In the Supreme Court of the United States



CHINOOK INDIAN NATION, ET AL.,

Petitioners,

v.

DOUGLAS J. BURGUM, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

James S. Coon
Counsel of Record
THOMAS, COON, NEWTON & FROST
820 S.W. 2nd Ave., Suite 200
Portland, OR 97204
(503) 522-9184
jcoon@tcnf.legal

QUESTION PRESENTED

Does a federal court have jurisdiction to recognize the existence of an Indian tribe where the findings in the Indian Tribe List Act, Public Law 103-454, sec. 103(3), provide that "Indian Tribes presently may be recognized by . . . a decision of a United States court," and no other federal statute addresses the question of tribal recognition?

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants below

- Chinook Indian Nation
- Confederated Lower Chinook Tribes and Bands
- Anthony A. Johnson

Respondents and Defendants-Appellees below

- Douglas J. Burgum, in his capacity as Secretary of the U.S. Department of Interior
- U.S. Department of Interior
- Office of Federal Acknowledgment
- United States of America
- Scott Davis, in his capacity as Assistant Secretary of Indian Affairs

CORPORATE DISCLOSURE STATEMENT

The Petitioners Chinook Indian Nation and the Confederated Lower Chinook Tribes and Bands are not public companies, and no public company owns 10% or more of each Petitioner.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit No. 24-3629

Chinook Indian Nation, et al., *Plaintiffs-Appellants*, v. Doug Burgum, Secretary of the Interior, et al., *Defendants-Appellees*

Final Opinion: June 17, 2025

U.S. District Court, W.D. of Washington (Tacoma)

No. 3:17-cv-5668

Chinook Indian Nation, et al., *Plaintiffs*, v. Ryan K. Zinke, et al., *Defendants*

Final Decision by Court: May 9, 2024

Order on Attorney's Fees: January 24, 2025

TABLE OF CONTENTS

| | Page |
|-------------------------------------|---|
| QUESTION PRESENTEDi | |
| PARTIES TO TI | HE PROCEEDINGSii |
| CORPORATE D | ISCLOSURE STATEMENTii |
| LIST OF PROC | EEDINGSiii |
| TABLE OF AUT | HORITIESvii |
| OPINIONS BEI | OW 1 |
| JURISDICTION | 1 |
| | NAL AND STATUTORY S INVOLVED2 |
| STATEMENT O | F THE CASE2 |
| REASONS FOR | GRANTING THE PETITION 7 |
| | ING FEDERAL COURT OF APPEALS |
| Court on the Be Rec | Tenth and District of Columbia of Appeals Decisions Have Relied List Act finding that a Tribe May ognized "by a Decision of a United Court" |
| Decision Distriction of App Is a | nt Mentioning the List Act, ons of the Seventh, Ninth, Tenth, t of Columbia and Federal Courts eals Hold that Tribal Recognition Political Decision Reserved for ess and the Executive |

| TABLE OF CONTENTS – Continued |
|---|
| Page |
| II. THE DECISION BELOW IS WRONG 14 |
| A. The Courts Below Erred in Construing the List Act14 |
| B. The List Act Finding that Provides the Judicial Tribal Recognition Power Is Also the Only Principled Source of Respondent Agency's Authority to Grant or Deny Tribal Recognition |
| III. THIS CASE OFFERS A STRAIGHTFORWARD VEHICLE FOR THE QUESTION |
| CONCLUSION 24 |

TABLE OF CONTENTS - Continued Page APPENDIX TABLE OF CONTENTS **OPINIONS AND ORDERS** Memorandum Opinion, U.S. Court of Appeals for the Ninth Circuit (June 17, 2025)...... 1a Order, U.S. District Court Western District of Washington (June 20, 2018) 5a Order, U.S. District Court, Western District of Order, U.S. District Court, Western District of First Amended Complaint, U.S. District Court for the Western District of Washington CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF AUTHORITIES

| Page |
|--|
| CASES |
| American Power & Light Co. v. SEC, 329 U.S. 90 (1946) |
| Arizona v. Navajo Nation, 599 U.S. 555 (2023) |
| Cherokee Nation of Okla. v. Norton, 389 F.3d 1074 (10th Cir. 2004)11 |
| Chinook Indian Nation v. Burgum, 2025 U.S .App. LEXIS 148951 |
| Chinook Indian Nation v. Zinke, 326 F.Supp.3d 1128 (W.D. Wash. 2018) 1, 15 |
| Christopher v. Harbury, 536 U.S. 403 (2002) |
| FCC v. Consumers' Research, 145 S.Ct. 2482 (June 27, 2025)17 |
| Frank's Landing Indian Cmty. v. Nat'l Indian Gaming Comm'n, 918 F.3d 610 (2019) 11 |
| Gundy v. United States, 588 U.S. 128 (2019) |
| Halbert v. U.S., 283 U.S. 753 (1931)3 |
| Hill v. United States DOI, 699 F. Supp. 3d 1 (D. D.C. 2023) |
| IHP Indus. v. C.J. Mahan Constr. Co., LLC, 2016 U.S. Dist. LEXIS 170743 (2016) |
| J.P. v. County Sch. Bd. of Hanover County, VA, 447 F. Supp. 2d 553 (E.D. Va. 2006) 14, 15 |

| TABLE OF AUTHORITIES - Continued |
|--|
| Page |
| Jamul Action Comm. v. Simermeyer, 974 F.3d 984 (9th Cir. 2020) |
| Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979)13 |
| Kahawaiolaa v. Norton, 386 F.3d 1271 (9th Cir. 2004) 13, 21 |
| Miami Nation of Indians of Ind., Inc. v. United States DOI, 255 F.3d 342 (2001)12, 13 |
| OPP Cotton Mills, Inc. v. Administrator of Wage and Hour Div., Dept. of Labor, 312 U.S. 126, 144 (1941) |
| Pennhurst v. Halderman, 451 U.S. 1 (1981) |
| Shinnecock Indian Tribe v. Kempthorne, No. 06-5013, 2008 U.S. Dist. LEXIS. 75826 (E.D.N.Y. Sept. 30, 2008) |
| Stand Up for Cal.! v. United States DOI, 994 F.3d 616 (2021)12 |
| United States v. Holliday, 70 U.S. 407 (1866) |
| United States v. Sandoval, 231 U.S. 28 (1913) |
| United States v. Zepeda, 792 F.3d 1103 (9th Cir. 2015)11 |
| Western Shoshone Business Council v. Babbitt, 1 F.3d 1052 (10th Cir. 1993)13 |
| Wyandot Nation v. United States, 858 F.3d 1392 (2017) |

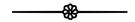
| TABLE OF AUTHORITIES - Continued |
|--|
| Page |
| CONSTITUTIONAL PROVISIONS |
| U.S. Constitution, Art. I, § 8, cl.3 |
| STATUTES |
| 1851 Tansey Point treaty 4 |
| 25 U.S.C. § 14525 |
| 25 U.S.C. § 1903(8)5 |
| 25 U.S.C. § 2 |
| 25 U.S.C. § 3001 et seq |
| 25 U.S.C. § 3725 |
| 25 U.S.C. § 3735 |
| 25 U.S.C. § 9 |
| 28 U.S.C. § 1254(1) |
| 43 U.S.C. § 1457 |
| Equal Access to Justice Act |
| General Allotment Act of 1887 3 |
| H.R. Res. 108, 83rd Cong. (1953) |
| Pub. L. No. 103-454, 108 Stat. 4791, Federally Recognized Indian Tribe List Act of 1994i, |
| |
| JUDICIAL RULES |
| Fed. R. Civ. P. 12(b)(1)24 |
| Sup. Ct. R. 13 |

| TABLE OF AUTHORITIES - Continued |
|--|
| Page |
| REGULATIONS |
| 25 C.F.R. § 83 |
| 36 C.F.R. § 230.26 |
| 36 C.F.R. § 800.26 |
| OTHER AUTHORITIES |
| Kirsten Matoy Carlson, Congress, Tribal Recognition, and Legislative-Administrative Multiplicity, 91 IND. L.J. 955 (2016). |
| William C. Canby, Jr., American Indian Law in a Nutshell (4th ed. 2004)21 |



OPINIONS BELOW

This is a petition for review of the decision of the Ninth Circuit Court of Appeals issued June 17, 2025. *Chinook Indian Nation v. Burgum*, 2025 U.S. App. LEXIS 14895. (App.1a). The Ninth Circuit decision affirmed the decision of the District Court for the Western District of Washington. *Chinook Indian Nation v. Zinke*, 326 F.Supp 3d 1128 (2018). (App.10a, final judgment at App.5a, 7a).



JURISDICTION

This Court has jurisdiction to review the final decisions of the several United States Courts of Appeal under 28 U.S.C. § 1254(1). The judgment of the Ninth Circuit Court of Appeals was entered on June 17, 2025, and this petition is filed within the 90 days required under Supreme Court Rule 13.



The following constitutional and statutory provisions are reproduced at App.135a-138a:

U.S. Const., Art. I, Sec. 8

25 U.S.C. § 2 130a

25 U.S.C. § 9 130a

25 U.S.C. § 479a

25 U.S.C. § 479a-1

43 U.S.C. § 1457

STATEMENT OF THE CASE1

Against the historical background of changing and conflicting government policies, the United States has pursued a course of dealing with the Chinook Tribe as representatives of their people government-to-government, consistently, repeatedly, and in a number of ways. The Chinook were a recognized Indian tribe, representing their people as of the mid-nineteenth

¹ The facts are taken from the First Amended Complaint. On a motion to dismiss for lack of subject matter jurisdiction, the reviewing court accepts the plaintiff's factual allegations and takes them in the light most favorable to plaintiff. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). Respondent has made no argument that the allegations of the First Amended Complaint are not the operative facts on which the case was decided below.

century treaty era and signing a treaty with the United States in 1851 at Tansey Point though Congress failed to ratify that treaty. (App.50a and 55a). Defendants recognized, almost a century later, in 1954:

We are fully aware that the Chinooks are an Indian Tribe, and it is unfortunate that no treaties were ever executed with them. However, you are familiar with the circumstances, undoubtedly, surrounding the [1855 Chehalis River] treaty negotiations, and it was not at that time assumed that any serious consequences could arise in the future years because of the failure to enter into this treaty.

(App. 79a).

Indeed, in 1931, the U.S. Supreme Court had recognized the Chinook Tribe, holding that "the Chehalis, Chinook and Cowlitz tribes are among those whose members are entitled to take allotments within the Quinaielt Reservation, if without allotments elsewhere." *Halbert v. U.S.*, 283 U.S. 753, 760 (1931).

The Bureau of Indian Affairs (BIA) has also taken in trust for Chinook members other historically Chinook lands. (App.79a). Congress appropriated funds in 1912 to be "paid to" Chinook Tribes in Oregon and Washington for tribal lands taken under unratified treaties in 1851, and, though those amounts would later be found to have been unconscionably insufficient, they were paid to the Chinook Tribe two years later in 1914. (App.80a-81a). Those payments were made to the tribes, as representatives of their people, in settlement for their ancestral lands that were taken under the unratified Tansey Point treaty with the federal government. 37 Stat. 518, 535 (1912); (App.81a). The payment of those

sums ratified the 1851 treaty under which Plaintiffs' land had been taken. *E.g.*, *IHP Indus. v. C.J. Mahan Constr. Co.*, *LLC*, 2016 U.S. Dist. LEXIS 170743, *14-*15 (2016) (where a party's conduct is consistent with either an unsigned or unwritten agreement, courts may enforce the agreement as constructively ratified).

With the new Eisenhower Administration in 1953. the government undertook to terminate its trust relationships with Indian tribes in an effort to end federal benefits and services to tribes "as soon as possible." H.R. Res. 108, 83rd Cong. (1953). As part of assessing termination possibilities, Defendants met with the Chinook and other tribes in Washington in 1953 and 1954, twice in the ancestral Chinook village that is now Bay Center, Washington. (App.85a). Defendants contracted with the Chinook, as a tribe, for a loan from a federal revolving fund that provided financial assistance to tribes making claims before the Indian Claims Commission (ICC), (App.85a). The ICC recognized the Chinook Tribe as representative of its people claiming compensation for lands ceded in the 1851 treaty. 6 Ind. Cl. Com. 229a. (Chinook "have the capacity and the right to assert claims for their respective lands" described in the Commission's findings.) The funds adjudicated for the Chinook Tribe in 1970 by the ICC were held in trust by Defendant BIA and amounted to about \$500,000 at the time of the filing of the complaint below. (App.20a-21a). After the trial court remanded Plaintiffs' trust fund claim to the agency, those funds were paid to Petitioner Chinook Indian Nation. (App. 7a-8a). (Declaration of Anthony Johnson in support of fee award under the Equal Access to Justice Act).

The Chinook have received federal services and benefits designated by statute for tribes that are "recognized" as eligible for such services and benefits "because of their status as Indians." 25 U.S.C. § 1903(8). These include healthcare for Chinook tribal members admitted to BIA medical facilities because of their membership in the Chinook Tribe. (App.93a). Respondents also consult with the Chinook in matters relevant to Respondents' original probate jurisdiction under 25 U.S.C. §§ 372 and 373. (App.87a). They have kept and reported accounts pursuant to their accounting responsibility for Indian trust funds and corresponded concerning these accounts directly with Petitioner Chinook Indian Nation. (App.88a).

The Chinook have also received economic development support made available to recognized Indian tribes under 25 U.S.C. § 1452. (App.88a). BIA has funded a feasibility study for a CIN charter boat business. *Id.* The Chinook also received a 1979 grant for tribal clerical and planning services and a 1982 grant for tribal office maintenance. *Id.*

Other federal agencies, such as the National Park Service, have consulted with the Chinook on a government-to-government basis concerning the establishment of national parks and monuments such as Fort Clatsop (where the Chinook helped the Lewis & Clark Corps of Discovery survive the winter of 1805), environmental and salmon recovery projects and the repatriation of ancestral remains. (App.89a-91a). Federal agencies also consult with the Chinook and formally-recognized tribes under the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq. The Chinook are the only tribe among those regularly

consulted who have not been formally recognized by Defendants. (App.91a).

In 2017 the U.S. Fish and Wildlife Service and U.S. Navy initiated required National Historic Preservation Act consultation with the Chinook Indian Nation under 36 C.F.R. 800.2 with respect to tribal lands and historic properties of significance to the Tribe. (App.92a). These agencies consult with Petitioners under these requirements as representatives of the Chinook people pursuant to regulations defining "Indian Tribe" as "federally recognized Indian tribes and Alaska Native Corporations." 36 C.F.R. § 230.2.

In sum and as alleged in the FAC, for well over 100 years, Respondent has recognized and engaged in a course of dealing with the Chinook Tribe as the authorized and governing representative of the Chinook people. It has done so in fact and in practice in a broad array of the circumstances in which the United States can deal with an Indian tribe on a government-to-government basis. Respondent has constructively ratified the 1851 Tansey Point treaty by statutory payment of treaty amounts in 1912 and 1925, by the ICC judgment for further compensation for those lands, by paying those adjudicated amounts on remand in this case and by their repeated actions acknowledging their obligation to consult and deal with the Chinook Indian Nation as representative of the Chinook people.

Petitioners Chinook Indian Nation ("CIN") and its Tribal Council Chair Anthony Johnson filed this action against Respondent Secretary and Department of Interior for, among other things,² federal recognition

² Plaintiffs' claims also included (1) a challenge to defendant's 25 CFR Part 83 regulation barring re-petitioning by a Tribe previously

as an Indian Tribe, in 2017. Respondent moved to dismiss Petitioners' claim for federal recognition, and the trial court granted that motion to dismiss on the ground that federal recognition of an Indian tribe is a non-justiciable political question. 326 F. Supp. 3d 1137-40. The Ninth Circuit Court of Appeals affirmed, holding that although the finding in the List Act is the only Congressional statement concerning the power to recognize Indian tribes, it "does not have the legal effect that CIN ascribes to it." 2025 U.S. App. LEXIS 14895.



REASONS FOR GRANTING THE PETITION

Federal recognition of Indian tribes has been an unprincipled patchwork of Congressional, judicial and administrative action for most of the Nation's history. *Shinnecock Indian Nation v. Kempthorne*, 2008 U.S. Dist. LEXIS 75826, *57-60. Federal courts have often said both that they do and that they do not have the power to recognize Indian tribes. The decisions below in this case construe the List Act so as to ignore the

denied federal recognition and (2) a challenge to defendant's decision to deny them access to trust funds adjudicated in 1970 by the Indian Claims Commission ("ICC") for the taking of Chinook ancestral lands. (App.133a) (re-petitioning); (App.133a) (trust fund claims). The trial court ruled for plaintiffs on both issues, remanding to the agency for further proceedings. Defendant has now proposed a rule that would allow re-petitioning by tribes previously denied recognition (89 Fed Reg 57097) and has paid to CIN all of the trust funds adjudicated by the ICC for the taking of Chinook lands. (App.7a) Plaintiffs' trust fund claims have therefore been dismissed as moot. (App.6a, 8a) (final judgment).

only statement Congress has ever made about the power to recognize Indian Tribes. The List Act is, at the same time, the only principled delegation to Respondent of the power it has claimed and exercised for nearly half a century to grant or deny tribal recognition. No other principled delegation exists. The List Act delegation of power to recognize tribes is stated in terms that apply identically to Respondent agency and to the federal courts. It cannot apply to one and not the other. The Court should grant the petition to resolve the understandable conflict among the Courts of Appeals.

I. CONFLICTING FEDERAL COURT OF APPEALS DECISIONS

The recognition of sovereign Indian Nations has been subject to confusion and inconsistency for more than two hundred years. The Constitution assigned to Congress the power "To regulate Commerce with . . . the Indian Tribes." Congress passed three statutes in the nineteenth century purporting to delegate to the Executive Branch "the management of all Indian affairs and of all matters arising out of Indian relations," the power to "prescribe such regulations as [the President] may think fit for carrying into effect the various provisions of any act relating to Indian affairs," and "the supervision of public business relating to the following subjects and agencies: * * Indians." None of these delegations included any intelligible

³ U.S. Constitution, Art. I, Sec. 8, par. 3.

^{4 25} U.S.C. § 2 (1830).

⁵ 25 U.S.C. § 9 (1930).

⁶ 43 U.S.C. § 1457, first enacted in 1879, R.S. sec. 441, ch. 182 , 20 Stat. 394; last amended in 1957, P.L. 85-86, 71 Stat. 157.

9

principle or made any mention of tribal recognition. Tribes were recognized, often *ad hoc*, by Congress, the courts and the Department of the Interior.

In 1975, Congress created a Commission to address the lack of standards for tribal recognition and recommend legislation. The Commission held hearings and issued a report, but Congress took no further action. Finally, in 1978, Respondent created *sua sponte* a regulatory process by which it purported to grant or deny tribal recognition.⁷

In 1994, Congress passed the List Act, Public Law 103-454, sec. 103, which included eight findings expressing its intentions regarding tribal recognition—the principles that tribal recognition may not be reversed except by an Act of Congress (fourth finding), that previously terminated tribes should be reinstated (fifth finding) as well as that tribes may be recognized by Congress, Respondent agency and the federal courts (third finding). This third finding is the only statement Congress has ever made as to who has the power to recognize an Indian tribe:

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 denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court;

⁷ Kirsten Matoy Carlson, Congress, Tribal Recognition, and Legislative-Administrative Multiplicity, 91 IND. L.J. 955, 960, 964 n.7 (2016).

Public Law 103-454, sec. 103(3) (emphasis added).8

One unsurprising result of this history is that a number of federal courts have quoted the List Act to say that the judiciary has the power to recognize tribes, while others, like the trial court and Court of Appeals in this case, have held that the question of recognition is political, not subject to the power of a federal court. Only one district court other than the trial court below, has purported to analyze List Act finding three, but numerous courts have stated either that federal courts have the power of federal recognition or that they do not.

A. Ninth, Tenth and District of Columbia Court of Appeals Decisions Have Relied on the List Act finding that a Tribe May Be Recognized "by a Decision of a United States Court"

The Ninth Circuit has confirmed the three ways in which an Indian Tribe may be recognized, citing the third List Act finding:

A group of Indians may achieve federal recognition in three ways: (1) by Congressional act; (2) by Secretarial acknowledgment or (3) by a decision of a United States court.

⁸ As argued below, Respondent's own website for its Office of Federal Recognition quoted this List Act language as of September 14, 2024. That entry has now been removed, and the URL for that page now leads to "Page not found." https://www.bia.gov/faqs/how-federal-recognition-status conferred#:~:text=Also %20in%201994%2C%20Congress%20enacted%20Public%20Law %20103-454%2C, or%20By%20decision%20of%20a%20United% 20States%20court. (access attempted August 23, 2025).

Frank's Landing Indian Cmty. v. Nat'l Indian Gaming Comm'n, 918 F.3d 610, 614 (2019), citing the List Act and United States v. Zepeda, 792 F.3d 1103, 1114 (9th Cir. 2015).

The Tenth Circuit Court of Appeals relied on the List Act tribal recognition finding in *Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074 (10th Cir. 2004):

The law governing Federal recognition of an Indian tribe is, today, clear. The Federally Recognized Indian Tribe List Act of 1994 provides Indian Tribes may be recognized by: (1) an "Act of Congress;" (2) "the administrative procedures set forth in part 83 of the Code of Federal Regulations[;]" or (3) "a decision of a United States court." Pub. L. No. 103-454, § 103(3), 108 Stat. 4791.

389 F.3d at 1076. The court held that the Department of Interior's decision recognizing the Delaware Indians in Oklahoma was invalid because it was contrary to two Supreme Court decisions "and violated sec. 103(3) of the Federally Recognized Indian Tribe List Act." *Id.* at 1087.

Similarly, the Court of Appeals for the District of Columbia has held that the tribal recognition finding of the List Act authorized court approval of a settlement that restored recognition to a tribe whose status had been terminated:

Appellants argue that the List Act did not authorize the restoration of congressionally-terminated tribes through court-approved settlements in its substantive provisions... Appellants are mistaken. While it is true that the District Court relied on the "Findings"

section of the List Act, the "Findings" section acknowledges that "Indian tribes presently may be recognized...by a decision of a United States court." *Id.* § 103(3). This finding comports with decades of courtapproved settlements reestablishing federal recognition of Indian tribes.

Stand Up for Cal.! v. United States DOI, 994 F.3d 616, 627 (2021).

B. Without Mentioning the List Act, Decisions of the Seventh, Ninth, Tenth, District of Columbia and Federal Courts of Appeals Hold that Tribal Recognition Is a Political Decision Reserved for Congress and the Executive⁹

Opposing the above decisions from the Ninth, Tenth and D.C Circuits on the question whether an Indian tribe may be recognized by a decision of a federal court are decisions in those and other Circuits that have held tribal recognition to be a political question that only Congress or the Executive can answer. None of these decisions mentions the List Act finding that a tribe may be recognized by "a decision of a United States Court".

The Seventh Circuit in Miami Nation of Indians of Ind., Inc. v. United States DOI, 255 F.3d 342 (2001)

⁹ Respondent relied below on this Court's cases that have held tribal recognition to be a nonjusticiable political question. All of those cases were decided long before Congress enacted the List Act in 1994, providing that a tribe may be recognized by "a decision of a United States Court." *E.g. United States v. Holliday*, 70 U.S. 407, 419 (1866); *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

held that recognition is traditionally an Executive Department function that "lies at the heart of the doctrine of 'political questions" not subject to judicial interference. *Id.* at 347.

The Ninth Circuit in *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1276 (9th Cir. 2004) said "a suit that sought to direct Congress to federally recognize an Indian tribe would be non-justiciable as a political question." Of course petitioner's claim in the trial court was for a declaration by the court recognizing the Chinook, not for an order requiring Congress to do so. (App.133a).

In Jicarilla Apache Tribe v. United States, 601 F.2d 1116, 1126 (10th Cir. 1979), decided before the 1994 enactment of the List Act, the Tenth Circuit Court of Appeals held that the federal power of tribal recognition "is a political rather than a judicial question and that power is plenary." The same court said in Western Shoshone Business Council v. Babbitt, 1 F.3d 1052, 1057 (10th Cir. 1993), a year before enactment of the List Act, "the limited circumstances under which ad hoc judicial determinations of recognition were appropriate have been eclipsed by federal regulation." Of course rules adopted by a federal agency may not "eclipse" a Congressional enactment.

The Federal Circuit relied on that language from Western Shoshone to deny a tribal claim for judicial recognition under the political question doctrine in Wyandot Nation v. United States, 858 F.3d 1392, 1401-02 (2017).

The Court should grant certiorari to resolve these conflicts within and among the circuits.

II. THE DECISION BELOW IS WRONG

The Court of Appeals and trial court decisions below are in error because they decline to follow the only Congressional enactment that addresses the question of jurisdiction to recognize an Indian tribe. Under the "political question" doctrine, these decisions purport to defer to the power of Congress while ignoring the unambiguous statement by Congress that an Indian tribe may "presently" be recognized by "a decision of a United States court."

The trial court below relied on a decision from a federal district court that misconstrues the plain language of the List Act and, because of the non-delegation doctrine, reaches a result that would remove the basis for Respondent's own power to decide issues of tribal recognition.

A. The Courts Below Erred in Construing the List Act

The parties and the courts below found only one case that squarely confronts the List Act's finding that an Indian Tribe may be recognized "by a decision of a United States court." In the unofficially reported Shinnecock Indian Nation v. Kempthorne, 2008 U.S. Dist. LEXIS 75826 at *54-56, the court conceded that "normally Congressional findings are entitled to much deference" but argued that "a Congressional finding does "not create a substantive right," citing Pennhurst v. Halderman, 451 U.S. 1, 19 (1981) and J.P. v. County Sch. Bd. of Hanover County, VA, 447 F. Supp. 2d 553, 573 (E.D. Va. 2006). Neither of those cases stands for a general rule that Congressional findings cannot "create a substantive right." And neither case concerns congressional findings as to what the law is. Rather,

Pennhurst and *J.P.* discuss findings as to the general background or purpose of a statute. Pennhurst, 451 U.S. at 19 (findings expressing congressional preference for certain kinds of mental health treatment); J.P. at 447 F. Supp. 2d at 573 (finding that education of disabled children is more effective with parental involvement). The List Act findings state clearly what the law is, and, as above, they have been cited with approval and relied upon in a number of federal court decisions. That is especially appropriate because the List Act findings are the only Congressional statement that delegates authority to make decisions concerning tribal recognition or that state any policy or principle relevant to such decisions. Without the List Act findings. there is no intelligible principle for delegation of tribal recognition authority to anyone.

Shinnecock and the trial court below also misread the plain text of the third List Act finding. Again, the finding says that "Indian tribes <u>presently</u> may be recognized by . . . a decision of a United States court" (emphasis added). Both decisions characterize that finding as "historical," a recitation of a former state of affairs before the 1978 creation of the Part 83 administrative process. Shinnecock at *17("simply a reflection of the historical practice"); CIN v. Zinke, 326 F.Supp at 1138 (quoting Shinnecock). However, the List Act finding plainly states the present state of the law: "Indian tribes <u>presently</u> may be recognized by . . . a decision of a United States court." "Presently" cannot be construed to mean "in the past." The trial court and Shinnecock were wrong.

The Court of Appeals below took a slightly different tack, holding that, rather than meaning what it plainly says, "[i]t is more likely that [the List Act

recognition finding references narrow ways in which tribes have been "recognized" under other statutes for limited purposes, citing Janul Action Comm. v. Simermeyer, 974 F.3d 984, 993 (9th Cir. 2020). The Jamul decision does not support the court's reasoning. To the contrary, the Jamul panel construed other List Act findings as substantive requirements: "Congress also enacted further reforms to limit the BIA's ability to withdraw federal recognition or limit the rights of a recognized tribe. See Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791." 974 F3d at 993. Those "enacted further reforms" are found in List Act finding number (4): "a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress." This is one of the "further reforms" the Jamul court found to have been "enacted" in the List Act findings. Jamul does not support, rather it contradicts the Court of Appeals' reasoning below.

The List Act findings offer the only indication of Congressional intent concerning the delegated means of tribal recognition. To ignore what Congress said does not further the aim of the political question doctrine – to respect the will of Congress.

B. The List Act Finding that Provides the Judicial Tribal Recognition Power Is Also the Only Principled Source of Respondent Agency's Authority to Grant or Deny Tribal Recognition

As this Court has recently confirmed, the delegation of Congressional power to an Executive agency requires some expression by Congress of "intelligible principles" to guide the agency's exercise of that power. $FCC\ v$.

Consumers' Research, 145 S.Ct. 2482, 2497 (June 27, 2025):

in examining a statute for the requisite intelligible principle, we have generally assessed whether Congress has made clear both "the general policy" that the agency must pursue and "the boundaries of [its] delegated authority." American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946). And similarly, we have asked if Congress has provided sufficient standards to enable both "the courts and the public [to] ascertain whether the agency" has followed the law. OPP Cotton Mills, Inc. v. Administrator of Wage and Hour Div., Dept. of Labor, 312 U.S. 126, 144 (1941). If Congress has done so—as we have almost always found—then we will not disturb its grant of authority.

Id. The delegation of power to recognize Indian tribes on which Respondent relies includes no hint of any intelligible principle, general policy or boundaries of delegated authority.

Congress has, other than in the List Act in 1994, never mentioned delegating the recognition of Indian tribes to Respondent at all, let alone subject to any intelligible principles. Its pre-List Act delegations to the Department of Interior have consisted of "the management of all Indian affairs and of all matters arising out of Indian relations," 10 "carrying into effect the various provisions of any act relating to Indian

^{10 25} U.S.C. § 2 (1830)

affairs, and for the settlement of the accounts of Indian affairs,"¹¹ and "public business relating to Indians."¹²

These statutes include no suggestion of what the goals or policies behind these blanket delegations might be. Are the Indians to be dealt with in the public interest? Justly and reasonably? Fairly and equitably? To protect public safety or the public health? All of these are policy standards held sufficient by this Court to uphold Congressional delegations of other powers. *Gundy v. United States*, 588 U.S. 128, 146 (2019)(citing cases). The handing over to Respondent of "Indian affairs" includes no suggestion of how Congress wants those affairs to be managed, what general outcomes are desired. Even under the very broad standards the Court has previously approved, this "delegation" fails the "intelligible principles" test. It includes no principles at all.

In the List Act, Congress has expressed its intent to delegate to both the Executive and the Judiciary the power to decide tribal acknowledgment. Those delegations are expressed in precisely parallel terms for the agency and for the courts and should stand or fall together.

It is only in the List Act findings that Congress has provided intelligible principles to guide the agency and the courts, and these must pass the non-delegation test if the delegation of tribal recognition to Respondent or to the courts is to survive.

^{11 25} U.S.C. § 9 (1830)

^{12 43} U.S.C. § 1457 (1879)

The complete List Act findings provide:

The Congress finds that—

- (1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;
- (2) ancillary to that authority, the United States has a trust responsibility to recognize Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;
- (3) 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 denominated Procedures For Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court;
- (4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;
- (5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;
- (6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;
- (7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States

to determine the eligibility of certain groups to receive services from the United States; and

(8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the specific programs and services provided by the United States to Indians because of their status as Indians.

P.L.103-454 sec. 3.

The "Findings" in Section 103 of the List Act are the only Congressionally enacted language from which intelligible principles can be derived to guide decisions whether or not to recognize an Indian tribe. Those principles are not found in section 104, which says only that the Secretary shall publish annually a list of tribes that qualify for special federal programs and services. Those principles appear only in the section 103 findings, as follows:

1. "[T]he United States has a Trust Responsibility to Recognized Indian Tribes" Finding (2)

"Trust responsibility" is a well-understood common law and statutory concept that imports a panoply of duties from trustee to beneficiary. Though the United States is a sovereign rather than a private trustee, governed by enacted principles rather than by the common law of trusts, *Arizona v. Navajo Nation*, 599 U.S. 555, 564 n.1 (2023), that "trust responsibility" is an intelligible principle based on existing law. The idea that the U.S is acting as a trustee and that a tribe

qualifies as an appropriate beneficiary of the relationship gives the decision maker a strong indication that that a trust relationship exists, thus that that tribe is appropriately recognized. Respondent managed for half a century the funds paid for the Chinook ancestral lands under the 1970 ICC award. That is, among others, a compelling indicator of an existing trust relationship.

2. The United States "Maintains a Government-to-Government Relationship" with the Tribe and Recognizes Its Sovereignty (Finding 2).

The historical relationship between the federal government and the tribe has a great deal to say about whether recognition is appropriate because it serves as historical precedent that defines the existing relationship and addresses reliance interests on both sides. As has been true for the government and the Chinook, there can be many ways in which the government has treated the tribe as the authorized, sovereign representative of its people. As the court said in *Kahawaiolaa v. Norton*, 386 F3d 1271 (9th Cir. 2004).

Federal recognition may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity.

Id. at 1273, quoting William C. Canby, Jr., American Indian Law in a Nutshell at 4 (4th ed. 2004). From treaty negotiations in the 1850s to claims brought by the Chinook on behalf of their people at the end of the 19th century, to payment of those claims by Congress in 1914 and 1925, to Reorganization Act consultations in the 1930s, to further land claims before the ICC in

the 1950s and the 1970 ICC award for Chinook lands, to the providing of Chinook governing documents to the BIA in 1953, to the modern day providing of health-care on the basis of tribal membership, to consultation in probate matters, to trust fund management for Chinook beneficiaries, to economic development support and consultation concerning the protection and repatriation to the tribe of ancestral graves and artifacts, to consultation between the U.S. Navy and the Chinook about military training exercises, the findings define a "government-to-government" course of dealing with a tribe as a sovereign representative of its people as an important factor supporting recognition.

3. A Tribe May be Recognized by Congress, by Respondent Agency or "by a Decision of a United States Court" (Finding 3)

This finding states a specific intelligible procedural principle.

4. Recognized Tribes May Not be Terminated (Finding 4) Recognized Tribes that Have Been Terminated Should be Reinstated (Finding 5)

More specific even than general principles, these findings require specific action in specific circumstances.

5. This List Should be Current and Accurate Because It Is Used to Determine the Eligibility of Certain Groups to Receive Services from the United States (Finding 7)

This finding imparts the intelligible principle that accuracy is required so as to allocate services and resources appropriately.

The "findings" section of the List Act is the only place where Congress has articulated intelligible principles by which an agency or a court can decide whether to recognize an Indian tribe. It is the sole indication of Congress' intent and the sole principled delegation of the power to recognize tribes. If those findings are held not to express Congress' intent, there is no principled basis for the delegation to the Department of Interior of the power to make tribal recognition decisions. Indeed, there is no intelligible, principled delegation at all. And while the eight List Act findings suggest intelligible principles with varying clarity, one of them is clear and unequivocal:

Indian tribes presently [in 1994] may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court.

(emphasis added). The courts below erred in failing to credit that finding as the only relevant and principled expression of Congressional intent concerning tribal recognition.

III. THIS CASE OFFERS A STRAIGHTFORWARD VEHICLE FOR THE QUESTION

This case was decided on Respondent's motion to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1). The facts alleged in the complaint are taken as true, *Christopher*, 536 U.S. at 403, and there was no argument in the trial court as to the veracity of any of Petitioners' allegations. The clear and only question is a question of law – whether a federal court has jurisdiction to recognize an Indian Tribe.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James S. Coon
Counsel of Record
THOMAS, COON, NEWTON & FROST
820 S.W. 2nd Ave., Suite 200
Portland, OR 97204
(503) 522-9184
jcoon@tcnf.legal

 $Counsel\ for\ Petitioners$

September 12, 2025