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No. _____

In The

Supreme Court of the United States

MACKINAC TRIBE,

Petitioner,

v.

SALLY JEWELL, U.S. SECRETARY OF THE INTERIOR,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals deviated from this Court's decision in *Carcieri v Salazar*, 555 U.S. 379 (2009) which held that the Secretary of Interior's Federal Acknowledgment Process (FAP) established in 25 C.F.R. Part 83 is not determinative as to whether Indian Tribe is "recognized" for the purposes of the Indian Reorganization Act (25 U.S.C. § 479)?

Whether the Secretary of Interior can avoid performing her mandatory non-discretionary duty under the Indian Reorganization Act (25 U.S.C. § 476) to call elections to ratify tribal constitutional documents within a reasonable time by requiring a tribe to exhaust administrative remedies estimated to require 30 years to complete?

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PETITION FOR A WRIT OF CERTIORARI

The Mackinac Tribe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals is reported at 829 F. 3d 745. (App. at 1-15) The Memorandum Opinion of the United States District Court for the District of Columbia is reported at 87 F. Supp. 3d 127. (App. at 20-55)

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 2016. (App. at 16-17) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces Article V- Treaty of July 31, 1855 with the Ottawa and Chippewa (11 Stat. 621), § 16 of the Indian Reorganization Act (25 U.S.C. § 476), § 19 of the Indian Reorganization Act (IRA) (25 U.S.C. § 479), § 104 of the Tribal List Act (25 U.S.C. § 479a-1), and selected provisions of the IRA

implementing regulations (25 C.F.R. Parts 81.1 and 81.5) (App. 56-64)

STATEMENT OF THE CASE

The relevant facts in this case are both simple and clear. The Mackinac Tribe was part of the larger Ottawa and Chippewa Nation, which entered into 29 treaties with the United States between 1785 and 1854.[1] *Mackinac Tribe v Jewell*, 829 F. 3d 754, 755 (D.C. Cir. 2016) (App. 2) The 1836 Treaty set aside five (5) temporary reservations in Michigan for the Mackinac, pending their removal to the west of the Mississippi. *See* Art. 3, Treaty with Ottawa and Chippewa, 7 Stat. 491 (Mar. 28, 1836). Removal was unsuccessful, and in an 1855 Treaty, two (2) reservations were set aside for the Mackinac in Michigan. *See* Art. 1, Treaty with the Ottawa and Chippewa, (11 Stat. 621) (July 31, 1855). Article V of the 1855 Treaty dissolved the Ottawa and Chippewa Nation by mutual agreement, and replaced it with a promise that the Federal government would, in the future, deal directly with the Mackinac in all matters related to the treaty. *Id.* (App. 56) Based upon this Treaty, the Mackinac assert that they are a federally recognized Indian Tribe.

In 1872, the government terminated federal services to the Michigan tribes, including the Mackinac. *Mackinac Tribe v Jewell*, 829 F. 3d, at 755 (D.C. Cir.

[1] A full listing of the treaties may be found at Appellant's Opening Brief, footnote 2 before the Court of Appeals.

2016) (App. 3) That action has been characterized as administratively terminating federal recognition of the Michigan Tribes, which the Court's have held to be illegal. *Grand Traverse Band of Ottawa and Chippewa Indians v Office of U.S. Atty. for the Western District of Michigan*, 369 F. 3d 960, 968 (6th Cir. 2004). As a result of the illegal 1872 termination of the Mackinac, the Tribe does not appear on the Secretary's list of federally acknowledged tribes to this day.

In 2011, the Mackinac requested the Secretary of the Interior to convene an election to adopt a Tribal Constitution under the Indian Reorganization Act (IRA) [25 U.S.C. § 476] (App. 57-60) and implementing regulations found at 25 C.F.R. Part 81. *Mackinac Tribe v Jewell*, 829 F. 3d, at 755 (D.C. Cir. 2016) (App. 3) For three (3) years, the Secretary took no action, and in 2014 the Mackinac filed this lawsuit to compel the Secretary to hold an election under the IRA.

The Secretary argues that the Mackinac's omission from her list of federally acknowledged tribes – based upon the Tribe's illegal termination in 1872 – rendered the Mackinac ineligible for reorganization under the IRA. The Secretary contends that the Tribe must petition to be added to her tribal list through the Federal Acknowledgment Process (FAP) established in 25 C.F.R. Part 83. The FAP (Part 83) is a separate administrative process outside the IRA and the IRA's implementing regulations. *Compare* 25 C.F.R. Part 81 and 25 C.F.R. Part 83. As Judge Brown noted, the Bureau of Indian Affairs (BIA) estimates that the FAP

(Part 83) process takes 30 years and millions of dollars to complete. *Id.*, at 758 (App. 10)

The Court's below have declined to answer the legal question whether acknowledgment of tribal status under Part 83 is a necessary prerequisite to conducting an election under Part 81, but have held that the Tribe had to exhaust its administrative remedies by availing itself of the Part 83 process before it could seek an election under Part 81 regulations.

REASONS FOR GRANTING WRIT

I. The Court Of Appeals Decided An Important Federal Question In A Way That Conflicts With This Court's Decision In *Carcieri v Salazar*, And The Tribe's Treaty

The Court of Appeals held that the Federal Acknowledgment Process (FAP) established in 25 C.F.R. Part 83 is functionally determinative as to whether a tribe is "recognized" for the purposes of the Indian Reorganization Act (IRA) (25 U.S.C. § 476), which directly conflicts with this Court's decision in *Carcieri v Salazar*, 555 U.S. 379, 393 n. 8 (2009), which held that the Secretary's acknowledgment of a tribe under the FAP is not determinative of whether a group qualifies as a tribe under the IRA.

The IRA confers substantial benefits to Indian tribes. In addition to allowing Indian tribes the right to organize modern constitutional governments under

25 U.S.C. § 476, the IRA authorizes the Secretary to acquire land in trust for such tribes under 25 U.S.C. § 465. This latter benefit has been the subject of substantial litigation. *See Confederated Tribes of the Grand Ronde Cmty, v Jewell*, ___ F. 3d ___, 2016 WL 4056092 (D.C. Cir. July 29, 2016); *Stand Up for California v U.S. Dept. of Interior*, 2016 WL 4621065 (D.C. Cir. Sept. 6, 2016)

In *Carcieri v Salazar*, 555 U.S. 379 (2009), this Court held that the term "tribe" under the IRA [25 U.S.C. § 479] means a federally recognized tribe that was under federal jurisdiction on June 1, 1934. The case involved the Narragansett, a tribe acknowledged by the Secretary through the Federal Acknowledgment Process (FAP) established in 25 C.F.R. Part 83. Notwithstanding such acknowledgment by the Secretary, this Court held that the Secretary could not acquire land for the Narragansett because it was not a "tribe" for IRA purposes. *Carcieri v Salazar*, 555 U.S., at 391. The majority in *Carcieri v Salazar* specifically held that "the term 'Indians' as used in the IRA is not controlled by later enacted regulations governing the Secretary's recognition of tribes. . . ." (i.e. the FAP). *Carcieri v Salazar*, 555 U.S., at 393 n. 8.

In the present case, the Courts below declined to answer the legal question whether acknowledgment of tribal status under Part 83 is a necessary prerequisite to determining whether a tribe was "recognized" for IRA purposes under Part 81, but held that the Tribe had to exhaust its administrative remedies under the Part 83 process before it could seek an election under

the IRA and Part 81 regulations. The substance of the lower Courts' holdings are that the FAP (Part 83) process is a functional prerequisite of reorganization under the IRA. This holding is obviously inconsistent with this Court's holding in *Carcieri v Salazar* that a tribe's acknowledgment under the FAP (Part 83) process is not determinative of the tribe's eligibility for benefits under the IRA. *Compare Carcieri v Salazar*, 555 US, at 393 n. 8.

The IRA directs that "Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws." 25 U.S.C. § 476 (App. 57) The IRA defines "Indian" to "include all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction." 25 U.S.C. 479 (App. 61) It is well established that tribe status is established when "a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure." *U.S. v Washington*, 520 F. 2d 676, 693 (9th Cir. 1975) Tribes recognized through treaty require congressional termination before they legally lose their status. *See Menominee Tribe v United States*, 391 U.S. 404, 412-13 (1968); *Mashpee Tribe v New Seabury Corp.*, 427 F. Supp. 899, 902-03 (D. Mass. 1977), *aff'd in* 592 F. 2d 575; *U.S. v Washington*, 641 F. 2d 1368, 1373-74 (9th Cir. 1981); *Joint Tribal Council of Passamaquoddy Tribe v Morton*, 388 F. Supp. 649, 663 at n.15 (D. Maine, 1975). The Mackinac clearly fulfill this standard, and are a Tribe for the purposes of the IRA.

Unique to the Mackinac, however, is the treaty promise of continued future government-to-government relations contained in Art. 5 of Treaty with the Ottawa and Chippewa, 11 Stat. 621, (July 31, 1855) (App. 56) To conclude that the Tribe cannot avail itself of treaty rights before undertaking a 30-year administrative process is a clear violation of the Treaty, and the laws of the United States.

II. The D.C. Court of Appeals Application Of The Exhaustion Doctrine In This Case Conflicts With Decisions In Other Circuits And Expressed Congressional Intent

The D.C. Circuit Court decision in this matter conflicts with decisions in the Eighth, Ninth, Fourth and Sixth Circuits respecting the application of the exhaustion doctrine.

Judge Brown's concurring opinion below expressly notes the disagreement between the D.C. and Eighth Circuit respecting the application of exhaustion doctrine. As Judge Brown noted, the BIA estimates that the FAP (Part 83) process takes about 30 years, which imposes unwarranted and unreasonably long delays of decade and generational length. 829 F. 3d, at 759 (App. 10-15) Judge Brown observed that in the Eighth Circuit, "exhaustion is not required when unreasonable administrative delay would render the administrative remedy inadequate." 829 F. 3d, 759 n. 2 (App. 12 n. 2), *citing Southwest Bell Tel. Co. v FCC*, 138 F. 3d 746, 750 (8th Cir. 1988). However, Judge Brown went on to note

that this rule was applied differently in the D.C. circuit, *citing Mashpee Wampanoag Tribal Council v Norton*, 336 F. 3d 1094, 1100 (D.C. Cir. 2003). In the D.C. Circuit, unreasonable administrative delay does excuse exhaustion requirements.

Of particular applicability to the present case, however, is Ninth Circuit precedence recognizing that exhaustion is not required under the IRA when unreasonable administrative delay would render the administrative remedy inadequate. In *Coyote Valley Band of Pomo Indians v United States*, 639 F. Supp. 165 (E.D. Cal. 1986), the Secretary refused to hold an election requested by tribes for several years in a manner similar to the case at bar. The Court held that the Secretary had a mandatory non-discretionary duty to call elections to ratify IRA documents within a reasonable time after a request from a tribe. *Id.*, at 175. The Court in *Coyote Valley Band of Pomo Indians v United States*, applied the Ninth Circuit's rule that in such cases, exhaustion of administrative remedies is not required. *Id.* at 168 n. 5, *citing United Farm Workers v Arizona Agricultural Employment Relations Board*, 669 F. 2d 1249, 1253 (9th Cir. 1982) (exhaustion of administrative remedies is not required where the remedies are inadequate, inefficacious, or futile. . . .) and *Aleknagik Natives Ltd. v Andrus*, 648 F. 2d 496, 499-500 (9th Cir. 1980) (The general rule requiring exhaustion of remedies before an administrative agency is subject to an exception where the question is solely one of statutory interpretation.)

The Ninth Circuit test as applied in *Coyote Valley Band of Pomo Indians* is particularly important in light of this Court's statement in *Darby v Cisneros*, 509 U.S. 137, 144-45, 113 S. Ct. 2539 (1993) where this Court stated, "Whether courts are free to impose an exhaustion requirement as a matter of judicial discretion depends, at least in part, on whether Congress has provided otherwise, for of paramount importance to any exhaustion inquiry is congressional intent." *Darby* is relevant because Congress has clearly stated its intention on this matter.

In 1988, Congress amended the IRA to affirm the Ninth Circuit rule as applied to the IRA in *Coyote Valley Band of Pomo Indians*. Specifically, Congress amended the IRA to adopt strict timelines requiring Secretarial response within one hundred eighty (180) days after receipt of a tribal request for an election, and authorized direct access to federal court to enforce the provision of the IRA. *See* Pub. L. 100-581; 25 U.S.C. § 476(c) & (d). (App. 57-58) In doing so, Congress expressly confirmed its intention to affirm the holding in *Coyote Valley Band of Pomo Indians v United States*. *See S. Rep. No. 577*, 100th Cong., 2nd Sess. 2, p. 2 (1988). Congress's approval and reaffirmation of the *Coyote Valley Band of Pomo Indians* decision in the 1988 IRA Amendments confirmed Congressional intent that tribes should have direct access to federal court to enforce the IRA without having to exhaust illusionary administrative processes that delay decisions over multiple generations. In so doing, Congress

confirmed and endorsed the Ninth Circuit interpretation that exhaustion is not required when a tribe seeks to enforce the terms of the IRA authorizing tribal governments to reorganize under 25 U.S.C. § 476.

Equally, the Fourth and Sixth Circuits have confirmed that exhaustion is not required when unreasonable administrative delay would render the administrative remedy inadequate in non-Indian cases. *See Hodges v Shalala*, 121 F. Supp. 2d 854, 869 (Dist. S.C. 2000), *aff'd, Hodges v Thompson*, 311 F. 3d 316 (4th Cir. 2002); *Ruiz v Mukasey*, 552 F. 3d 269 (2d Cir. 2009); *Welsh v Wachovia Corp.*, 191 F. App'x 345, 356 (6th Cir. 2006)

The D.C. Circuit's holding regarding the application of exhaustion doctrine clearly conflicts with other Circuits and express Congressional intent respecting the IRA.

CONCLUSION

For the reasons and authorities set forth above, the Mackinac request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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