No. 04-1368

IN THE

Supreme Court of the United States

DELAWARE TRIBE OF INDIANS,

Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
GALE NORTON, Secretary of the Interior, and
JAMES E. CASON, acting as Assistant Secretary –
Indian Affairs,

Respondents.

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

REPLY TO BRIEFS IN OPPOSITION

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REPLY

It is clear from the briefs in opposition that the issues on the merits will be squarely joined, with the Cherokee Nation asserting one side of them, and the Delaware Tribe and the Secretary of the Interior asserting the other. While there is more to say concerning why the Delaware Tribe and the Secretary are correct on the merits and the Cherokee Nation is wrong, the question at this point is whether a writ of certiorari should be granted to resolve those merits.[1] That question turns, in sum, on whether it is "important" that review be granted. On that, the parties are not in agreement, but the answer is nonetheless clear.

I. The Questions Presented Are Important, and There is a Compelling Need for Review Now.

The Cherokee Nation argues that there is no important or compelling need for this Court's review, but that is not true. As established in the Petition, this case involves an unprecedented decision by a federal appellate court to void direct relations between the Executive branch and the chosen tribal government of over 7,000 Native Americans. That decision is based on the court of appeals' erroneous ruling that two of this Court's decisions from 100 years ago command that result, despite more recent Congressional acts,

[1] It may be noted now, however, that, reduced to its essence, the entirety of the Cherokee Nation's argument is that, because in the 1867 Agreement the Delaware Tribe of Indians agreed to provisions for individual Delawares to have the rights of native Cherokees, the Delaware Tribe necessarily also abandoned its own identity as a distinct tribal organization. That is not so, as outlined in the Petition, *e.g.*, Pet. at 16-17, as recognized by the Department, *e.g.*, Br. for Fed. Resp. in Opp. at 8, and as acknowledged by this Court in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 77 (1977).

Executive determinations, and this Court's own more recent decision in *Weeks*.

That ruling is also in conflict with the D.C. Circuit's interpretation of this Court's holdings in *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), as the Secretary has acknowledged. *See* Br. for Fed. Resp. in Opp. at 8. As noted on page 13 of the Petition, the Tenth Circuit and the D.C. Circuit are in conflict as to whether *Journeycake* and *Delaware Indians* foreclosed the Department from finding that the Tribe did not abandon its tribal organization in the 1867 Agreement. Indeed, if the D.C. Circuit had thought the point already foreclosed, it would not have remanded the matter "for initial decision by the district court" concerning "the proper interpretation of the 1867 Agreement with the Delaware Tribe as a party to the proceedings and in light of the full administrative record, which is not before this court." *Cherokee Nation v. Babbitt*, 117 F.3d 1489, 1503 n.15 (D.C. Cir. 1997). The D.C. Circuit thus also specifically directed, contrary to the Tenth Circuit's later holding, that the "full administrative record," and not merely the Agreement itself, must be reviewed because of the "light" it would shed on the "proper interpretation" of the Agreement.[2]

The Tenth Circuit also failed to defer to the agency charged by Congress and recognized by this Court as the

[2] In addition to this conflict over the meaning of *Journeycake* and *Delaware Indians,* the D.C. Circuit is also in conflict with the Tenth Circuit concerning the ambiguity of the Agreement ("On its face, the language of the 1867 Agreement provides no clear indication as to which of the two Article 15 provisions applies." 117 F.3d at 1500) and the Department's authority to use a procedure other than Part 83 to reestablish federal recognition ("[F]ederal recognition of the Delawares [could be reestablished] either by means of the Final Decision, the Part 83 procedures, or another method." 117 F.3d at 1503). *See* Pet. at 24 n.10 and 29 n.15.

primary authority regarding federal/tribal relations and further compounded its errors by limiting that agency's powers in a way that, if allowed to stand, casts into doubt the previous recognition of several other Indian tribes.[3] Each and all of these are important and compelling reasons for review.

But that is far from all. As adverted to in the Petition, the immediate consequences for the members of the Delaware Tribe are disastrous. Not only has the Tenth Circuit's decision required the Bureau of Indian Affairs to terminate federal contracts with the Tribe, *see* Pet. at 12-13; the Tenth Circuit's decision effectively "decertified" the over 7,000 Native Americans who are enrolled only in the Delaware Tribe[4] from the protections and programs which, under various federal and state laws, are only afforded to members of federally recognized tribes, including: protections for Indian children under the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.*; existing government construction and service contracts with preferences for minority contractors;[5] federal tax credits to Oklahoma businesses employing individual Delaware Tribe members;[6] prior and current state income tax exemptions in Oklahoma for individual Delaware Tribe

[3] The Secretary does not take issue with the Petition's point, Pet. at 29, that at least six other tribes have been federally recognized outside of the Part 83 process.

[4] *See* Affidavit of Chief Larry Joe Brooks, Chief of the Delaware Tribe of Indians, Appendix G to the Application to Stay Mandate, filed under this Court's No. 04A832 (referenced in the Petition at 21 n.8), at ¶ 2 (Delaware Tribe has over 10,000 enrolled members, over 7,000 of whom are not enrolled in any other tribe).

[5] *See, e.g.*, 13 C.F.R. Parts 124-126; OMB Circular A-76 Update XI (March 1, 1999).

[6] 26 U.S.C. § 45A (2000).

members residing on and working for businesses operating on trust lands or allotments throughout Oklahoma; existing university scholarships and grants to individual Delaware Tribe members; ongoing tribal excavations and relocation of Delaware burial remains under the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 *et seq.*; potential criminal liability for individual members of the Delaware Tribe for possession of ceremonial eagle feathers and other items without the protections of the American Indian Religious Freedom Act, 42 U.S.C. §§ 1996 *et seq.*, as amended; and nullification of other tribes' current and prior criminal and civil jurisdiction over individual Delaware Tribe members within their jurisdiction, 25 U.S.C. §§ 1301 *et seq.* These are not "racial" protections, privileges, and effects; they are based on political distinctions that flow from tribal recognition and from being an *enrolled* member of a *recognized* Indian tribe, as this Court found in *Weeks*.[7] The ability of the more than 7,000 Delaware Tribe members who are not enrolled in other tribes to receive such benefits and protections is directly affected.[8]

The response of the Cherokee Nation to this crisis, that affected individuals can simply seek membership in the

[7] 430 U.S. at 85-86. *See also, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974) (Bureau of Indian Affairs employment preference for Native Americans does not constitute a racial preference).

[8] Among the programs directly affected by the termination of funding to the Tribe is its nationally acclaimed Delaware Child Development Program, which owns and operates three childcare centers and provides technical support and assistance to child care businesses. The program served 555 children. The number of children served drops to 37 with the loss of the BIA funds. *See* Affidavit of Chief Brooks, *supra* note 4, at ¶ 11. Similarly devastating effects occur in the Tribe's elder nutrition program, the elder housing program, the Low Income Home Energy Assistance Program, and the Tribe's health clinic. *Id.*

Cherokee Nation, is painfully similar to the tactic which the record reflects was employed against the Delawares in 1867, when the local Indian agent simply withheld annuity payments until tribal members agreed to relocate to Cherokee territory. *See* Pet. at 6. What is more, it ignores the cultural and political significance of such an act. It matters in the most fundamental way possible to each and all of the more than 7,000 enrolled Delawares that they be recognized as – because they *are* – members of the Delaware Tribe of Indians. This Court, the Congress, and the Executive branch have each recognized this historical truth, repeatedly. As this Court itself found in *Weeks*:

> Each Delaware moving to Indian Country . . . was to receive . . . the right to become a member of the Cherokee Nation. Most of the Delawares . . . were gradually assimilated for most purposes into the Cherokee Nation. . . . Despite their association with the Cherokees, these Indians . . . have over the years maintained a distinct group identity, and they are today a federally recognized tribe.

430 U.S. at 77. As Congress noted in appropriating funds to the Tribe:

> This group, now known as the Delaware Tribe of Indians . . . acquired full political rights in the Cherokee Tribe, but they maintained their group identity, having tribal chiefs and business committees continuously until the present time.

S. Rep. No. 96-628, at 5 (1980). And as the Department determined:

> [The] national or tribal character of the Delaware-Cherokees was never lost or completely merged into that of the Cherokees.

Department of the Interior Decision Memorandum of January 23, 1941 (AR vol. 1 0015).[9] It is thus no answer to the Tenth Circuit's obliteration of federal relations with their tribal government to say that the Delaware have a political right to "become" Cherokee.

Sadly, many of the above points also apply to the response of the Secretary. While it is gratifying that the Secretary agrees the Tenth Circuit erred in all the respects urged in the Petition, the comfort taken by the Secretary in the Tenth Circuit's refusal to consider the evidence of post-1867 relations between the United States and the Delaware Tribe is cold comfort to the thousands of members of the Delaware Tribe directly and immediately affected by its unprecedented decision. Moreover, regardless of whatever administrative avenues might be available, the Delaware Tribe will not have another opportunity, outside of this appeal, to challenge the Tenth Circuit's erroneous interpretation of the 1867 Agreement, and neither will the Secretary. Neither Congress nor the Executive can correct the Tenth Circuit's erroneous characterization of this Court's holdings in *Journeycake* and *Delaware Indians*. As the insidious result thereof, a tribe which has in fact maintained not only its own tribal organization and government for

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[9] *See also, e.g., Delaware Tribe of Indians v. United States*, 2 Ind. Cl. Comm. 253, 265 (1952):

> They continued to maintain their tribal customs, practices, and their hereditary form of Delaware government. They received annual payments . . . separate from the Cherokees. . . . They were governed by hereditary tribal chiefs until . . . 1895. Thereafter, they maintained a tribal council and business committee to perform the functions and duties previously performed by their chiefs. This tribal council and business committee have continuously functioned as an identifiable group. . . .

centuries, but has also maintained a government-to-government relationship with the United States since 1778, must suffer the indignity of submitting to administrative procedures meant only for tribes that have *not* maintained their tribal organization, and must be prepared to wait up to 15 years or more for those procedures to run their course. *See* Pet. at 27 n.12 and 28 n.14.

This affront to tribal identity is not academic. In addition to the devastating practical effects detailed above, its moral effects cannot be overstated. The Delaware Tribe of Indians is not a museum tribe, existing only to preserve customs and rituals. It is the chosen governmental organization of the 7,000 Native Americans who are enrolled only in it, and as such it exists both to govern them concerning tribal matters and to relate to other governments, especially the federal government, regarding matters that affect it as a tribe. That a lower federal court has erroneously voided all federal relations with that government is not a tolerable situation for its members, even for a matter of days or months, let alone for an uncertain number of years. Thus, if the Tenth Circuit is wrong, it is intolerably wrong, and this Court's review should not be withheld simply because the Secretary – who agrees that it is wrong, on all counts – may be willing to let the Tribe suffer its consequences for an indefinite time.[10]

* * *

It is rare — perhaps unique — that a lower federal court decision brought before this Court for review has directly

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[10] While the Secretary adverts to possible future Departmental action, *see* Br. for Fed. Resp. in Opp. at 7, 9 n.2, the procedural fact is that the Tenth Circuit explicitly denied the Tribe's request for a remand to the Department, *see* Pet. at 12, instead ordering that "any action taken by the agency on its 1996 final decision is void." *Id.*

flouted all three branches of the national government, but that is precisely what has occurred here. In the many years since 1867, Congress, the Executive, and this Court have each regarded the Delaware Tribe of Indians as a "federally recognized tribe," but the Tenth Circuit's unprecedented decision has nonetheless voided that federal/tribal governmental relationship. It has thereby severely and negatively affected the daily lives of over 7,000 Native Americans. They and their chosen government respectfully submit that decision merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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