBER 2014