No. 10-717

In the Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
PETITIONER

v.

KRAUS-ANDERSON CONSTRUCTION COMPANY

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a federal district court has federal-question jurisdiction under 28 U.S.C. 1331 to recognize and enforce a tribal-court judgment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rules:

Statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The United States has a "longstanding policy of encouraging tribal self-government," including through the "vital role" played by tribal courts. *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 14 (1987).[1] Tribal courts adjudicate, *inter alia*, civil disputes arising in areas

[1] See, *e.g.*, Indian Tribal Justice Act, 25 U.S.C. 3601 *et seq.*; Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. 3651 *et seq.*

where Tribes have retained their sovereign authority to regulate. See *Strate* v. *A-1 Contractors*, 520 U.S. 438, 453 (1997). That authority extends not only to tribal members and trust lands but also to "'the activities of nonmembers who enter consensual relationships with the [T]ribe or its members, through commercial dealing, contracts, leases, or other arrangements,'" and to "activ-it[ies] that directly affect[] the [T]ribe's political integrity, economic security, health, or welfare." *Id.* at 446 (quoting *Montana* v. *United States*, 450 U.S. 544, 565 (1981)). As a result, tribal-court judgment creditors—like successful litigants in state, federal, or foreign courts—sometimes seek to enforce their judgments in other jurisdictions.

Congress has expressly required state-court or federal-court recognition of tribal-court judgments in only a few specified categories.[2] But state courts have often been called upon to recognize and enforce tribal-court judgments more generally. See Nell Jessup Newton et al., eds., *Cohen's Handbook of Federal Indian Law* § 7.07, at 654-669 (2005 ed. & Supp. 2009) (*Cohen*). Some States treat tribal-court judgments more like those from sister States, which are entitled to full faith and credit under the Constitution and federal statute. See U.S. Const. Art. IV, § 1; 28 U.S.C. 1738. Other

[2] See 18 U.S.C. 2265 (state courts must give full faith and credit to tribal domestic-violence-protection orders); 25 U.S.C. 1911(d) (federal and state courts must give full faith and credit to tribal Indian-child-custody orders); 28 U.S.C. 1738B (state courts must give full faith and credit to tribal child-support orders under specified conditions); 25 U.S.C. 1725(g) (State of Maine must give full faith and credit to judicial proceedings of Passamaquoddy Tribe and Penobscot Nation), 3106(c) (federal and state courts must give full faith and credit to tribal judgments in forest-trespass cases under specified conditions), 3713(c) (same for agricultural-trespass cases).

States treat them more like judgments from foreign countries, which are generally entitled to "comity"—a concept that is, in more than 30 States, informed by their codifications of uniform laws governing recognition of foreign judgments.[3] See *Cohen* § 7.07[2][b] at 660 (noting that all States that have addressed the issue grant either full faith and credit or at least some form of comity to tribal-court judgments).

Several States—including Arizona, California, Iowa, Michigan, Minnesota, New York, North Carolina, North Dakota, Oklahoma, South Dakota, Washington, Wisconsin, and Wyoming—have enacted legislation or adopted court rules expressly governing the recognition of tribal-court judgments in their state courts. See App., *infra*, 1a-3a. In some States—including Alaska, Connecticut, Idaho, Montana, New Jersey, New Mexico, North Dakota, and Oregon—courts have articulated common-law principles applicable to the recognition of tribal-court judgments. See *id.* at 3a-5a. In Florida, where this case arose, it appears that courts have in practice recognized tribal-court judgments without expressly discussing the standards governing recognition. See, *e.g.*, *Weiss* v. *Mashantucket Pequot Gaming Enter.*, 935 So. 2d 69, 70-71 (Fla. Dist. Ct. App. 2006) (noting that tribal entity had "filed a complaint to domesticate a foreign judgment" from tribal court; court of appeals did not ques-

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[3] See *Hilton* v. *Guyot*, 159 U.S. 113 (1895) (describing principles of comity with respect to recognition of foreign judgments). There have been two uniform acts governing recognition of foreign-court money judgments. See Uniform Foreign-Country Money Judgments Recognition Act of 2005, 13 (Pt. II) U.L.A. 7 (Supp. 2010) (adopted by 16 States); Uniform Foreign Money-Judgments Recognition Act of 1962, 13 (Pt. II) U.L.A. 39 (2002) (adopted by 16 States, excluding those that have adopted the 2005 Act).

tion practice of recognizing tribal-court judgments, but held that service of process in state-court recognition action had been ineffective); *Mashantucket Pequot Gaming Enter.* v. *Morlans-Diaz*, No. 03-5710-CA-04 (Fla. 11th Jud. Cir. Ct. Oct. 7, 2003) (entering default judgment enforcing tribal-court judgment).

This case involves a comparatively infrequent scenario, in which a judgment creditor has asked that a tribal-court judgment be recognized and enforced by a federal district court rather than a state court.

2. In 1997 and 1998, petitioner Miccosukee Tribe of Indians of Florida entered into three contracts with respondent Kraus-Anderson Construction Company for the construction of several buildings on its reservation in Miami-Dade County, Florida. Pet. App. 3a & n.3. Petitioner waived sovereign immunity from suit in connection with the contracts "only with respect to actions brought in Miccosukee Tribal Court." *Id.* at 4a-5a.

In 1999, petitioner refused to pay certain invoices, contending that respondent had overcharged and failed to remedy several defects. Pet. App. 5a. Respondent sued for breach of contract in the Miccosukee Tribal Court, seeking $7,077,604.70, and petitioner counterclaimed. *Id.* at 6a. In June 2004, after discovery and a 16-day bench trial, the two-judge tribal court issued a judgment in favor of petitioner for $1,654,998.88. *Ibid.*

Under the Miccosukee Criminal and Civil Code, an appeal from a final order of the Tribal Court may be taken, with the approval of the Tribe's Business Council, to the Miccosukee Court of Appeals, which consists of the Tribe's "General Council" (which includes all adult Tribal members). Pet. App. 2a n.1, 33a-35a, 39a. Respondent filed a timely notice of appeal. *Id.* at 7a. In July 2004, the Business Council disallowed the appeal on

the grounds that the Tribal Court's order did "not constitute a departure from the essential requirements of Miccosukee Law and/or procedure and other applicable laws and raise[d] no issues meriting review by the Miccosukee Court of Appeals." *Id.* at 35a.

3. In November 2004, petitioner filed a complaint in the United States District Court for the Southern District of Florida, seeking to enforce the Tribal Court's judgment. Pet. App. 7a. Petitioner asserted that the court had federal-question jurisdiction under 28 U.S.C. 1331, diversity jurisdiction under 28 U.S.C. 1332, and "federal common law of comity jurisdiction" under 28 U.S.C. 1738. Pet. App. 7a. The complaint did not identify the specific source of the cause of action, but asserted that the judgment is "entitled to recognition, registration, and enforcement in accordance with the applicable federal law." *Ibid.* Respondent disputed the presence of jurisdiction under 28 U.S.C. 1332 or 1738, but agreed that there was federal-question jurisdiction because it had asserted, as a defense, that the tribal proceedings had denied it due process.[4] Pet. App. 7a.

The district court granted summary judgment for respondent. Pet. App. 21a-53a. As relevant here, the court found it had federal-question jurisdiction under Section 1331.[5] *Id.* at 25a-28a. It acknowledged that peti-

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[4] The Due Process Clauses of the Fifth and Fourteenth Amendments do not apply directly to Indian Tribes, but Congress has, in the Indian Civil Rights Act of 1968 (25 U.S.C. 1302), imposed "similar, but not identical," restrictions on tribal governments. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56-57 (1978).

[5] The district court held that it lacked jurisdiction under Sections 1332 and 1738 (Pet. App. 24a-25a & nn.3-4), and the court of appeals later agreed (*id.* at 16a-18a). The question presented in this Court is limited to jurisdiction under Section 1331. See Pet. i.

tioner's complaint did not "disclose a proper statutory basis" for federal-question jurisdiction, and that respondent's defense (deprivation of due process) did not provide a basis for jurisdiction under the well-pleaded-complaint rule. *Id.* at 25a-26a. The court nevertheless concluded that it had jurisdiction over an action to enforce a tribal-court judgment against a non-Indian party "based on federal common law." *Id.* at 26a-27a.

On the merits, the district court declined to recognize the tribal-court judgment "under principles of comity," because it concluded that respondent was denied due process when the Business Council—which had been directly involved in the underlying contract dispute—made the decision not to allow an appeal. Pet. App. 51a.

4. The court of appeals reversed, holding that the district court did not have jurisdiction over the action to enforce the tribal-court judgment. Pet. App. 1a-18a. With respect to federal-question jurisdiction, the court of appeals was unable to identify any constitutional provision, federal statute, or "recognized theory of common law" under which petitioner's cause of action arose. *Id.* at 11a-12a, 16a. Although the court recognized that an action to *challenge* tribal-court jurisdiction arises under federal common law, it explained that there was no dispute about the Tribal Court's jurisdiction in this case. *Id.* at 14a-15a. The court concluded that a "suit to domesticate a tribal judgment does not state a claim under federal law, whether statutory or common law." *Id.* at 15a. Thus, petitioner's action had to be dismissed for lack of jurisdiction. *Id.* at 16a. The court of appeals noted that petitioner could, *inter alia*, seek enforcement of its judgment in state court. *Id.* at 18a n.16.[6]

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[6] Even before the court of appeals' decision, petitioner filed actions to enforce its tribal-court judgment in Florida and Minnesota state

DISCUSSION

The court of appeals correctly determined that the district court did not have federal-question jurisdiction over petitioner's action to recognize and enforce a tribal-court judgment in its favor. Jurisdiction over such actions generally exists in state courts. The court of appeals' decision does not conflict with any decision of this Court. Nor is there any conflict with another federal court of appeals that warrants this Court's review.

A. The Court Of Appeals Correctly Held That The District Court Lacked Federal-Question Jurisdiction To Recognize And Enforce The Tribal Court's Judgment

Under 28 U.S.C. 1331, federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The great majority of actions that arise under federal law do so because the plaintiff "plead[s] a cause of action created by federal law." *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). But there is also a "less frequently encountered[] variety" of federal-question jurisdiction: when "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 312, 314.

Both parties take the position that there is federal-question jurisdiction over an action to recognize a tribal-court judgment. They do not, however, suggest that the

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courts. See *Miccosukee Tribe of Indians* v. *Kraus-Anderson Constr. Co.*, No. 09-41171 CA 22 (Fla. 11th Jud. Cir. Ct. filed May 27, 2009); *Miccosukee Tribe of Indians* v. *Kraus-Anderson Constr. Co.*, No. 27 CV 09-16588 (Minn. 4th Jud. Dist. Ct. filed June 15, 2009).

action arises under any particular federal statute or treaty. Instead, they suggest three rationales for jurisdiction: (1) that "federal common law applies as [when] a district court determines whether to recognize and enforce a foreign judgment," Resp. Br. in Support of Cert. (Resp.) 8-9; (2) that Indian law is "uniquely federal in nature," Pet. 17 (citation omitted), and federal law "defines the outer boundaries of an Indian tribe's power over non-Indians," Pet. 14, 15 (quoting *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 851 (1985)); and (3) that, even if the claim does not "fall within the traditional reach of § 1331," whether the tribal court had jurisdiction is sufficiently bound up in the decision to enforce a tribal-court order to satisfy *Grable & Sons*, Pet. 18; see also Resp. 10. None of those rationales is persuasive.

1. Respondent analogizes Tribes' sovereignty to that of foreign countries (Resp. 11-12), and contends (*id.* at 7-10) that the rule governing recognition of foreign-country judgments—comity—should govern the recognition of tribal-court judgments. Even assuming that is true, respondent errs in asserting (*id.* at 8) that "federal common law applies" in that context. To the contrary—notwithstanding *Hilton* v. *Guyot*, 159 U.S. 113 (1895)—actions to recognize foreign-country judgments have long been brought pursuant to state law. That established practice is reflected in two uniform laws governing recognition of foreign-country money judgments, which have, thus far, been enacted by 32 States. See note 3, *supra*. It is also acknowledged in the comments to the Restatement provision that respondent invokes (Resp. 8). See Restatement (Third) of the Foreign Relations Law of the United States § 481 cmt. a (1987) ("Since Erie v. Tompkins, 304 U.S. 64 * * * (1938), it

has been accepted that in the absence of a federal statute or treaty * * * an action to enforce a foreign country judgment is not an action arising under the laws of the United States."). Thus, while federal common law does govern certain issues affecting foreign relations, see, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398 (1964) (act of state doctrine), courts have not applied a general or uniform body of federal common law to determine whether to enforce a foreign judgment.[7]

Of course, even if there were a federal rule of recognition, it would not necessarily provide a federal *cause of action* for recognition. Both the Full Faith and Credit Clause (U.S. Const. Art. IV, § 1) and the Full Faith and Credit Act (28 U.S.C. 1738) prescribe a rule of recognition, but they do not create a federal cause of action. See *Minnesota* v. *Northern Sec. Co.*, 194 U.S. 48, 72 (1904); *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 291-292 (1888). The same is true of the principles of comity that generally govern recognition of foreign judgments. See, *e.g.*, *Taveras* v. *Taveraz*, 477 F.3d 767, 783 (6th Cir. 2007) (federal courts "are obligated to consider whether a judgment of a foreign court should be afforded comity only when the federal court already has jurisdiction").

Furthermore, even if federal interests would be served by a uniform federal rule of recognition (see Pet. 18-20; Resp. 5, 9, 12), that would not mandate original jurisdiction in federal district courts. See *Merrell Dow*

[7] The American Law Institute has proposed a federal statute to govern recognition of foreign-country judgments. See American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* (2006). Congress has not, however, adopted such a statute. Meanwhile, California and Michigan have expressly incorporated provisions for tribal-court judgments in their codifications of the most recent uniform act governing foreign judgments. See App., *infra*, 1a.

Pharm. Inc. v. *Thompson*, 478 U.S. 804, 816 (1986) (finding no Section 1331 jurisdiction over state-law negligence claim expressly premised on violation of federal Food, Drug and Cosmetic Act; minimizing "concern about the uniformity of interpretation * * * even if there is no original district court jurisdiction," because "this Court retains power to review the decision of a federal issue in a state cause of action"); see also *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677, 692-693 (2006) ("'the involvement of an area of uniquely federal interest . . . establishes a necessary, not a sufficient, condition for the displacement of state law'"; finding "no cause to displace state law, much less to lodge this case in federal court") (citation omitted).

Thus, in the absence of a federal statute governing recognition, or some other basis for federal jurisdiction (such as diversity), the analogy to actions to enforce foreign-country judgments is fully consistent with the court of appeals' conclusion (Pet. App. 18a) that petitioner may pursue its claim in state, not federal, court.[8]

2. The parties suggest (Pet. 10, 17; Resp. 6, 9-10) that a claim to recognize a tribal-court judgment arises

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[8] Although recognition of foreign-country judgments has ordinarily been regarded as a matter of state law, even under that framework a specific state law hostile to foreign citizens or nations may impermissibly intrude on the federal power over foreign relations. See, *e.g.*, *Zschernig* v. *Miller*, 389 U.S. 429 (1968) (holding unconstitutional an Oregon statute limiting inheritance of property by foreign citizens). By analogy, there may be circumstances in which fundamental principles of federal Indian law could preempt particular state statutes, court rules, or common-law rules that are hostile to, or do not accord a minimum degree of recognition to, tribal-court judgments. No improper exercise of state power is alleged in this case, which thus provides no occasion for the Court to address what federal-law principles, if any, apply to determinations whether to recognize tribal-court judgments.

under federal law because "Indian law" is "federal." Petitioner further stresses (Pet. 9, 12-16) that this Court has found jurisdiction under Section 1331 to address a claim that "a tribal court has exceeded the lawful limits of its jurisdiction." *National Farmers Union*, 471 U.S. at 853. The contention that the federal issue from *National Farmers Union* is also present here mistakenly conflates Indian Tribes' inherent sovereignty with the federal laws that have circumscribed that power.

Indian Tribes "retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America." *National Farmers Union*, 471 U.S. at 851; see also *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 649-650 (2001) ("For powers not expressly conferred upon them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty."). That "retain[ed]" sovereignty is "unique" in part because it is subject to limitation by Congress. *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (quoting *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978)); see also *United States* v. *Lara*, 541 U.S. 193, 207, 210 (2004). Thus, when the parties quote the Ninth Circuit to the effect that "Indian law is uniquely federal in nature" (Pet. 10-11; Resp. 7) (quoting *Wilson* v. *Marchington*, 127 F.3d 805, 813 (1997)), they are not describing the power that a tribal court typically wields, but are instead referring to a body of federal law that may have limited that power. Their characterization of Indian law is thus akin to saying that state law is "inherently federal" in any area where it is subject to potential preemption by federal law.

The difference between Tribes' retained sovereignty and the federal law that defines limits on that sover-

eignty explains why petitioner errs in contending (Pet. 12-15) that the decision below conflicts with *National Farmers Union*. In *National Farmers Union*, this Court held that there is federal-question jurisdiction over a suit brought by parties "contend[ing] that [a] Tribal Court has no power to enter a judgment against them." 471 U.S. at 852. That question, the Court explained, was based on "federal law" because the "right of freedom from Tribal Court interference" that the federal-court plaintiffs asserted depended on their establishing that "federal law ha[d] divested the Tribe of th[e] aspect of sovereignty" necessary to adjudicate the dispute before the tribal court. *Id.* at 852-853.[9]

The claim in this case—to have a tribal court's judgment recognized and enforced—is different in a critical respect from the one in *National Farmers Union* to declare a tribal-court proceeding ultra vires. Petitioner does not contend that the tribal court was exercising some power granted by federal law, and respondent does not contend that the tribal court was acting outside its legitimately retained powers. Pet. App. 15a & n.14. The restrictions imposed by federal law on tribal courts are relevant only to *respondent's defense* that the tribal court's judgment should not be recognized because the tribal-court proceedings violated due process. But, under the well-pleaded-complaint rule, a question necessary to resolve a defense—as opposed to an essential

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[9] Similarly, federal courts have appropriately exercised jurisdiction over suits brought by Tribes contending that State laws "impermissibly infringe[d] on tribal government" in violation of federal law. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 222 (1987); see also *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983). Cf. *Inyo County* v. *Paiute-Shoshone Indians*, 538 U.S. 701, 712 (2003) (remanding for consideration of Section 1331 jurisdiction).

element of the plaintiff's claim—cannot be the basis for federal-question jurisdiction. See, *e.g.*, *Vaden* v. *Discover Bank*, 129 S. Ct. 1262, 1272, 1277 n.17 (2009) (no jurisdiction over bank's state-law claim seeking past-due charges even though there could have been jurisdiction if the credit-card holder first filed suit claiming a violation of the Federal Deposit Insurance Act).

Thus, unlike in *National Farmers Union*, no federal question is inherent in petitioner's claim that a tribal-court judgment should be recognized (as opposed to invalidated). And, to the extent that petitioner contends (Pet. 16) that failing to extend *National Farmers Union* to this context "would result in an absence of mutuality in federal jurisdiction," such non-mutuality is inherent in the well-pleaded-complaint rule itself, which this Court has, since *National Farmers Union*, continued to apply in cases involving Indian Tribes. See, *e.g.*, *Oklahoma Tax Comm'n* v. *Graham*, 489 U.S. 838 (1989) (Tribe's potential federal-law defense of sovereign immunity did not provide Section 1331 jurisdiction).[10]

3. The parties also contend that this case falls within the narrow category of federal-question jurisdiction this Court discussed in *Grable & Sons*, *supra*. They quote (Pet. 18; Resp. 6) a district court's explanation that, even if a claim to recognize 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 turns on substantial questions of federal law." *MacAr-*

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[10] Petitioner also errs in assuming (Pet. 9, 16) that a lack of mutuality in this context necessarily treats Indians and non-Indians differently. The prevailing party in a tribal-court proceeding need not be a Tribe, and may be either an Indian or a non-Indian. And a judgment debtor, even if an Indian, may have assets in another jurisdiction. Thus, an enforcement action could be brought by a non-Indian against an Indian.

thur v. *San Juan County*, 391 F. Supp. 2d 895, 987 (D. Utah 2005) (internal quotation marks and brackets omitted), aff'd in relevant part, 497 F.3d 1057, 1066 & n.4 (10th Cir. 2007), cert. denied, 552 U.S. 1181 (2008). In fact, *Grable & Sons* is inapplicable to petitioner's suit for three principal reasons.

a. First, a plaintiff's claim to enforce a tribal-court judgment does not necessarily turn on questions of federal law. In the case cited by the parties, the district court reasoned that a federal question is "necessarily implicate[d]" in a suit to enforce a tribal-court judgment, because recognition "[i]mplicit[ly]" rests on "whether the tribal court had subject-matter and personal jurisdiction." *MacArthur*, 391 F. Supp. 2d at 987. But *Grable & Sons* incorporated the well-pleaded-complaint rule. 545 U.S. at 314, 315 (asking whether "a state-law claim *necessarily raise[s]* a stated federal issue," and finding that standard satisfied because Michigan law made satisfaction of a federal statute "*an essential element* of [Grable's] quiet title claim") (emphases added).[11] And the absence of jurisdiction is something that would typically need to be proved by a "party resisting recognition" of a judgment, rather than a plaintiff seeking recognition. See Uniform Foreign-Country Money Judgments Recognition Act, § 4(b)(2)-(3) and (d), 13 (Pt. II) U.L.A. 15 (Supp. 2010); see also Restatement (Third) of

[11] The cases on which *Grable & Sons* relied (545 U.S. at 312-313) also incorporated the well-pleaded-complaint rule into their Section 1331 analysis. See, *e.g.*, *City of Chicago* v. *International Coll. of Surgeons*, 522 U.S. 156, 164 (1997) ("even though state law creates a party's cause of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law") (brackets and citation omitted); *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983).

Foreign Relations § 482 cmt. a ("jurisdiction of the rendering court over the subject matter is normally presumed" in the absence of "a credible challenge" by someone "resisting recognition or enforcement").

Thus, a plaintiff's well-pleaded claim to recognize a tribal-court judgment generally would not require a court to determine whether the tribal court had jurisdiction, unless the defendant opposed recognition on that basis. See, *e.g.*, 17C Ariz. Rev. Stat. Ann. Tribal Ct. Civ. J. Recognition R. 5(c) (2009).[12] As this case itself illustrates, a claim to recognize a tribal-court judgment may be litigated without any dispute about the tribal court's jurisdiction, meaning the issue is a far cry from *Grable & Sons*' reference to a state-law claim that "necessarily raise[s] a stated federal issue, actually disputed and substantial." 545 U.S. at 314.

b. Second, even if resolution of a federal question were somehow necessary to determining whether to recognize a tribal-court judgment, *Grable & Sons* requires "an assessment of any disruptive portent in exercising federal jurisdiction." 545 U.S. at 314. There, the Court found that federal "jurisdiction over actions like Grable's would not materially affect, or threaten to affect, the normal currents of litigation." *Id.* at 319. But that is not the case here. To the contrary, as discussed above (at pp. 2-4), suits to enforce tribal-court judgments—like those to enforce foreign-country judgments—have long

[12] South Dakota's statute governing recognition of tribal-court judgments appears to be unique in containing a presumption *against* recognition, which a tribal-court judgment creditor must overcome with clear and convincing evidence about certain requirements (including that the tribal court had jurisdiction). See S.D. Codified Laws § 1-1-25 (2004 & Supp. 2010). Thus, in South Dakota, a well-pleaded complaint for recognition of a tribal-court judgment might present at least one federal issue (whether the tribal court had jurisdiction).

been brought in state courts. Indeed, before this case, there appear to be only three reported cases in which a federal district court exercised jurisdiction over an action to recognize and enforce a tribal-court judgment (though none of them ultimately resulted in enforcement). See *MacArthur*, 497 F.3d at 1077; *Bird* v. *Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1138 (9th Cir. 2001); *Wilson*, 127 F.3d at 815. The parties' contention that petitioner's action in this case satisfies *Grable & Sons* would mean that *any* action to enforce a tribal-court judgment could be brought in federal court. As a result, it would "upset[] the state-federal line drawn (or at least assumed) by Congress," and trigger that further limitation on federal jurisdiction. 545 U.S. at 314.

c. Third, the inapplicability of *Grable & Sons* is further buttressed by *Empire HealthChoice Assurance*, in which the Court found "the slim category *Grable* exemplifies" to be inapplicable when the federal issue that needed to be resolved in the course of the plaintiff's state-court tort action was "fact-bound and situation-specific." 547 U.S. at 701. Even assuming an underlying federal-law question here that is the same as in *National Farmers Union* (*i.e.*, whether the tribal court had jurisdiction over the parties' contract dispute), such determinations are indeed "fact-bound and situation-specific" as a general matter.

The court of appeals was thus correct in holding that the parties have failed to identify an "ascertainable basis for jurisdiction under [Section] 1331" over petitioner's claim to enforce a tribal-court judgment. Pet. App. 16a.

B. There Is No Conflict In The Federal Courts Of Appeals Warranting Certiorari

The parties contend (Pet. 10-12; Resp. 6-7, 9-10) that the decision below creates a conflict in the federal courts of appeals. There is, however, no conflict.

1. In *Wilson* v. *Marchington*, 127 F.3d 805 (9th Cir. 1997), cert. denied, 523 U.S. 1074 (1998), the federal-court plaintiff was a member of the Blackfeet Indian Tribe who sought to enforce a Blackfeet Tribal Court judgment against an employee of "an Idaho carnival company" who caused a car accident while driving on a state highway through the Blackfeet Reservation in Montana. *Id.* at 807. She invoked both diversity and federal-question jurisdiction. See *Wilson* v. *Marchington*, 934 F. Supp. 1187, 1189, 1191 (D. Mont. 1996), rev'd, 127 F.3d 805 (9th Cir. 1997), cert. denied, 523 U.S. 1074 (1998). The district court did not address whether diversity jurisdiction existed, instead holding that, although federal law had not "created the cause of action," there was federal-question jurisdiction because "the unique status occupied by Indian Tribes under our law" makes it "imperative" that a "uniform body of law develop in relation to the recognition and enforcement" of tribal-court judgments. *Id.* at 1191-1192 & n.10. Applying "the principle of comity," the district court held that the tribal-court judgment was entitled to recognition and enforcement. *Id.* at 1193.

On appeal in *Wilson*, the Ninth Circuit reversed. It agreed that "the principles of comity, not full faith and credit, govern whether a district court should recognize and enforce a tribal court judgment," 127 F.3d at 807, but it refused to recognize the judgment in question, finding, under this Court's decision in *Strate*, *supra*, that the tribal court had lacked subject-matter jurisdiction

over the dispute. *Id.* at 813-815. Although the Ninth Circuit concluded that federal law provided the relevant rule of recognition in federal court (and applied that rule), *id.* at 813, it did not address the basis for federal jurisdiction over the enforcement action. Because *Wilson* did not address the applicability of Section 1331, it does not give rise to the sort of conflict with the decision below that could warrant this Court's review.[13]

2. Although the parties allege a direct conflict only with the Ninth Circuit (Pet. 10; Resp. 7), they also cite (Pet. 12 n.2; Resp. 10) the Tenth Circuit's decision in *MacArthur* v. *San Juan County*, 497 F.3d 1057 (2007), cert. denied, 552 U.S. 1181 (2008). In *MacArthur*, the federal plaintiffs asserted multiple claims against the defendants, including a claim to enforce certain preliminary injunctions issued by a Navajo tribal court. See *MacArthur* v. *San Juan County*, 309 F.3d 1216, 1218 (10th Cir. 2002). During an initial appeal, the Tenth Circuit proceeded "with the assumption that the Navajo Nation injunction is enforceable in federal court," but noted it was "unwilling to enforce judgments of tribal courts acting beyond their authority." *Id.* at 1225. It thus dismissed the enforcement claim with respect to some defendants over whom the tribal court had lacked subject-matter jurisdiction, but remanded for further proceedings with respect to other defendants. *Id.* at 1225, 1227-1228.

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[13] The Ninth Circuit's subsequent decision in *Bird*, *supra*, also involved an action to recognize and enforce a Blackfeet Tribal Court judgment. 255 F.3d at 1138. Applying principles of comity, the court of appeals held that the tribal-court judgment was not entitled to recognition because its proceedings violated due process. *Ibid.* As in *Wilson*, however, the court of appeals did not address the grounds for the district court's jurisdiction, thus providing no foundation for a conflict with the decision below.

On remand, the district court opined about federal-question jurisdiction in the course of rejecting the plaintiffs' argument that the federal district court "lack[ed] jurisdiction * * * to determine the subject-matter jurisdiction of the Navajo court." *MacArthur*, 391 F. Supp. 2d at 986. The district court rejected that argument, stating that a "'federal question' is raised no less by an attempt to enforce a tribal court order in a federal forum than it is by an attempt to avoid its enforcement." *Id.* at 987. Citing *National Farmers Union* and *Grable & Sons*, it concluded that, even "[t]hough 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 turns on substantial questions of federal law," by virtue of the "[i]mplicit" need to determine during the recognition process "whether the tribal court had subject-matter and personal jurisdiction." *Ibid.* (internal quotation marks and brackets omitted).[14] The district court held that the tribal court had jurisdiction over some, but not all, claims, but it ultimately refused to enforce the Navajo court's preliminary injunctions because they were "interlocutory, non-'final' orders" and had largely "been rendered moot." *Id.* at 1023, 1027, 1029, 1056.

On renewed appeal, the Tenth Circuit assumed that, "if" it could enforce tribal-court "preliminary injunction

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[14] Given the other claims against the defendants in *MacArthur*—including "discrimination and denial of equal protection; denial of free speech and association; denial of due process; [and] antitrust and racketeering violations," 309 F.3d at 1220—the district court likely had supplemental jurisdiction over the claim to enforce the tribal-court orders, whether or not it had Section 1331 jurisdiction over it. See 28 U.S.C. 1367.

orders," it would do so "as a matter of comity." *MacArthur*, 497 F.3d at 1066. On that assumption, it rejected the suggestion that it had "no power to do anything other than enforce" the orders. *Ibid.* The Tenth Circuit addressed federal-question jurisdiction in a single textual sentence: "The 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." *Ibid.* In an accompanying footnote, it noted that the plaintiffs were not just claiming that the Navajo court retained "civil jurisdiction over [the] [d]efendants' activities," but were also arguing that "federal law has granted [the Navajo Nation] jurisdiction." *Id.* at 1066 n.4. In that light, it "agree[d] with the district court's observation that" the action turned on substantial questions of federal law. *Ibid.* The Tenth Circuit went on to reverse the district court's conclusion that the tribal court had jurisdiction over certain claims, but to affirm the district court's refusal to enforce the tribal-court orders even against the one defendant over whom there was jurisdiction. *Id.* at 1076-1077.

The brief discussion of federal-question jurisdiction in *MacArthur* does not conflict with the decision below. It was based in part on the plaintiffs' argument there that federal law affirmatively granted the tribal-court jurisdiction, which would be more closely akin to *National Farmers Union* than is petitioner's claim here. See pp. 12-13, *supra*. Unlike this case, *MacArthur* did not even involve a *final* judgment, which is generally indispensable in a free-standing recognition proceeding. The court's discussion thus appeared as dicta predicated

on the assumption that it might be able to enforce the orders in question.

3. Although the parties assert (Pet. 17-20, Resp. 4-5, 12) that this Court's review could alleviate a geographic disparity in the enforcement of tribal-court judgments, they have cited no evidence that the decisions in *Wilson* and *MacArthur* altered enforcement practices. In fact, it appears that state courts within the Ninth Circuit still hold themselves open for enforcement of tribal-court judgments under state law, and have not read *Wilson* to establish a federal standard that preempts the application of state recognition law.[15] In addition, as a practical matter, tribal-judgment creditors have probably not been drawn to federal court in the Ninth or Tenth Circuit, given that those courts decided *not* to enforce the tribal-court judgments at issue in *Wilson*, *Bird*, and *MacArthur*. See *Cohen* § 7.07[2][b] at 662 n.498 ("Federal courts applying the comity doctrine have not shown as much respect for tribal judgments as have state courts.").

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[15] Montana courts continue to recognize and enforce tribal-court judgments under principles of comity, citing *Wippert* v. *Blackfeet Tribe*, 654 P.2d 512, 514 (Mont. 1982), rather than *Wilson* or *Bird*. See *State* v. *Spotted Eagle*, 71 P.3d 1239, 1245 (Mont. 2003); *Anderson* v. *Engelke*, 954 P.2d 1106, 1111-1112 (Mont. 1998). The Alaska Supreme Court has concluded that state courts should recognize tribal-court judgments on the basis of comity, and has described *Wilson* as establishing "guidelines for the federal courts." *John* v. *Baker*, 982 P.2d 738, 762-764, 763 n.176 (1999), cert. denied, 528 U.S. 1182 (2000). In Arizona, the group that developed the State's rule on recognition of tribal-court judgments noted that *Wilson* "provides criteria for recognition of tribal judgments by federal courts and does not necessarily apply to state court recognition." Arizona State, Tribal and Federal Court Forum, *Minutes of June 9, 1998 Meeting*, at 2, http://www.azcourts.gov/portals/93/98thru99/98-06-09_minutes.pdf.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

1. The following States have enacted legislation or adopted court rules that expressly provide for the recognition of tribal-court judgments in their state courts:

Arizona: 17C Ariz. Rev. Stat. Ann. Tribal Ct. Civ. J. Recognition R. 1-7 (2009) (adopted by Arizona Supreme Court in 2000; providing for recognition of tribal-court judgments unless objecting party demonstrates tribal court lacked jurisdiction or did not afford due process, or enforcing court finds discretionary factors warrant non-recognition).

California: Cal. Civ. Proc. Code § 1714(b) (West Supp. 2011) (enacted in 2007; defining "[f]oreign-country judgment" as including "a judgment by any Indian tribe recognized by the government of the United States" for purposes of California's codification of the Uniform Foreign-Country Money Judgments Recognition Act).

Iowa: Iowa Code Ann. § 626D.5 (West Supp. 2011) (enacted in 2007; providing that tribal-court judgments are generally to be recognized and enforced to the same extent as Iowa judgments, but listing factors that shall or may justify a refusal to recognize and enforce).

Michigan: Mich. Comp. Laws Ann. § 691.1132(a)(iii) (West Supp. 2010) (enacted in 2008; defining "[f]oreign country" as including "[a] federally recognized Indian tribe whose tribal court judgments are entitled to recognition and presumed to be valid under a court rule adopted by the supreme court" for purposes of Michigan's codification of the Uniform Foreign-Country Money Judgments Recognition Act); Mich. Ct. R. 2.615 (adopted by Michigan Supreme Court in 1996 based on a proposal by the Indian Tribal Court/State Trial Court Forum; providing that judgments of tribal courts from

Tribes that grant reciprocity to Michigan state-court judgments are recognized unless an objecting party proves one of the listed factors).

Minnesota: Minn. Gen. R. Pract. for Dist. Cts. 10.02 (adopted by Minnesota Supreme Court in 2003; listing ten factors for trial court to consider in determining whether to recognize a tribal-court judgment that is not otherwise required to be recognized by state or federal statute).

New York: N.Y. Indian Law § 52 (2001) (enacted in 1909; providing that decisions of the Peacemakers' courts of the Seneca Nation and the Tonawanda Nation are enforceable in state court).

North Carolina: N.C. Gen. Stat. § 1E-1(a) (2007) (enacted in 2001; requiring that full faith and credit be given to judgments of the Tribal Court of the Eastern Band of Cherokee Indians to the same extent as judgments of sister States, provided that the tribal court grants reciprocity and the claim is not contrary to North Carolina public policy).

North Dakota: N.D. Cent. Code § 27-01-09 (2006) (enacted in 1989; providing for recognition of judgments of the tribal court of the Three Affiliated Tribes of the Fort Berthold Reservation with respect to certain family-law matters, including some not covered by the federal statutes cited in note 2, *supra*).

Oklahoma: Okla. Stat. Ann. tit. 12, § 728 (West 2000) (enacted in 1992; providing that the Oklahoma Supreme Court may issue standards for extending full faith and credit to tribal-court judgments if the Tribe grants reciprocity to state-court judgments); Okla. Dist. Ct. R. 30 (adopted by the Oklahoma Supreme Court in 1994; so providing).

South Dakota: S.D. Codified Laws § 1-1-25 (2004 & Supp. 2010) (enacted in 1986; providing that no tribal-court judgment may be recognized unless the party seeking recognition establishes "by clear and convincing evidence" five listed factors).

Washington: Wash. Superior Ct. Civ. R. 82.5(c) (adopted by Washington Supreme Court in 1995; providing for recognition of tribal-court judgments unless court finds that the tribal court lacked jurisdiction, or denied due process, or does not provide for reciprocal recognition of Washington state-court judgments).

Wisconsin: Wis. Stat. Ann. § 806.245 (West 1994) (enacted in 1991; providing for recognition of tribal-court judgments when listed requirements are satisfied).

Wyoming: Wyo. Stat. Ann. § 5-1-111 (2009) (enacted 1994; providing for recognition of judgments of the tribal courts of the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation when listed requirements are satisfied).

2. In the following States, courts have articulated common-law rules governing the recognition of tribal-court judgments:

Alaska: *John* v. *Baker*, 982 P.2d 738, 769 (Alaska 1999) (holding that Alaska state courts should decide whether to recognize a tribal-court custody decree based on the comity doctrine), cert. denied, 528 U.S. 1182 (2000); *Starr* v. *George*, 175 P.3d 50, 58 (Alaska 2008) (noting that "tribal courts need not provide due process in the exact manner as state courts," but holding that recognition of Tribe's adoption resolution was precluded under facts of case by lack of notice to paternal grandparents).

Connecticut: *Mashantucket Pequot Gaming Enter.* v. *DiMasi*, 25 Conn. L. Rptr. 474 (Conn. Super. Ct. 1999) (recognizing and enforcing tribal-court judgment for gambling debt under principles of comity).

Idaho: *Sheppard* v. *Sheppard*, 655 P.2d 895 (Idaho 1982) (holding that state courts must afford full faith and credit to tribal-court judgments under 28 U.S.C. 1738).

Montana: *Wippert* v. *Blackfeet Tribe*, 654 P.2d 512, 514 (Mont. 1982) (finding tribal-court judgment on loan default entitled to recognition under principles of comity); *Anderson* v. *Engelke*, 954 P.2d 1106, 1111-1112 (Mont. 1998) (endorsing *Wippert*'s rule of comity but holding that state court cannot enforce tribal-court judgments within the exterior boundaries of the reservation); *State* v. *Spotted Eagle*, 71 P.3d 1239, 1245 (Mont. 2003) (noting that "[i]n most instances" comity requires Montana courts to give "full effect" to tribal-court judgments even though their procedures are not identical to Montana's), cert. denied, 540 U.S. 1008 (2003).

New Jersey: *Mashantucket Pequot Gaming Enter.* v. *Malhorta*, 740 A.2d 703, 705-707 (N.J. Super. Ct. Law Div. 1999) (recognizing and enforcing tribal-court judgment for gambling debt under principles of comity).

New Mexico: *Jim* v. *CIT Fin. Servs. Corp.*, 533 P.2d 751 (N.M. 1975) (holding that state courts must afford full faith and credit to tribal-court judgments under 28 U.S.C. 1738); but see *Garcia* v. *Gutierrez*, 217 P.3d 591, 608 (N.M. 2009) (suggesting that *Jim*'s interpretation of Section 1738 should be reconsidered in light of the subsequent and more detailed analysis of other courts, and noting that "[o]ther jurisdictions have recognized that

comity provides the 'best general analytical framework for recognizing tribal judgments'") (citation omitted).

North Dakota: *Fredericks* v. *Eide-Kirschmann Ford, Mercury, Lincoln, Inc.*, 462 N.W.2d 164, 167-168 (N.D. 1990) (enforcing tribal-court money judgment in favor of tribal member against automobile dealer for illegal repossession of automobile under principles of comity).

Oregon: *In re Marriage of Red Fox*, 542 P.2d 918, 920-923 (Or. Ct. App. 1975) (recognizing tribal-court divorce decree under principles of comity).