No. 10-613

IN THE

Supreme Court of the United States

ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC.,

Petitioner,

v.

SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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In this case, the Eighth Circuit Court of Appeals held that a tribal court may reject binding final orders of the National Indian Gaming Commission (NIGC) and the Bureau of Indian Affairs (BIA). In the Eighth Circuit now, a tribal court may overrule BIA and NIGC decisions upon concluding that the federal agencies relied on a misunderstanding of tribal law. Thus, as happened here, a tribal court may effectively overturn federal orders related to the control of an Indian casino when it concludes that the federal agencies gave the "wrong" tribal council authority to operate the casino and bind the tribe to casino-related contracts (including casino-related arbitration agreements divesting tribal courts of jurisdiction). Elementary administrative law dictates that a tribal court does not sit in judgment of federal agencies, even when they misinterpret tribal law. And the Eighth Circuit's holding that questions of tribal law are "beyond the purview of the federal agencies" is patently inconsistent with federal law and the decisions of other federal courts and portends severe consequences. See Pet. 14–20.

The Eighth Circuit also held that a tribal court may adjudicate tort claims arising out of a nonmember's effort to help a tribe's federally recognized council regain control of a casino that tribal dissidents illegally seized. The so-called second *Montana* exception allows tribal jurisdiction over nonmember conduct that catastrophically threatens tribal sovereignty. Other courts have held that tribes have little sovereignty in casinos and the land where they sit. And in becoming the first court of appeals to affirm tribal-court jurisdiction under the second *Montana*

exception since this Court honed the exception to stop its misapplication, the Eighth Circuit failed to resolve important open questions, like whether the second *Montana* exception ever allows tribal *adjudicative* (as opposed to *legislative*) jurisdiction. See Pet. 20–32.

The brief in opposition of the Sac and Fox Tribe of the Mississippi in Iowa does not address many conflicts identified in the petition, dismissing them summarily as "minor arguments." Opp'n 35. Nor does the Tribe try to refute the extraordinariness of the Eighth Circuit's holding; instead, it quotes the *original* formulation of the second *Montana* exception, string-cites decisions *rejecting* tribal-court jurisdiction, then calls this case "the paradigm example" of the never-satisfied standard. Opp'n 25–31. Mostly, the Tribe's brief distracts with overheated rhetoric and *ad hominem*. It calls API "despicable" and "morally unfit." Opp'n 11, 37. It accuses API's counsel of "bald-faced fabrication," "gross distort[ion]," and failing their "duty of candor to this Court." Opp'n 4, 17. It labels API's arguments as "preposterous," "pure fantasy," and "frivolous" (notwithstanding the Eighth Circuit's 34-page opinion). Opp'n 21, 22, 30. The Tribe's invective is irrelevant, false, and beyond the pale. Its brief provides no reason why API's petition should not be granted.

I. FURTHER REVIEW BY THIS COURT IS APPROPRIATE.

A. The petition is not interlocutory.

The Tribe erroneously contends that API's petition is premature because "the case was remanded to the district court to analyze and issue a determination on the applicability of the first *Montana* excep-

tion." Opp'n 38. The Eighth Circuit vacated only the portion of the District court judgment affirming tribal-court jurisdiction over the Tribe's *conversion claim*. See App., *infra*, 34a; see also Pet. 32. The remand proceedings will neither confirm nor undo the Eighth Circuit's judgment that the tribal court has jurisdiction over the Tribe's *trespass and trade-secrets claims*. Prevailing on the limited remand will not help API avoid having to litigate those claims in tribal court, notwithstanding the parties' arbitration agreement. Now is the only chance for the Court to review the Eighth Circuit's decision.

Insofar as the Tribe asserts that its trespass and trade-secrets claims satisfy the first *Montana* exception even if they fail the second *Montana* exception, API's petition should nonetheless be granted. That alternative ground is unavailable. The tribal court of appeals based jurisdiction on only the second *Montana* exception, explicitly rejecting the first. App., *infra*, 91a. Neither logic nor precedent permits a federal court to uphold tribal-court jurisdiction on a ground the tribal court spurned. See Pet. 33–34. The Tribe does not disagree; indeed, it does not even argue how or why the first *Montana* exception applies to its trespass and trade-secrets claims. In all events, the Court has recently granted a petition to review an Eighth Circuit decision affirming tribal jurisdiction under only one *Montana* exception and has gone on to resolve the other *Montana* exception on the merits. See *Plains Commerce Bk.* v. *Long*, 128 S. Ct. 2709, 2726–2727 (2008). Given the significant reasons for reviewing this case, the Court can take the same approach here.

B. API's arguments are preserved.

The Tribe does not seriously contend that API waived either of the questions presented. The twin focuses of API's case have constantly been (a) the effect of the BIA and NIGC orders on the Walker Council's authority to bind the Tribe to the June 2003 Agreement and (b) whether the second *Montana* exception applies. Scattered throughout the Tribe's brief are assertions that API has waived subsidiary arguments. Those assertions lack merit.

Twice, the Tribe asserts that "the NIGC orders were never at issue in this litigation." Opp'n 3, 17. Even the Tribe is unconvinced, though, for it also writes that "both the tribal and federal courts rejected the notion that the NIGC's Order somehow vested Walker with authority." Opp'n 22. A scan of the lower-court opinions and briefs confirms that API has not suddenly sprung the three NIGC orders on the Tribe; the Notice of Violation, Temporary Closure Order, and Permanent Closure Order have been at issue since the case began. See App., *infra*, 29a–34a (Eighth Circuit addressing NIGC orders); 60a (District Court acknowledgement of API's arguments); 70a (Tribal Court of Appeals' acknowledgment); see also API's CA8 Opening Br. 7, 26–27, 34, 37–39; API's CA8 Reply Br. 1–3, 16–17.

Next, the Tribe contends that API has not preserved the argument that the tribal courts collaterally attacked the federal orders. Opp'n 3–4, 23–24. That, too, is wrong. Plainly, API has disputed the ability of the Tribe and its courts to contradict and effectively overturn the BIA and NIGC orders. See API's CA8 Opening Br. 37 ("[F]inding the Agreement invalid on account of Walker's lack of tribal authority effectively, and impermissibly, overturns the au-

thoritative federal decisions of the Secretary of the Interior, BIA, and NIGC, which recognized Walker and deemed him the only Tribe member with authority to run the casino. * * * NIGC's decision cannot be gainsaid now because the proper time and place to do so has long since passed.") (citing *Yakus* v. *United States*, 321 U.S. 414, 434 (1944)); API's CA8 Reply Br. 12–14 ("The Tribe contends that the consequences of federal recognition do not matter in this case because its tribal courts have ruled that, from the beginning, the federal government, BIA, and NIGC were wrong to recognize the Walker Council during the 2003 intra-tribal governmental dispute. * * * Tribal courts do not sit in judgment of the federal government and its agencies and cannot, years later, rewrite history to erase a federal recognition decision they disagree with. * * * The time for challenging Walker's federal recognition has long since lapsed.").

The Tribe further accuses API of raising a waived argument *before the Eighth Circuit*—"that the federal courts should apply the well-pleaded complaint rule when analyzing whether a tribal court has jurisdiction." Opp'n 32; see Tribe's CA8 Br. 52–53 (making the same objection below). API has not argued that the well-pleaded complaint rule applies *ex proprio vigore* in tribal courts; instead, API has argued that this Court's approach to analyzing whether tribal-court claims satisfy a *Montana* exception is like both the well-pleaded complaint rule and the categorical approach used to determine whether a State crime is the same as a generic crime in the federal career-criminal laws. See API's SJ Reply Br. 5; API's CA8 Opening Br. 14–17; see also Pet. 23–24 (making the point without referring to the well-pleaded complaint rule). The Eighth Circuit

expressly considered and rejected API's contentions. See App., *infra*, 16a–19a. API's arguments, therefore, are properly before this Court.

II. THE EIGHTH CIRCUIT'S DECISION CONDONES COLLATERAL ATTACKS ON BIA AND NIGC ORDERS BY TRIBAL COURTS.

Throughout 2003, the BIA recognized the Walker Council as the council representing the Tribe (over claims by the competing Bear Council), and the NIGC ruled that the Walker Council had exclusive control over the Tribe's casino. Pet. 6–7. In June 2003, API agreed to provide the Tribe, acting through the Walker Council, with investigative and security services for the casino and to help reopen the casino. Pet. 8. The June 2003 Agreement contains an arbitration clause. *Ibid.* Once the Tribe haled API into tribal court, API argued that the arbitration agreement divested the court of adjudicative jurisdiction. The tribal court of appeals held that the agreement was void *ab initio* because, notwithstanding the on-point BIA and NIGC orders, the Walker Council had no authority to act for the Tribe in casino matters. Pet. 10–11. The agencies picked the wrong council, the Tribe explains, because they failed to see that the Tribe's hereditary chief had exercised inherent powers—not written in the Tribe's federally approved constitution—to remove the Walker Council. Opp'n 8.

The Tribe declares that "[n]othing about this case constitutes a collateral attack on federal administrative 'orders' of the NIGC and the BIA." Opp'n 21. The proof of the pudding is in the eating. The Tribe says that it "resolved the leadership dispute with its May 22, 2003 election, regardless of whether it took

federal authorities nine days, nine months, or nine years to recognize that result." Opp'n 3. Yet one day later, the BIA ruled that "the May 22 special election was not called and held in accordance with tribal law and, therefore, we will not recognize the results of it." App., *infra*, 147a. (That ruling also belies the Tribe's assertion that "the letters of the BIA * * * represent nothing more than the BIA's acknowledgment that it could not decide the Tribe's internal leadership dispute." Opp'n 17.) The Tribe says that "Walker was without authority over the Casino * * * at the time he entered the contract with API, regardless whether [sic] federal authorities recognized him as the Tribe's Chairman." Opp'n 18. Yet the NIGC held "that the Walker Council is the group that can lawfully act on behalf of the Tribe and correct the bases for closure," one of which was that "an unrecognized faction has illegally taken over the tribal government and its gaming operation." App., *infra*, 136a, 140a.[1] If any more proof were needed to show that this case is a collateral attack, the Tribe's statements in its Eighth Circuit brief would put the issue to rest: "the appropriate tribal forum has now resolved the 2003 leadership question and determined that Walker was removed from office in March 2003

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[1] The Tribe writes that "Walker" instituted the NIGC proceedings, implying that Walker appealed for himself only. See Opp'n 13. In fact, the Walker Council appealed for the Tribe; the Bear Council did not. App., *infra*, 133a ("The Respondent Walker Council, on behalf of the Tribe, narrowed the issues in its written submissions * * *."); 120a–130a (discussing improper *ex parte* letters sent by the "Bear Faction"). The Tribe also singles out API for calling the Bear Council "dissidents," Opp'n 2, but that is the label the NIGC used, see App., *infra*, 112a, 126a, 134a, 137a, 139a.

and in a valid, constitutional election held on May 22, 2003, the Bear Council was elected. To the extent [BIA] made any interim determination to the contrary, its predictions are outdated and wrong, and certainly are not binding." Tribe's CA8 Br. 39.

The Tribe assumes that the conflict between its positions and the federal orders does not amount to a collateral attack because tribes and tribal courts are the arbiters of tribal law. See Opp'n 2, 17–18, 20. But given that the BIA and NIGC must interpret tribal law to fulfill their duties—a truth the Eighth Circuit simply got wrong, see Pet. 15–16—the question in this case cannot be answered with that generality. The question is *how* tribes can register disagreement with the agencies' interpretations of tribal law. The answer comes from basic administrative law. Tribes must invoke the protocols Congress enacted for appealing BIA and NIGC decisions—first administratively, then in federal court. Any challenge to the orders giving the Walker Council control over the Tribe's casino should have been appealed immediately, not collaterally attacked years later. See Pet. 15–18.[2]

Ringing the alarm bell, the Tribe warns that API would have "this Court create a rule denying Indian people the right to vote for leaders of their tribe." Opp'n 21. Of course not. See Pet. 18. A federal agency's interpretation of another sovereign's law for purposes of applying federal programs is no more po-

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[2] The Tribe disagrees that the letters communicating the BIA's recognition decisions are technically "orders." See Opp'n 21–22. Orders or not, the underlying decisions were appealable. See Pet. 17.

litically threatening to Indian tribes than to States. See *Pennsylvania* v. *Riley*, 84 F.3d 125, 132 (CA3 1996) (federal agency's classification of a State program under federal law does not prevent the State from "characteriz[ing] its program anyway it pleases" and does not "impinge upon the State's authority to interpret its own laws"). Furthermore, federal Indian agencies must try in good faith to ascertain who best represents a tribe, even during a governmental stalemate. See *Seminole Nation* v. *United States*, 316 U.S. 286, 296–297 (1942); *Calif. Valley Miwok Tribe* v. *United States*, 515 F.3d 1262, 1267–1268 (CADC 2008); see also *Goodface* v. *Grassrope*, 708 F.2d 335, 339 (CA8 1983); *Wheeler* v. *BIA*, 811 F.2d 549, 552–553 (CA10 1987). To hold that tribes cannot unilaterally vitiate federal agencies' recognition decisions, even when a tribe believes one is wrong, is not to deny tribes the power to resolve intramural disputes. Had the Tribe (or the Bear Council) appealed the agency orders at issue in this case and persuaded an appropriate appellate body of its position's correctness, the orders would have been reversed and the Bear Council might have been given control over the casino, *nunc pro tunc*, on May 22, 2003. But no appeals were taken, and the agencies gave the Bear Council prospective authority to operate the casino only after it won a federally approved election in November 2003.

Accordingly, the Court should grant API's petition to consider the Eighth Circuit's significant and dangerous departure from settled administrative-law doctrines.

III. THE EIGHTH CIRCUIT'S *MONTANA* HOLDING CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS.

Ever searching for an easy out, the Tribe argues (for the first time) that the *Montana* framework does not apply because API became a *de facto* Indian by contracting with the Walker Council. Opp'n 27. The Court has held, however, that *de jure* membership—for instance, being able to vote, hold tribal office, and serve on tribal juries—is the on-off switch for tribal jurisdiction. See *Duro* v. *Reina*, 495 U.S. 676, 688 (1990). Plus, the Tribe's theory makes a hash of the first *Montana* exception for consensual relationships. The lower courts correctly understood that this is a *Montana* case.

Focusing mostly on the merits, *e.g.*, Opp'n 28–29, the Tribe only cursorily responds to the conflicts the Eighth Circuit created.[3] Contrary to this Court's admonition that only *conduct* matters for the *Mon-*

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[3] One of the Tribe's merits arguments deserves a response: The Tribe blames API for underemphasizing allegations that API entered the Tribe's Community Center and nonpublic areas of the casino. Opp'n 23–24. Those allegations do not change the *Montana* analysis, though, because the complaint is clear that API's entries there were related to recovering casino "records." App., *infra*, 150a. Unlike the Tribe's *brief*, the Tribe's *complaint* does not challenge or turn on API's supposed interference with tribal politics. Compare Opp'n 31 (API acted "with the purpose of forcibly overthrowing the Tribe's constitutionally elected governing body") with App., *infra*, 149a (the Tribe brought suit "to cause Defendant to return funds to the Tribe * * * and because Defendant committed torts against the Tribe and harm to tribal real property and to other tribal property on the Settlement").

tana exceptions, the Eighth Circuit held that "*context* is also significant," see Pet. 22–24, and the Tribe attempts to minimize the conflict as "euphemism," Opp'n 31–32. The Tribe does not defend the Eighth Circuit's decision to ignore federal statutes and administrative orders when determining the extent of tribal sovereignty for the second *Montana* exception. See Opp'n 35; see also Pet. 24–27. The Tribe asserts that the Eighth Circuit's consideration of land status (if merely noting status counts as "consideration," see Pet. 28) created no conflict, but the Oklahoma Supreme Court has held that a casino's location on tribal lands should be irrelevant, see *Cossey* v. *Cherokee Nation Enters.*, 212 P.3d 447, 458 (Okla. 2009). Finally, the Tribe erroneously calls the Eighth Circuit's equation of tribal legislative and adjudicative jurisdiction *dictum*, Opp'n 36, for API now must defend itself in tribal court because the Eighth Circuit (unlike this Court) held that the *Montana* framework for tribal legislative jurisdiction governs exercises of tribal adjudicative jurisdiction as well.

CONCLUSION

The Court should grant API's petition for certiorari to correct the Eighth Circuit's errors.

Respectfully submitted,

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