No. 17-7044 (consolidated with No. 17-7042)

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

THE CHEROKEE NATION,
Plaintiff/Appellee,

v.

DAVID BERNHARDT, in his official capacity, et al.,
Defendants/Appellants,

and

UNITED KEETOOWAH BAND
OF CHEROKEE INDIANS IN OKLAHOMA, et al.,
Defendants/Intervenors/Appellants.

Appeal from the United States District Court
for the Eastern District of Oklahoma
No. 6:14-cv-428 (Hon. Ronald A. White)

FEDERAL APPELLANTS' OPPOSITION TO MOTION TO STAY MANDATE

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On September 5, 2019, this Court vacated the district court's May 31, 2017 injunction against the lawful taking into trust of a parcel owned in fee by the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") within the former Cherokee reservation. The Cherokee Nation of Oklahoma ("CNO") has moved to stay this Court's mandate. The CNO does not carry its burden to show that there is a substantial possibility of Supreme Court review and that there is good cause for a stay. Accordingly, the motion should be denied.

I. There is no "substantial possibility" that the Supreme Court will grant a petition for writ of certiorari.

This Court does not grant a motion to stay the mandate in a civil case "unless . . . there is a substantial possibility that a petition for writ of certiorari would be granted." 10th Cir. R. 41.1(B); *see also* Fed. R. App. P. 41(d)(1). The Supreme Court grants such petitions "only for compelling reasons." Sup. Ct. R. 10. With respect to decisions of federal courts of appeals, Rule 10 indicates that the "character of reasons the Court considers" for granting a petition are that the lower court—

> (1) "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter";
>
> (2) "has decided an important federal question in a way that conflicts with a decision by a state court of last resort";
>
> (3) "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power"; or

> (4) "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Sup. Ct. R. 10(a), (c).

None of those highly selective standards is met here. Accordingly, the possibility that a petition for writ of certiorari would be granted is low—not "substantial"—and the CNO's motion to stay the mandate should be denied on that basis alone.

The CNO mainly asserts that a grant of certiorari is a substantial possibility because this Court "decided an important federal question in a way that conflicts with relevant decisions" of the Supreme Court. Motion 4 (quoting Sup. Ct. R. 10(c)); *see also* Motion 5-13. To justify a grant of certiorari on that basis, however, "the conflict must truly be direct and must be readily apparent from the lower court's rationale or result." Eugene Gressman et al., *Supreme Court Practice* ch. 4.5 (9th ed. 2007). The CNO asserts two ways in which this Court's decision is contrary to decisions of the Supreme Court, but neither assertion demonstrates a conflict, let alone the kind of direct and apparent conflict that justifies Supreme Court review.

First, the CNO is incorrect that this Court's decision "directly contravenes" *Carcieri v. Salazar*, 555 U.S. 379 (2009). Motion 5; *see also* Motion 4-9. This Court's decision concerned the authority of the Secretary of the Interior to take land into trust for an Oklahoma Indian

tribe under Section 3 of the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. § 5203. *Carcieri* concerned the Secretary's authority to take such action under a *different* statute, namely, the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5108. *See* 555 U.S. at 387-93. Consequently, even if there were disagreement between the decisions, the CNO is wrong to assert that there is a "direct[]" conflict and that the possibility of Supreme Court review is therefore substantial.

Regardless, this Court's decision is not in tension with *Carcieri*. The OIWA extended "rights or privileges secured to an organized Indian tribe under [the IRA]" to "[a]ny recognized tribe or band of Indians residing in Oklahoma." 25 U.S.C. § 5203. As this Court observed, *Carcieri* explained that "Congress may choose 'to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the definition of 'Indian' set forth in [the IRA]," which is "precisely what Congress did when it enacted OIWA." Slip Opinion 19 (quoting 555 U.S. at 392). "It would be strange for Congress to purport to extend the benefits of the IRA to a new group only to have that extension immediately nullified if the group does not satisfy the IRA's definition of 'Indian.'" *Id.*; *cf. Carcieri*, 555 U.S. at 392 n.6 (noting examples where Congress chose to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the definition of "Indian" in the IRA).

Second, the CNO asserts that this Court's decision "conflicts with the Supreme Court's teachings" regarding "the interaction between a treaty and a federal statute." Motion 9; *see also* Motion 10-13. This Court held that Article 26 of the Treaty with the Cherokee Nation of Indians, July 19, 1866, 14 Stat. 799 ("1866 Treaty"), "does not grant the [CNO] the power to veto the UKB's land-into-trust application." Slip Opinion 27. The CNO identifies no direct and apparent conflict with an applicable Supreme Court decision regarding Article 26. In fact, the Supreme Court has never considered that provision. Neither Supreme Court decision upon which the CNO relies interpreted the 1866 Treaty, let alone Article 26. *See* Motion 11 (citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *Talton v. Mayes*, 163 U.S. 376 (1896)). The CNO also relies upon Article 2 of the Treaty with the Cherokee Tribe of Indians, Dec. 29, 1835, 7 Stat. 478 ("1835 Treaty"). Motion 9-11. But this Court's decision did not construe the 1835 Treaty and the CNO does not identify any relevant controlling Supreme Court decision regarding the 1835 Treaty that this Court failed to apply.

The CNO's contention that the "practical" effect of this Court's decision is the "abrogat[ion]" of certain territorial rights under Article 15 of the 1866 Treaty cannot support its assertion of a direct conflict with Supreme Court precedents because this Court's decision did not interpret Article 15. Motion 9; *see also* Motion 10-11. Regardless, the CNO is incorrect that the trust acquisition violated the 1866 Treaty (or

any other treaty). "It is undisputed that the Subject Tract is entirely within the former [Cherokee] reservation." Slip Opinion 8. The parcel is "fully owned by the [UKB] in fee," Aplt. App. 063, and the CNO does not assert that the parcel is located on CNO trust land, which is where the CNO exercises authority under federal law. *See, e.g.*, 1 *Cohen's Handbook of Federal Indian Law* § 15.08 (2019) (protection of tribal property). The CNO's opposition to the parcel's acquisition into trust therefore does not "involv[e] principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955); *cf.* Motion 9.

In addition, the CNO argues that this Court committed "legal error" in construing a provision in an appropriations statute. Motion 13; *see also* Motion 14-18. Yet "the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." *Supreme Court Practice* ch. 4.17. In fact, Rule 10 admonishes that the Court will "rarely" grant review where the lower court arguably "misappli[ed] . . . a properly stated rule of law." Therefore, even if the CNO's statement of the law were correct, that still would not support its assertion that the likelihood of Supreme Court review is "substantial."

Regardless, this Court correctly held that the appropriations provision "provides explicitly that it amends" an earlier appropriations statute, and that "the substance of the amendment is to require [CNO]

consultation, instead of consent, when using funds to take land into trust within the boundaries of the original Cherokee territory in Oklahoma." Slip Opinion 21 (construing Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-246 (1998)). The CNO mischaracterizes this Court's decision as having "found that Congress had enacted an implied repeal" of a regulation. Motion 15; *cf.* Slip Opinion 22 (dismissing "the district court's concern" regarding "repeal by implication"). Furthermore, the CNO's argument disregards two basic legal principles: that the presumption against implied repeal is a canon for construing "two *acts* upon the same subject," *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) (emphasis added), and that agency regulations yield to statutory commands, *Enfield v. Kleppe*, 566 F.2d 1139, 1142 (10th Cir. 1977).

In sum, the CNO fails to demonstrate that there is a "substantial possibility" of Supreme Court review and that this Court should therefore stay its mandate.

II. There is no "good cause" for continuing the district court injunction of lawful agency action.

In addition, a movant must show "good cause" for staying the mandate. Fed. R. App. P. 41(d)(1). Neither of the CNO's "good cause" arguments is convincing.

First, the CNO asserts that lifting the district court's stay of lawful agency action would constitute an "irreparable harm for as long as it endures" because doing so would "infringe[]" the CNO's "sovereignty." Motion 19-20. The CNO does not attempt to explain how its authority could be implicated through a trust acquisition of a parcel owned in fee by the UKB "within the boundaries of the *original* Cherokee territory in Oklahoma," 112 Stat. at 2681-246—i.e., "within the former [Cherokee] reservation," Slip Opinion 8—but outside any CNO trust land where it may exercise authority. Moreover, as discussed in the government's briefing, both the UKB and the CNO have legitimate claims to be successors to the historical Cherokee Nation that entered into the 1866 Treaty. Opening Brief 10-11; Reply Brief 14-16.

Second, the CNO speculates that the government's acquisition of the parcel into trust will cause "jurisdictional chaos" because state, local, and CNO law enforcement "will be frustrated in the application of their laws." Motion 20. That assertion is based solely on a declaration of the CNO Attorney General that the CNO, unlike the UKB, has "cross-deputization agreements" with the State of Oklahoma and with local governments, and that the UKB "will oppose any attempts . . . to enforce criminal law" within the parcel. Hill Declaration 3-4.

Those predications are contradicted by the administrative record. As the Assistant Secretary-Indian Affairs ("Assistant Secretary") of the

Department of the Interior concluded, the "UKB would have exclusive jurisdiction over land that the United States holds in trust for the Band." Aplt. App. 220. Consistent with that understanding, the UKB's trust application states (1) that the tribe is "fully prepared to exercise . . . jurisdiction" over the parcel; and (2) that the tribe "already has an informal agreement with the City [of Tahlequah] and [Cherokee] County law enforcement agencies whereby the [UKB security force] monitors tribally-owned land and reports any suspicious activities" and "criminal activities." *Id.* at 73. The application further states that once the parcel is acquired into trust, the UKB plans to "enter[] into a formal memorandum of understanding with the City and County law enforcement agencies to memorialize the current informal arrangement regarding law enforcement issues" and to "work with [the Bureau of Indian Affairs] and the U.S. Department of Justice . . . in establishing a tribal law enforcement program." *Id.* at 73-74. These statements undermine the CNO's unfounded assertion that vacating the injunction would result in "jurisdictional chaos."

Furthermore, the UKB's application states that it "does not anticipate any land use conflicts . . . since it only plans to continue its current activities" on the parcel. The Assistant Secretary reasoned that, if necessary, the UKB and the CNO could exercise "shared jurisdiction" over the parcel, which is consistent with the long-held position of the Department of the Interior in support of such

arrangements, including within Oklahoma. *Id.* at 220-21. The Assistant Secretary therefore concluded that if a conflict over land use were to arise, the "UKB and the CNO should be able, as these other tribes have done, to find a workable solution to shared jurisdiction." *Id.* at 221. The position of the Department of the Interior that it could manage any jurisdictional dispute between the UKB and the CNO is uniquely within the Department's cognizance.

Thus, the CNO has failed to demonstrate "good cause" for preserving the district court's injunction of lawful agency action by staying this Court's mandate.

* * * * *

For the foregoing reasons, the motion to stay this Court's mandate should be denied.

Respectfully submitted,

s/ Avi M. Kupfer

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 27

I hereby certify that this response to a motion complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font, using Microsoft Word 2013. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2256 words.

s/ Avi M. Kupfer
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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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FORM CERTIFICATIONS

I hereby certify that:

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