No. 10-

IN THE

Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

KRAUS-ANDERSON CONSTRUCTION COMPANY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents an important question regarding the recognition and enforcement of Indian tribal court judgments in the federal courts. The question presented is whether an action to obtain recognition of a tribal court judgment presents a federal question under 28 U.S.C. § 1331, based on the common law and the federal character of Indian law, and whether the Eleventh Circuit was incorrect in its holding, which conflicts with other circuit court and Supreme Court precedents, that the district court lacked subject matter jurisdiction to enforce the Miccosukee Tribal Court judgment in this case.

PARTIES

Petitioner:

The Miccosukee Tribe of Indians of Florida is the petitioner in this case. The Tribe was the plaintiff/appellant below.

Respondent:

Kraus-Anderson Construction Company is the respondent. Kraus-Anderson was the defendant/appellee below.

CORPORATE DISCLOSURE STATEMENT

The Miccosukee Tribe of Indians of Florida has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Miccosukee Tribe of Indians of Florida ("Tribe") respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, which found that a federal district court lacks jurisdiction to domesticate a Miccosukee Tribal Court judgment.

OPINIONS BELOW

The Eleventh Circuit issued an opinion in this case, as well as an order denying en banc consideration. The opinion and final judgment of the court of appeals is styled, *Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Construction Co.*, 607 F.3d 1268 (11th Cir. 2010), and is included at Appendix A. The United States District Court for the Southern District of Florida's order granting summary judgment to Kraus-Anderson Construction Company ("Kraus-Anderson") is included at Appendix B, and the district court's final judgment is included at Appendix C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. The Eleventh Circuit panel entered an opinion and final judgment on May 28, 2010 (App. A). The court of appeals later denied rehearing en banc by order dated August 30, 2010 (App. D).

STATUTES INVOLVED

This case concerns the reach of 28 U.S.C. § 1331, the federal question jurisdictional statute.

STATEMENT OF THE CASE

I. Factual Background

This Petition concerns the Tribe's attempt to enforce a Miccosukee Tribal Court judgment against a construction contractor in federal court. This case arose from three contracts that the Tribe negotiated in the late 1990s, with Kraus-Anderson, for the construction of several buildings on the Tribe's Reservation in South Florida. Pursuant to the construction agreements, the Tribe agreed to waive sovereign immunity as to any claims arising in connection with the contracts so long as Kraus-Anderson agreed to resolve any such disputes in the Miccosukee Tribal Court. In 1999, certain disagreements arose regarding money due under the contracts, culminating in the Tribe's refusal to pay certain construction invoices on the basis that Kraus-Anderson had overcharged for its work.

II. The Tribal Court's Decision

On May 24, 2001, after the parties were unable to resolve their differences, Kraus-Anderson filed a complaint in Tribal Court to collect approximately $7,000,000 in unpaid invoices from the Tribe. The Tribe responded with a counterclaim alleging the right to a set-off based on Kraus-Anderson's overcharges and construction defects. On June 18, 2004, after discovery and a bench trial, the Tribal Court issued a decision denying Kraus-Anderson's claims and awarding the Tribe $1,600,000 on its counterclaim.

Thereafter, Kraus-Anderson filed a request for an appeal with the Tribal Business Council, arguing that the Tribal Court exceeded it powers, excluded material evidence, and rendered a decision based on prejudice. On July 15, 2004, the Council determined that no appeal would be allowed because "the Tribal Court committed no prejudicial error in reaching its decision" and the company otherwise "raise[d] no issues meriting review" by the Miccosukee Tribal Court of Appeals. *Kraus-Anderson*, 607 F.3d at 1272 (App. A). Specifically, the Council stated:

> In accordance with Tribal procedure, the Miccosukee Business Council conducted a review of the record in this case and convened a special session to consider [the requested] appeal. After careful consideration, the Miccosukee Business Council has determined that the Miccosukee Tribal Court Order, which is the subject of [Kraus-Anderson's] Notice of Appeal, does not constitute a departure from the essential requirements of Miccosukee Law and/or procedure and other applicable laws and raises no issues meriting review by the Miccosukee Court of Appeals. Accordingly, the Miccosukee Business Council has decided to disallow the appeal. The decision of the Miccosukee Business Council is final.

See District Court's Summary Judgment Order at 10-11 (quoting July 15, 2004 Letter Disallowing Appeal) (App. C).

III. The District Court's Decision

Despite the Council's decision, Kraus-Anderson refused to pay the Tribal Court judgment. Therefore, the Tribe commenced this action in federal district court to obtain recognition of the judgment by the United States, and to enforce and domesticate it. The Tribe's complaint alleged three bases for federal court jurisdiction: federal question, 28 U.S.C. § 1331; diversity of citizenship, 28 U.S.C. § 1332; and comity under the federal common law pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738. *See Kraus-Anderson*, 607 F.3d at 1272 (App. A).

In its answer to the complaint, Kraus-Anderson asserted that the Tribal Court judgment was unenforceable because, in its view, the Tribal Business Council violated due process by disallowing its request for an appeal. The answer denied that diversity or comity jurisdiction existed, but admitted that federal question jurisdiction under § 1331 was present because "the matter at issue implicates [Kraus-Anderson's] due process rights under the United States Constitution and the Indian Civil Rights Act." *See* Summary Judgment Order at 4 (quoting Defendant's Second Amended Answer to the Complaint) (App. C). In other words, Kraus-Anderson alleged that jurisdiction was proper because it had raised a federal question as a defense.

In the district court's summary judgment order, it conducted a subject matter jurisdiction analysis and ultimately concluded that jurisdiction was present pursuant to § 1331. First, however, the district court concluded that jurisdiction was not grounded in

diversity or the federal common law of comity under the Full Faith and Credit Act. *Id.* at 3 n.3, 4 n.4. It also noted that Kraus-Anderson's defenses could not confer federal question jurisdiction because "the well-pleaded complaint rule requires that a court look 'to the face of the complaint rather than to defenses, for the existence of a federal question.'" *Id.* at 4 (quoting *Jones v. LMR Int'l, Inc.*, 457 F.3d 1174, 1178 (11th Cir. 2006)). As for the complaint, the district court found that it did not "disclose a proper statutory basis for federal subject matter jurisdiction." *Id.* But, that did not end the court's inquiry as to federal question jurisdiction.

Following the Ninth Circuit's decision in *Wilson v. Marchington*, 127 F.3d 805, 813 (9th Cir. 1997), the district court held that federal question jurisdiction nevertheless existed because an action to enforce a tribal court judgment must be decided by reference to federal common law: "[T]he Court finds that subject matter jurisdiction over this action, which seeks the enforcement of a tribal court judgment against a non-Indian party, is based on federal common law," and that such federal common law claims fall within § 1331's statutory grant of jurisdiction. *See* Final Summary Judgment Order at 5 (citing *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) and *MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 987-88 (D. Utah 2005)).

After finding jurisdiction present, the district court granted summary judgment to Kraus-Anderson, holding that the Tribal Court judgment could not be afforded comity because the Council was an interested party in the litigation and its denial of Kraus-Anderson's

appeal violated due process. *Kraus-Anderson*, 607 F.3d at 1272 (App. A).

IV. The Eleventh Circuit's Decision

The Tribe appealed the summary judgment order to the Eleventh Circuit Court of Appeals. The Eleventh Circuit did not reach the merits of the Tribe's appeal, but instead focused on whether the district court had jurisdiction to entertain the Tribe's complaint in the first instance.

As to diversity jurisdiction, the Eleventh Circuit agreed with the district court, and "every court of appeals that has addressed the issue," that Indian tribes cannot sue or be sued in diversity under § 1332 because they are not citizens of any state. *Id.* at 1276 (quoting the district court's order). The court of appeals also rejected jurisdiction under the Full Faith and Credit Act: "Under circuit precedent, it is long established that § 1738 does not, standing alone, confer jurisdiction on a federal district court to domesticate a judgment rendered by a court of another jurisdiction." *Id.* The court noted that when an action already rests on federal question jurisdiction under § 1331, a party may appeal to comity as a discretionary basis for the court to decide whether a foreign judgment should be given preclusive effect. *Id.* at 1276-77.

Addressing § 1331, the Eleventh Circuit stated that federal question jurisdiction does not exist merely because an Indian tribe is a party to the action or because the case involves a contract with an Indian tribe. *Id.* at 1273. Rather, "a plaintiff's complaint still

must 'claim a right to recover under the Constitution and laws of the United States.'" *Id.* The Court observed the "lack of reference to any discernible federal law" in the Tribe's complaint, but noted that the parties argued, and the district court believed, that § 1331 jurisdiction was predicated on the federal common law: "The Tribe argue[d] that the district court had jurisdiction based on the quintessentially federal character of Native American law and that its claim for enforcement of a tribal judgment on non-tribal land relied exclusively on the Federal Government's longstanding policy of encouraging tribal self-government."[1] *Id.* at 1274 (internal quotation marks omitted).

While recognizing that claims founded upon federal common law may support federal question jurisdiction, the Eleventh Circuit found that was not the case here, citing this Court's decision in *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003), which "made clear" that "vague assertions" of federal common law by an Indian tribe will not support federal question jurisdiction. *Id.* The Eleventh Circuit concluded that, "here, the Tribe has failed to explain the specific prescription of federal common law that enables it to maintain an action to enforce a judgment handed down by a tribal court in a proceeding to which the defendant consented by contract." *Id.*

The court of appeals next considered whether there was "another way" that federal question jurisdiction

1. Before the court of appeals, Kraus-Anderson similarly argued "that 'the existence of abundant federal common law pertaining to Indian Tribes is sufficient to invoke federal question jurisdiction." *Id.* at 1274.

might exist. *Id.* While acknowledging that questions regarding "the reach of Indian power" and "[w]hether a tribal court has adjudicative authority over nonmembers" are sufficient to confer federal question jurisdiction under the common law, the Eleventh Circuit believed that this case did not concern those issues. *Id.* at 1274-75. In this case, the court said, "the tribe has not asked for a declaratory decree to resolve a dispute over whether the Tribal Court had jurisdiction to entertain [Kraus-Anderson's] claim for payment and the Tribe's set off and counterclaim." *Id.* at 1275. Thus, the Eleventh Circuit held that "[a] suit to domesticate a tribal judgment does not state a claim under federal law, whether statutory or common law," and thus the district court lacked federal question jurisdiction to adjudicate the complaint. *Id.* Accordingly, the court of appeals reversed and remanded with instructions that the complaint be dismissed for lack of subject matter jurisdiction. *Id.* at 1277.

Kraus-Anderson submitted a petition for rehearing and rehearing en banc, which the court denied on August 30, 2010. The Tribe now seeks a writ of certiorari to review the Eleventh Circuit's decision, which conflicts with Ninth Circuit and Supreme Court precedents on the important issue of whether federal question jurisdiction exists to enforce a judgment rendered by an Indian tribal court. *See id.* at 1275.

REASONS FOR GRANTING THE PETITION

In this case, certiorari should be granted because there is a conflict with circuit court and Supreme Court precedents regarding whether an Indian tribe may avail itself of a federal forum to enforce and domesticate a judgment entered by an Indian tribal court. This Court has long recognized that inquiries as to subject matter jurisdiction are threshold and must be addressed at the outset, as the answer governs whether a lawsuit, and lawsuits of its kind, may be entertained at all by the federal courts. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (subject matter jurisdiction is a "threshold matter" that is "inflexible and without exception") (collecting cases). Recognizing therefore the importance of jurisdictional questions, this Court has in the past granted review to resolve the threshold issue of jurisdiction. *See, e.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 582-83 (1999) (certiorari granted to resolve conflict between circuits on jurisdictional issue). And it has done so where the question of jurisdiction involves the enforcement of an Indian tribal court's judgment. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 847 (1985) (certiorari granted to determine if district court had jurisdiction to enjoin tribal court proceedings and judgment).

In this case, the Court should address the question of whether *National Farmers* makes federal forums available to non-Indians while denying that same forum to Indian tribes seeking to enforce judgments entered in their own courts. This Court should conclude that, for the reasons stated in *National Farmers*, Indians are entitled to a federal forum equally with non-Indians.

I. This Court Should Grant Certiorari Because The Circuits Disagree On An Important Question Of Federal Jurisdiction

Certiorari is warranted in this case because the Eleventh Circuit's decision conflicts with Ninth Circuit precedent regarding whether an Indian tribe may avail itself of a federal forum to enforce and domesticate a tribal court judgment. Without intervention by this Court, a tribe's right to a federal forum will vary depending solely on geography. Moreover, enforceability of tribal court judgments is a significant issue of national importance because it affects the ability of tribal courts to render enforceable decisions, and therefore the sovereignty of Indian tribes.

A. In The Ninth Circuit, Tribal Court Judgments May Be Enforced In Federal Court

In *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), the Ninth Circuit entertained an appeal in a federal lawsuit to enforce a tribal court judgment. The question presented was "whether, and under what circumstances, a tribal court tort judgment is entitled to recognition in the United States Courts." *Id.* at 807. The court of appeals answered this question by holding that "the recognition and enforcement of tribal judgments in federal court must inevitably rest on principles of comity," and "as a general principle, federal courts should recognize and enforce tribal judgments." *Id.* at 810. It also held that the federal common law applied to the enforcement of tribal judgments because "Indian law is uniquely federal in nature, having been drawn from the Constitution, treaties, legislation, and

an 'intricate web of judicially made Indian law.'" *Id.* at 813 (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978)). Further, the Ninth Circuit said that "the quintessentially federal character of Native American law, coupled with the imperative of consistency in federal recognition of tribal court judgments, by necessity require that the ultimate decision governing the recognition and enforcement of a tribal judgment by the United States be founded on federal law." *Id.* Thus, under *Wilson*, a suit to domesticate a tribal judgment presents a federal question.

B. In The Eleventh Circuit, Indian Tribes May Not Seek Enforcement Of Tribal Judgments In Federal Court

In contrast to the Ninth Circuit's holding in *Wilson*, the Eleventh Circuit in this case concluded that the district court lacked subject matter jurisdiction under 28 U.S.C. § 1331 because "[a] suit to domesticate a tribal judgment does not state a claim under federal law, whether statutory or common law." 607 F.3d at 1275. In so holding, the Eleventh Circuit necessarily rejected the Ninth Circuit's decision in *Wilson* that actions to enforce or domesticate a tribal judgment must be decided by reference to federal common law and, thus, are enforceable in federal court.

The Eleventh Circuit referred to *Wilson* only once in a footnote – even though that case formed the basis of the district court's finding of federal question jurisdiction. *See Kraus-Anderson*, 607 F.3d at 1274 n.12 (App. A). But the conflict is clear. According to the Eleventh Circuit's view, "the allegations in the complaint

and nature of Indian law are insufficient to confer federal question jurisdiction" and, therefore, the district court was mistaken in relying on *Wilson*, which the Eleventh Circuit labeled a mere "persuasive" Ninth Circuit case. *Id.*

Thus, the Court should grant certiorari to review this issue over which the circuits are split.[2] As a result of the circuit split, tribes in different parts of the country have different rights when it comes to enforcing their judgments and obtaining federal recognition of those judgments by the United States. The circuit split on this important question of federal jurisdiction should be resolved by this Court with a holding that Indian tribes, no matter where located, may resort to federal court to obtain the federal government's recognition and enforcement of tribal court judgments.

II. This Court Should Grant Certiorari Because The Eleventh Circuit's Decision Conflicts With Supreme Court Precedent

Certiorari is also warranted because the Eleventh Circuit has decided an important federal question in a way that conflicts with this Court's decisions.

The Eleventh Circuit has interpreted prior decisions of this Court – particularly, *National Farmers Union*

2. The Tenth Circuit's *MacArthur v. San Juan County*, 497 F.3d 1057, 1066 (10th Cir. 2007), which held that "[t]he question of the regulatory and adjudicatory authority of the tribes – a question bound up in the decision to enforce a tribal court order – is a matter of federal law giving rise to subject matter jurisdiction under 28 U.S.C. § 1331," supports the Ninth Circuit's conclusion.

Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) – to foreclose federal question jurisdiction except where there is a dispute over tribal court jurisdiction. *Kraus-Anderson*, 607 F.3d at 1275 (App. A). Because the parties in this case agreed that the Miccosukee Tribal Court had jurisdiction, the Eleventh Circuit held that no federal question was present:

> [A] dispute over tribal court jurisdiction is considered a dispute over tribal sovereignty, and therefore – like a dispute over tribal sovereignty – is a matter of federal law to which § 1331 applies. This case, however, does not involve a dispute over whether the Tribal Court had jurisdiction to entertain Kraus-Anderson's claim for payment and the Tribe's set off and counterclaim.

Id. Thus, the court of appeals held that "[a] suit to domesticate a tribal judgment does not state a claim under federal law." *Id.* But the Eleventh Circuit reached this conclusion through an overly literal reading of *National Farmers* that ignores the fundamental holding of the case.

In *National Farmers*, a school district and its insurer commenced a suit in federal district court seeking an injunction against a default judgment entered in tribal court. 471 U.S. at 847. The complaint invoked § 1331 as a basis for jurisdiction, and alleged that the injunction should issue because the tribal court lacked subject matter jurisdiction to enter the default judgment. *Id.* at 847-48. The district court agreed and granted the injunction, but the court of appeals

reversed, finding that the district court did not have subject matter jurisdiction over the complaint. *Id.* at 847. After granting certiorari, this Court reversed the court of appeals and stated:

> The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331. . . . [A] federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.

Id. at 852-53. Based on this statement, the Eleventh Circuit concluded that federal question jurisdiction was not present here because "the Tribe has not asked for a declaratory decree to resolve a dispute over whether the Tribal Court had jurisdiction to entertain Kraus-Anderson's claim for payment and the Tribe's set off and counterclaim." *Kraus-Anderson* at 1275 (App. A). This result is incorrect and wholly ignores the basis for the Court's finding of jurisdiction in *National Farmers*. Further, it means that Indian tribes are denied a federal forum, a result not required or envisioned by *National Farmers*.

As stated in *National Farmers*, "federal law defines the outer boundaries of an Indian tribe's power over non-Indians." *Nat'l Farmers*, 471 U.S. at 851. In *National Farmers*, this Court held that federal question jurisdiction was present because the school district's challenge to the tribal court's jurisdiction was grounded

on the contention that "federal law ha[d] divested the Tribe of th[at] aspect of sovereignty." *Id.* at 852-53.

"Indian tribes did not relinquish their status as sovereigns with the creation and expansion of the republic on the North American continent. The courts of the United States have long recognized that the tribes once were, and remain still, independent political societies." *See, e.g., Vann v. Kempthorne*, 534 F.3d 741, 746 (D.C. Cir. 2008). "At one time [Indian tribes] exercised virtually unlimited power over their own members as well as those who were permitted to join their communities." *Nat'l Farmers*, 471 U.S. at 851. However, one area where federal control of tribal power has been limited "involve[es] the relations between an Indian tribe and nonmembers of the tribe." *See United States v. Wheeler*, 435 U.S. 313, 326 (1978), *superseded by statute on other grounds as stated in Lara*, 541 U.S. at 205-07 (emphasis supplied). Thus, "questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians" have frequently been decided pursuant to federal law by the federal courts. *Nat'l Farmers*, 471 U.S. at 851.

A suit to enforce a tribal judgment belongs in federal court because "federal law defines the outer boundaries of an Indian tribe's power over non-Indians." *Id.* at 851. In reaching a contrary conclusion, the Eleventh Circuit's opinion is inconsistent with the holding of *National Farmers* – a fact that demonstrates the need for certiorari review in this case.

The Eleventh Circuit's view, if sustained, would result in an absence of mutuality in federal jurisdiction. While a non-Indian against whom a judgment is entered in tribal court may avail himself of a federal forum to raise a challenge to the tribal court's jurisdiction, the Indian tribe that obtained the judgment may not go into the same federal court to attempt to domesticate and enforce its judgment. As one commentator has observed:

> *National Farmers Union* involved a lawsuit by a non-Indian insurance company to prevent the imposition of tribal power by a tribal court plaintiff and tribal representatives in violation of federal law. . . . There is no principled reason to limit recognition of such an action to the party alignment in *National Farmers Union*. Under mutuality principles, tribes and non-Indians should stand on the same jurisdictional footing. Either instance presents a compelling federal problem . . . .

See Kaighn Smith, Jr., *Federal Courts, State Power, and Indian Tribes: Confronting the Well-Pleaded Complaint Rule*, 35 N.M. L. Rev. 1, 25 (2005) (footnote omitted).[3] This jurisdictional incongruity occasioned by the court of appeals further suggests the need for Supreme Court review.

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3. The commentator notes that "[t]he Supreme Court and lower federal courts have relied on the principle of mutuality to establish jurisdictional parity for tribal and state interests," citing, for example, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) and *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 257 (8th Cir. 1995). *See* Smith, 35 N.M. L. Rev. at 25 n.193.

III. This Court Should Grant Certiorari Because the Eleventh Circuit's Decision Risks Inconsistent Application And Development Of The Federal Common Law Applicable To Enforcement And Recognition Of Indian Tribal Court Judgments

Certiorari is also warranted because the circuit split risks inconsistent application and development of the federal common law on an issue of particular federal concern, to the detriment of the unique relationship between the federal government and Indian tribes.

In *Wilson*, the Ninth Circuit recognized that "Indian law is uniquely federal in nature, having been drawn from the Constitution, treaties, legislation, and an 'intricate web of judicially made Indian law.'" *Wilson*, 127 F.3d at 813 (quoting *Oliphant*, 435 U.S. at 206). In addition, while recognizing that state law is not always insignificant, the court stated that "the quintessentially federal character of Native American law, coupled with the imperative of consistency in federal recognition of tribal court judgments, by necessity require that the ultimate decision governing the recognition and enforcement of a tribal judgment by the United States be founded on federal law." *Id.*

Further, "this Court ha[s] recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) ("*Grable*"). Specifically, "[t]he doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn

on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Id.*

Obtaining enforcement of a tribal judgment against a non-Indian party is a matter particularly suited for decision by the federal courts. Thus, even assuming that enforcement of tribal judgments does not fall within the traditional reach of § 1331, federal question jurisdiction should be recognized under the authority of *Grable* because the decision to afford comity or full faith and credit to a tribal judgment implicates the unique relationship between the United States and Indian tribes, as well as the uniquely federal nature of Indian law. *See, e.g., MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 987-88 (D. Utah 2005) ("Though a plaintiff seeking enforcement of a tribal court judgment does not plead a cause of action created by federal law, the action nonetheless is one 'arising under' federal law because it "turn[s] on substantial questions of federal law."), *aff'd on this ground*, 497 F.3d 1057, 1066 n.4 (10th Cir. 2007) ("[W]e agree with the district court's observation that 'the action . . . is one arising under federal law because it turns on substantial questions of federal law.'").[4]

The need for consistency in the recognition of tribal judgments necessarily requires that a single body of

4. *See also Wilson*, 127 F.3d at 813; *cf.* 19 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 4517 (2010) ("[T]he Supreme Court recognized Native American relations as another 'enclave' of tradition and necessity in which federal common law may operate.").

federal common law have consistent development and application.[5] This can be achieved only if Indian tribes are afforded a federal forum to obtain recognition and enforcement of their judgments by the United States. Because of the unique status that Indian tribes occupy as "domestic dependent nations," *see Cherokee Nation*

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5. There is a conflict among the circuits as to whether, with respect to recognition and enforcement of tribal court judgments, Indian tribes fall within 28 U.S.C. § 1738, the Full Faith and Credit Act. *See, e.g.*, Heidi McNeil Staudenmaier & Anne W. Bishop, *The Three Billion Dollar Question*, 57 Drake L. Rev. 323, 343 (2005). As noted by courts and commentators alike, "the Supreme Court has broadcast mixed signals as to whether the tribes are to be considered territories or possessions of the United States and thus included within the language of § 1738." *MacArthur*, 497 F.3d at 1066. In *Wilson*, the Ninth Circuit recognized the inconclusiveness of this Court's pronouncements and the division of authority among other courts. *Wilson*, 127 F.3d at 808 (comparing cases).

In *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103 (1855), this Court decided that there is "no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union," and the Court expressly called the Cherokee tribal lands "not a foreign, but a domestic territory, – a territory which originated under our constitution and laws." Of this decision, one prominent Indian law scholar has said, "the earliest decision of the United States Supreme Court on such questions assumes a federal legal obligation to recognize and enforce the laws and judgments of Indian tribes under full faith and credit as judgments of the 'territories,' in a geographic, rather than political, sense." Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal Federal Cooperation*, 36 Ariz. St. L. J. 1, 13 (2004). This approach granted considerable respect to Indian tribal courts. *See id.*

v. Georgia, 30 U.S. 1, 17 (1831), tribal judgments should be subject to recognition by the federal polity, not on a piecemeal state-by-state basis. The Ninth Circuit in *Wilson* recognized this imperative. The Eleventh Circuit in this case did not. Thus, certiorari is warranted to resolve this conflict and to decide that tribal judgments may be enforced in federal district court under the federal common law.

CONCLUSION

For all of the important reasons explained above, the Court should grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit and review its decision in this case.

Respectfully submitted,

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