No. 14-340

In The
Supreme Court of the United States

FRIENDS OF AMADOR COUNTY,
BEA CRABTREE and JUNE GEARY,

Petitioners,

v.

SALLY JEWELL, Secretary of the Interior, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT BUENA VISTA RANCHERIA OF ME-WUK INDIANS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In the absence of a Circuit split, should this Court grant review of the Ninth Circuit's unremarkable, unpublished decision affirming the district court's Rule 19 determination, of which the Ninth Circuit denied en banc review?

2. May a litigant circumvent the doctrine of tribal sovereign immunity merely by alleging "putative" tribal status, despite the subject tribe having been restored to federal recognition over thirty years ago?

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BRIEF IN OPPOSITION

Respondent Buena Vista Rancheria of Me-Wuk Indians, a federally-recognized Indian tribe (the "Tribe"), respectfully requests that the Friends of Amador County's petition for a writ of certiorari be denied.

OPINIONS BELOW

The Petition identifies two of the opinions below at 1 and provides each as an appendix. Pet. App. 1-8a, 11-23a. The Petition identifies the Ninth Circuit's denial of the request for panel and en banc rehearing at 2 and also provides this decision as an appendix. Pet. App. 9-10a. The Petition fails to include the district court's denial of Plaintiffs' "Motion to Reconsider, Vacate, Amend or Modify"[1] the judgment. This opinion is available at 2011 U.S. Dist. LEXIS 142095.

INTRODUCTION

This Court should deny the petition for writ of certiorari to review the Ninth Circuit's unpublished decision because that decision does not conflict with any other decision of a circuit court of appeals and the case does not implicate issues of national

[1] The courts below referred to this as a motion "to vacate." Pet. App. 2a n.1. This brief does the same.

importance. Further, Petitioner's assertion that the facts of this case would somehow allow this Court to review the Secretary's federal recognition of a "putative" tribe is disingenuous. The Tribe's federal recognition was restored over thirty years ago. The complaint does not raise the issue of which Petitioners seek review. The Petition does not merit this Court's review.

STATEMENT OF THE CASE

1. a. The Me-Wuk Indians have lived on a piece of land they called Buena Vista since the nineteenth century. The United States recognized the Tribe in the early twentieth century.

b. The Tribe was one of numerous recognized Indian tribes terminated from recognition by the California Indian Rancheria Act of 1958. Act of Aug. 18, 1958, Pub. L. No. 85-671, 72 Stat. 619.

c. In 1979, the Tribe and several other terminated California Indians brought suit challenging their termination. *See Tillie Hardwick v. United States*, No. C79-1710-SW (N.D. Cal. 1983). In 1983, the United States settled with a subclass of the plaintiff tribes and expressly restored those seventeen tribes' federal recognition. *Id.*; Restoration of Federal Status to 17 California Rancherias, 49 Fed. Reg. 24,084 (June 11, 1984). *See also, e.g., Big Lagoon Rancheria v. California*, 741 F.3d 1032, 1034 (9th Cir. 2014) ("The [California Rancheria Termination] Act

mandatorily dissolved some 43 rancherias – the term for small Indian settlements in California – although some were later restored. *See Tillie Hardwick v. United States*, No. 79-1710 (N.D. Cal. stipulated judgment entered 1983)."); *Nisenan Maidu Tribe v. Salazar*, 2011 U.S. Dist. LEXIS 108277, *4 (N.D. Cal. 2011) (explaining the history of the *Tillie Hardwick* litigation and identifying that the Buena Vista Rancheria was a member of the subclass of seventeen Rancherias that were restored). As a result of its restoration, the Tribe was added to the government's formal list of Indian tribes. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 50 Fed. Reg. 6055-02 (Feb. 13, 1985). The Tribe remains on the list today. *Id.* at 79 Fed. Reg. 4748, 4749 (Jan. 29, 2014). *See also* Pet. App. 5a (Ninth Circuit's reference to 1985 Federal Register list); Pet. App. 20a (district court's identification that "[t]he Tribe is federally recognized").

d. In a second *Tillie Hardwick* stipulated judgment, in 1987, entered as an order of the U.S. district court, the boundaries of the Tribe's reservation, also called the Buena Vista Rancheria (the "Rancheria"), were similarly restored to recognition.

2. In 2010, Plaintiffs Friends of Amador County ("Petitioner"), Bea Crabtree and June Geary (collectively, "Plaintiffs") brought a complaint challenging the Rancheria's "Indian lands" status under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA"), and, based on the Rancheria's status, sought to invalidate the tribal-state gaming compact

agreement between the Tribe and the State of California.

3. a. After complete briefing, the district court unequivocally dismissed Plaintiffs' action. Under Fed. R. Civ. P. 19, the court found that the Tribe was required because, in its absence, the court could not accord the parties complete relief and because the suit implicated several of the Tribe's legally-protected interests that would be impaired or impeded if the suit continued. This included the Tribe's "direct, and legally protected" gaming-related interests, stemming from its status as a compact party, and the Tribe's:

> substantial interest in the already-determined "Indian lands" status of its Rancheria, its ability to govern that land, its ability to enforce its laws, its status as a federally-recognized Indian tribe, the two stipulated judgments that restored the Tribe and Rancheria, and its sovereign immunity not to have its interests adjudicated without its consent.

Pet. App. 18a. The court found a conflict of interest between the United States and the Tribe that prevented the United States' adequate representation of the Tribe's interests in this case:

> The Federal Defendants' litigation policy in this case appears to favor judicial review and to avoid taking positions that may conflict with its national Indian policy. Their failure to move this court to dismiss this case and their refusal to take a position on this motion appears to conflict with the Tribe's interest

> in protecting their tribal status and not having their interests litigated in their absence.

Id. at 19-20a. The court next found that the Tribe could not be joined, absent its consent, due to tribal sovereign immunity. *Id.* at 20a. Finally, the court determined that, because of the Tribe's absence, in equity and good conscience the case could not proceed with the existing parties, concluding that "[t]he potential prejudice to the Tribe cannot be effectively minimized under the second factor of Rule 19(b) because no adequate relief for plaintiffs can be shaped such that the Tribe would not be prejudiced." *Id.* at 21-22a.

b. Plaintiffs asked the district court to "reconsider, modify, correct and/or vacate" the order under Fed. R. Civ. P. 59 or 60. 2011 U.S. Dist. LEXIS 142095, *2. The district court denied the request, explaining that "Plaintiffs do not present the court with newly discovered evidence, nor do they present any new caselaw that would constitute an intervening change in controlling law." *Id.* at *3. In a footnote, the district court explained that despite Plaintiffs' "hint[ ]" in the conclusion of their motion to vacate of an additional argument raising a "challenge under the [APA] on the issue of the government's acknowledgment of the Tribe," that challenge "is not raised in plaintiffs' complaint, nor did plaintiffs request leave to amend their complaint to add such a challenge." *Id.* at *4.

4. a. Plaintiffs appealed, providing argument on issues beyond the scope of the Rule 19 decision. *See* Pet. App. 5-6a.

b. The Ninth Circuit affirmed the district court in an unpublished memorandum opinion limited to the Rule 19 determination. The Ninth Circuit agreed with the district court's "considered judgment" that the complaint implicated the Tribe's interests and that the government's "inactions [in this case] indicate divergent interests between the Tribe and the government." Pet. App. 4a. And the panel found no abuse of discretion in the district court's application of Rule 19(b)'s four-factor analysis. *Id.* at 6-7a.

5. Plaintiffs-Appellants then requested panel rehearing and/or rehearing en banc. The Ninth Circuit summarily denied both requests. Pet. App. 9-10a.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Between Circuits

A. Petitioner Mischaracterizes *Cherokee* to Support Its Claims of a Circuit Split

There is no circuit split here. The Ninth Circuit decision below is not in conflict with the D.C. Circuit's decision in *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489 (D.C. Cir. 1997), as Petitioner alleges. Rather, that case explicitly applied an exception to the ordinary rule applied by the Ninth Circuit here. In *Cherokee*, the ultimate issue complained of was an agency letter-decision recognizing the Delaware Tribe as a separate tribe despite its mid-nineteenth-century merger into the Cherokee Nation. *Id.* at 1495. The

Delawares, recognized by way of the challenged agency action, raised as a defense against the suit its recently acquired sovereign immunity. *Id.* at 1496. The court acknowledged the ordinary rule that "the inclusion of a group of Indians on the *Federal Register* list of recognized tribes would ordinarily suffice to establish that the group is a sovereign power entitled to immunity from suit." *Id.* at 1499. But in applying an exception to the ordinary rule, the *Cherokee* court explained that, among other things, the Delawares were included "on the most recent [Federal Register] list as a result of the Final Decision now challenged by the Cherokee Nation." *Id.* Thus, the court concluded that the Delawares could not assert sovereign immunity in a suit where the Cherokee Nation had unmistakably raised as the ultimate issue a challenge to the agency action granting Delaware its recognition and did so directly following the Delawares' placement on the Federal Register list. *Id.*

Here, the Ninth Circuit applied the ordinary rule without exception and precisely as described by the *Cherokee* court. *Cherokee*, 117 F.3d at 1499 (sovereign immunity "is available . . . when a group of Indians has been recognized as a sovereign by Congress, the Executive Branch, or the courts"); Pet. App. 5a ("[T]he court cannot simply turn a blind eye to the Tribe's status as a federally recognized tribe in the Federal Register.").[2] The Tribe was listed on the Federal

[2] Petitioner makes numerous allegations regarding the history of the Tribe, Pet. 3-6, that are not properly before the

(Continued on following page)

Register list of recognized tribes in 1985 as a result of its 1983 restoration. *Tillie Hardwick v. United States*, No. C79-1710-SW (N.D. Cal. 1983); Indian Entities Recognized, 50 Fed. Reg. 6055-02 (1985). Neither its restoration nor its listing were ever challenged.

Contrary to Petitioner's suggestion, the Tribe's sovereign immunity here did not operate as a bar to any challenge of tribal recognition. Petitioner mischaracterizes the viable claims in the action below. Below, Plaintiffs failed to raise cognizable challenges to the tribe's status; the complaint raised allegations relevant to the Tribe's status only in the context of the United States' 2004 compact approval. Plaintiffs did not – and could not – challenge the Tribe's restoration, as any such direct challenge, if it was available to them at all, was decades out of time. The Tribe was restored by judicial stipulation and court order in 1983, which required the Secretary of the Interior to add the Tribe to the Federally Recognized Indian Tribe List, which he did, in 1985. Indian Entities Recognized, 50 Fed. Reg. 6055-02 (1985). Plaintiffs did not bring their complaint until 2010.

Court. Petitioner asserts that the Tribe is required to obtain federal recognition through compliance with the regulations at 25 CFR Part 83 despite the Tribe's current status as federally recognized. This is contrary to law. *See, e.g.*, Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454, 108 Stat. 4791, 4792 (Nov. 2, 1994) ("Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations . . . ; or by a decision of a United States court[.]").

Petitioner misreads *Cherokee* – it was not, as it alleges, "directly contrary" to the Ninth Circuit decision; rather, it was a fact-specific and express exception to the general rule both circuits apply. *Cherokee*, 117 F.3d at 1499; Pet. App. 5a.

B. *Cherokee* Was Not Mentioned Below

It is so clear that *Cherokee* does not apply to this case that the case was never mentioned below – not in the briefing, argument, or decision of either the district court or the Ninth Circuit. Instead, Plaintiffs-Appellants' briefing before the Ninth Circuit on their challenges to the Tribe's federally-recognized status was limited to *Muwekma Ohlone v. Salazar*, 708 F.3d 209 (D.C. Cir. 2013). But *Muwekma*, in which a non-recognized group petitioning under the Part 83 federal acknowledgement regulations requested timely judicial review, is inapposite here as the panel explained at oral argument.

C. The Ninth Circuit Did Not Publish Its Decision and Denied Petitions for Panel and En Banc Review

The district court's thorough and clear thirteen-page dismissal order was appropriately specific to Rule 19 analysis on the facts here. Plaintiffs nonetheless asked the district court to "reconsider, modify, correct and/or vacate" the order under Rules 59 or 60. In its emphatic denial, the district court explained that "Plaintiffs do not present the court with newly

discovered evidence, nor do they present any new caselaw that would constitute an intervening change in controlling law." 2011 U.S. Dist. LEXIS 142095, *3.

On appeal, in an unexceptional and unpublished memorandum decision issued two weeks after oral argument, the Ninth Circuit affirmed the well-supported fact-specific decisions of the district court to dismiss the action on Rule 19 grounds and deny Plaintiffs' motion to vacate, finding no abuse of discretion.

Undeterred, Plaintiffs-Appellants requested panel rehearing and rehearing en banc. The panel and the full court summarily denied these requests. Pet. App. 9-10a.

II. The Implications of Petitioner's Request Would Allow Litigants to Turn Tribal Sovereign Immunity On Its Head Through False, Untimely Allegations That a Federally-Recognized Tribe Is Not a Tribe

A. Petitioner Asks This Court to Allow Any Plaintiff to Circumvent Tribal Sovereign Immunity Merely by Alleging – Contrary to Judicially Recognizable Fact and Without Any Support – That a Federally-Recognized Tribe Is Not a Tribe

Petitioner's concerns that by the decision below, the Ninth Circuit is somehow "allowing a would-be tribe to bootstrap its federal recognition into an

immunity from any challenge to the lawfulness of that recognition," Pet. 14-15, are unfounded on both the facts of this case and on Ninth Circuit case law. Here, having been federally restored to recognition in 1983, the Tribe is not a "would-be tribe." And were the Tribe's status properly before the Ninth Circuit, it would have reviewed it under the guidance of the ample and stable precedent before it to assess the availability of sovereign immunity to a tribal party. *See, e.g., Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994) ("Federally recognized Indian tribes enjoy sovereign immunity from suit."); *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 (1) it is recognized as such by the federal government") (citing *United States v. Sandoval*, 231 U.S. 28, 46-47 (1913)). *See also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030-2031 (2014) ("[W]e have time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver).").

In fact, because this case challenges a Tribe that has been indisputably federally-recognized for over thirty years, what Petitioner proposes is to allow any plaintiff to circumvent the well-established protections of tribal sovereign immunity by merely alleging in the complaint – however speciously – that the tribe is not a tribe. This would turn tribal sovereign immunity on its head.

B. Petitioner's Request Would Allow Settled Matters Related to a Tribe's Recognition to Be Reopened Without Limitation

Regardless of the absence of merit in the Petition, what Petitioner requests would subvert the reasonable limitations placed on those wishing to challenge a tribe's federal recognition. There is no question that cases properly and timely brought may seek review of agency action under the APA. 5 U.S.C. §§ 704, 706. But the APA has a general statute of limitations of six years. 28 U.S.C. § 2401(a). Here, the Tribe has been federally recognized for over thirty years and has appeared on the Federal Register list, which Petitioner or its members have had access to, for nearly thirty years. Were Petitioner permitted to sustain a challenge to the Tribe that rests on the disingenuous assertion that the Tribe is not a tribe, this case would have a deeply destabilizing effect for tribes, the federal government, and all who interact with tribes. Petitioner would allow any litigant to reopen such well-settled matters as federal recognition apparently without any statute of limitations. Such a result cannot stand.

III. Petitioner Seeks Review of an Issue Not Raised Below

As explained by the district court in its dismissal of Plaintiffs' motion to vacate, the complaint did not state the challenge of which Petitioner now seeks this Court's review:

> In their [motion's] conclusion, plaintiffs appear to be hinting at a fourth argument – that plaintiffs have a valid challenge under the Administrative Procedure Act ("APA") on the issue of the government's acknowledgment of the Tribe. (Mot. for Recons. at 47:11-17.) This specific challenge is not raised in plaintiffs' complaint, nor did plaintiffs request leave to amend their complaint to add such a challenge.

2011 U.S. Dist. LEXIS 142095, *4 n.2; *see, e.g.*, Pet. 15 (asserting that the federal recognition of the Tribe is reviewable under the APA). Contrary to Petitioner's assertions, the Tribe's federal-recognition was not properly before the district court. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (only an exceptional case warrants such unusual review). To the extent Plaintiffs-Appellants may have raised the issue – for the first time – on appeal, the Ninth Circuit easily answered that the Tribe had been federally recognized since at least 1985. Pet. App. 5a.

As identified by the district court, the complaint made allegations concerning the legality of the tribal-state compact under IGRA, the "Indian lands" status of the Tribe's Rancheria, and the United States' approval of gaming on the Rancheria. Pet. App. 13a. The complaint's allegations related to the Tribe's recognized status were tied to the complaint's compact-invalidity claims. *Id.* Petitioner cannot now

collapse the distinction between the underlying assertion and the properly-asserted (if erroneous) claims against the United States' gaming-related approvals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 2014