No. 19- 937

IN THE

Supreme Court of the United States

THE CHEROKEE NATION,

Petitioner,

v.

DAVID BERNHARDT, IN HIS OFFICIAL CAPACITY, ET AL.,

Respondents,

AND

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, ET AL.,

Intervenors/Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Secretary of the Interior properly take land in trust for the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") after consultation with the Cherokee Nation of Oklahoma ("CNO")—an Indian tribe organized in 1976—where both tribes are successors to the historic Cherokee Nation which signed the 1866 Treaty creating a reservation boundary within which the land lies?

2. Does the recent disposition of *Maine Community Health Options v. United States*, No. 18-1023 have a bearing on this case, even though this case, unlike *Maine Community Health Options*, involves no repeal of a statute by implication?

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INTRODUCTION

The Petition presents no circuit split or conflict with Supreme Court precedent. This case arises from unique facts surrounding two federally recognized Indian tribes, the Cherokee Nation of Oklahoma ("CNO") and the United Keetoowah Band of Cherokee Indians ("UKB"), which share a common historical reservation area in northeastern Oklahoma.

In its Introduction, the CNO claims to have a "*centuries-old treaty territory*" exclusive of the UKB. (Pet. at 2). However, the CNO is not the same entity as the historical Cherokee Nation which signed the Treaty with the Cherokee, 1866, 14 Stat. 799 (July 19, 1866) ("1866 Treaty"). Rather, both the CNO and the UKB are successors to the historical Cherokee tribe which signed the 1866 Treaty. In fact, the UKB were on the Oklahoma reservation first.

The Western Cherokee, who the UKB claim to succeed directly, signed a treaty with the United States in 1828, giving it a reservation in northeastern Oklahoma in exchange for its Arkansas reservation. Treaty with the Western Cherokee 7 Stat. 311 (May 6, 1828).

Ten years later, the CNO's ancestors were forcibly moved from the southeast to the Oklahoma reservation and the two historic tribal groups merged into a single Cherokee government. But strife between the two persisted. In part because the UKB opposed slavery and the Cherokee government was siding with the South, the UKB adopted a written constitution in 1859 to form a separate government. (AR2240–2257). After the Civil War, both tribes' ancestors were part of the Cherokee who signed the 1866 Treaty with the United States establishing the final boundaries of the historical Cherokee Nation.

In 1946, Congress recognized the UKB Act of August 10, 1946, ch. 947, 60 Stat. 976. The UKB then reorganized under the Oklahoma Indian Welfare Act[1] ("OIWA"). In 1950, the United States approved a new UKB constitution and granted the UKB an OIWA corporate charter. (AR19–23; AR24–31). In 1976, the CNO organized its government by approving a constitution, which the United States approved.[2] The two tribal groups have shared the historical Cherokee reservation since 1839.

STATEMENT

The CNO seeks review of a unanimous panel decision and denial of rehearing *en banc* by the U.S. Court of Appeals for the Tenth Circuit. The Tenth Circuit interpreted two Congressional acts (the OIWA and the 1999 Appropriations Act[3]) and one treaty (the 1866 Treaty) as authority for the Secretary of the Interior to take land in trust for the UKB without the CNO's consent. The CNO identifies no circuit split. The CNO's cited cases also show no conflict exists between the Tenth Circuit's decision and Supreme Court precedent. Further review is not warranted.

ARGUMENT

The Tenth Circuit correctly rejected the CNO's contentions. Its decision does not conflict with any

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[1] 49 Stat. 1967 (June 26, 1936) (codified at 25 U.S.C. §§ 5201–5210).

[2] The CNO's unilateral adoption of the "Cherokee Nation" moniker since the United States' recognition of its 1976 constitution—in which it is named the "Cherokee Nation of Oklahoma"—has no legal effect.

[3] Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681.

decision of this Court or another court of appeals. Further review is not warranted.

I. No conflict exists between The Tenth Circuit's OIWA interpretation and Supreme Court precedent.

The only case CNO cites to support its argument that the Tenth Circuit's interpretation of the OIWA conflicts with Supreme Court precedent is *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). (Pet. at 11–16). This Court, however, did not consider, address, or even cite the OIWA in *Carcieri*. Rather, *Carcieri* dealt solely with the Indian Reorganization Act[4] ("IRA"), a different act of Congress passed two years before the OIWA. The CNO cites no Supreme Court cases interpreting the OIWA. The Tenth Circuit's OIWA analysis conflicts with no precedent of this Court or of any court of appeals and further review is not warranted.

II. No conflict exists between the Tenth Circuit's interpretation of the 1866 Treaty and Supreme Court precedent.

The Tenth Circuit's analysis of the 1866 Treaty does not conflict with any precedent of this Court or another court of appeals. The CNO argues the Tenth Circuit rejected its "treaty right to sovereignty." However, no argument based on a general "treaty right to sovereignty" was before the Tenth Circuit. Rather, the treaty issue was limited to whether one specific provision of the 1866 Treaty required CNO consent. Article 26's clause regarding "hostilities of other tribes," (Op. at 24–27 (Doc. No. 010110223405)) was the sole treaty issue before the Tenth Circuit.

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[4] 48 Stat. 985 (June 18, 1935) (codified at 25 U.S.C. §§ 5101 *et. seq.*).

The Tenth Circuit interpreted the hostilities-of-other-tribes clause consistently with Supreme Court precedent regarding the interpretation of treaties—by reading the plain language of the clause as unambiguously not granting the CNO a veto over the United States' decision to take land in trust for the UKB.

The hostilities-of-other-tribes clause simply does not today mean, and would not at the time of the treaty have meant, the right of one Cherokee government (the CNO), descended from the historical 1866 Cherokee tribe, to veto a decision by the United States to take land in trust for another Cherokee government (the UKB), which also descends from the historical 1866 Cherokee tribe.

Because the CNO did not raise a general "treaty right to sovereignty" argument in the Tenth Circuit or the District Court, it has waived that argument. And the Tenth Circuit's decision that the hostilities-of-other-tribes clause is unambiguous does not conflict with this Court's precedent. Further review is not warranted.

III. No conflict exists between the Tenth Circuit's 1999 Appropriations Act analysis and this Court's precedent.

The CNO insinuates the appearance of a conflict between the Tenth Circuit's decision and this Court's decisions on repeals by implication where none exists. Every Supreme Court case cited by the CNO involves the potential repeal by implication of a *statute*, not of a *regulation*. Yet the CNO argues the Tenth Circuit improperly found an implicit repeal of a regulation, a decision that would not conflict with any precedent of this Court.

As the CNO put it: "[t]he 1999 Appropriations Rider did not repeal *the regulation* at issue, and [] the Tenth Circuit failed to use this Court's established test for determining whether an appropriations law works such a repeal." (Pet. at 23). Here, the CNO argues the Court's precedent regarding repeals by implication should apply to the analysis of the Tenth Circuit's interplay between the 1999 Appropriations Act and 25 C.F.R. § 151.8. But every case cited by the CNO to support this argument involves the repeal-by-implication of a *statute*, not of a *regulation*.

The primary cases relied on by the CNO, *Maine Community Health Options* and *Moda Health Plan,* involve the alleged repeal of a *statute* (section 1342 of the Affordable Care Act ("ACA"), codified at 42 U.S.C. § 18062 (2012)) by subsequent appropriations acts. *Maine Cmty. Health Options v. United States*, 133 Fed. Cl. 1, 7–13 (2017), *aff'd,* 729 F. App'x 939 (Fed. Cir. 2018); *reversed and remanded* No. 18-1023 (U.S. April 27, 2020); *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1322–29 (Fed. Cir. 2018), *cert. granted,* 139 S. Ct. 2743, 204 L. Ed. 2d 1130 (2019).

Similarly, secondary citations by the CNO regarding repeals by implication involve the interplay between statutes or between statutes and appropriations acts. *See Harford v. United States*, 12 U.S. (8 Cranch) 109, 109 (1814) (statute and appropriations act); *Minis v. United States*, 40 U.S. 423, 443–48 (1841) (appropriations act and subsequent statute); *United States v. Langston*, 118 U.S. 389, 393–94 (1886) (statute and subsequent appropriations acts); *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 501 (1936) (Federal Reserve Act, Federal Reserve Act amendments, and the Organic Act for the Philippine Islands); *Tennessee*

Valley Auth. v. Hill, 437 U.S. 153, 189–93 (1978) (Endangered Species Act and subsequent appropriations acts); *United States v. Will*, 449 U.S. 200, 204, 101 S. Ct. 471, 475 (1980) (Postal Revenue and Federal Salary Act, Executive Salary Cost-of-Living Adjustment Act, and Federal Pay Comparability Act); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (Clean Water Act and Endangered Species Act).

The Tenth Circuit's decision regarding an appropriations act's impact on a regulation does not conflict with any Supreme Court precedent. Further review is not warranted.

CONCLUSION

For the foregoing reasons the Petition should not be granted.

Respectfully submitted,

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