No. 24-3629

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHINOOK INDIAN NATION, et al.,
Plaintiffs–Appellants,

v.

DEB HAALAND, et al.,
Defendants–Appellees.

Appeal from the United States District Court for the
Western District of Washington
No. 3:17-cv-5668 (Hon. Marsha J. Pechman)

APPELLEES' ANSWERING BRIEF

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INTRODUCTION

The Chinook Indian Nation (CIN) seeks a declaratory judgment that it is a federally recognized tribe. Federal recognition is a decision of enduring importance that establishes a government-to-government relationship between the tribe and the United States. But courts—including this Court and the Supreme Court—have consistently held that the decision to recognize an Indian group as a tribe is a nonjusticiable political question committed to the Legislative and Executive branches. Indeed, CIN previously petitioned the U.S. Department of the Interior for federal acknowledgment through the proper administrative process, and Interior denied that petition in 2002.

CIN filed this suit against the United States in 2017, arguing that it is entitled to "place[ment] on the Federally Recognized Indian Tribe List." The district court correctly found that this claim raises a nonjusticiable political question and dismissed the claim for lack of jurisdiction.

CIN raises only one argument as to why that ruling was incorrect: it argues that a congressional finding of fact in the 1994 List Act creates

a cause of action to seek tribal recognition by judicial fiat. But that is wrong—the congressional finding describes historical practice; it does not create a substantive cause of action to sue the United States for a judicial declaration of federal recognition. And, even if this Court finds that the List Act creates a cause of action, CIN's claim is time barred. The district court correctly dismissed CIN's claim, and this Court should affirm.

STATEMENT OF JURISDICTION

The district court had federal-question jurisdiction under 28 U.S.C. § 1331 because CIN brought a claim for relief under the List Act, 25 U.S.C. § 5131, federal treaties, and 28 U.S.C. § 1361. But, as discussed further below, the court correctly found that it lacked subject-matter jurisdiction because CIN's claims present nonjusticiable political questions. The district court entered final judgment on May 9, 2024. ER-22–23. CIN timely filed a notice of appeal on June 3, 2024. ER-21. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether CIN's claim seeking a declaration that CIN "is a federally recognized tribe" presents a nonjusticiable political question.

2. If the district court did possess jurisdiction over CIN's claim, whether the six-year statute of limitations nonetheless bars the claim where Interior issued a final decision denying federal acknowledgment of CIN in 2002 and CIN did not file suit until 2017.

STATEMENT OF THE CASE

A. Statutes and Regulations Governing Federal Acknowledgment

For an Indian group to establish a government-to-government relationship with the United States and be eligible for federal benefits and services, it must be "federally recognized." *See* 25 C.F.R. § 83.2; *see also Cohen's Handbook of Federal Indian Law* § 3.02[3] at 133–34 (2012 ed.). Federal recognition is a "formal political act confirming [a] tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." *Mackinac Tribe v. Jewell*, 829 F.3d 754, 755 (D.C. Cir. 2016) (citation omitted).

Congress has authorized the Executive branch to manage relations with tribes, including to recognize tribes for the purpose of establishing a government-to-government relationship with the United States. *See* 25 U.S.C. § 2 ("The Commissioner of Indian Affairs shall,

under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."); *Id.* § 9 ("The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.").

Historically, Indian tribes were recognized by the United States through treaties approved by Congress or case-by-case decisions of the Executive branch. Since the nineteenth century, courts have held that the question of whether a tribe is entitled to federal recognition is one that lies with Congress and the Executive and is essentially committed to the political branches, not the courts. *See, e.g.*, *United States v. Holliday*, 70 U.S. 407, 419 (1865) (explaining that the Court must follow "the action of the executive and other political departments of the government, whose more special duty it is to determine" questions of tribal organization); *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (holding that "questions whether, to what extent, and for what time [Indian groups] shall be recognized and dealt with as dependent tribes . . . are to be determined by Congress, and not by the courts.");

Kahawaiolaa v. Norton, 386 F.3d 1271, 1276 (9th Cir. 2004) ("[T]he action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review." (citation omitted)).

In 1978, Interior promulgated regulations that established procedures by which Indian groups could petition for federal acknowledgment as tribes. *See* 25 C.F.R. pt. 83. Interior promulgated the Part 83 regulations to ensure that ensure that it took "a uniform approach" in evaluating whether groups were entitled to federal recognition. *Procedures for Establishing that an American Indian Group Exists as an Indian Tribe*, 43 Fed. Reg. 9361, 39361 (Aug. 24, 1978). Under the regulations, Interior conducts a detailed review of political, sociological, genealogical, and anthropological evidence to determine whether a petitioner meets seven criteria for federal acknowledgment. *See* 25 C.F.R. § 83.11. Courts have upheld these regulations as a valid exercise of the Secretary of Interior's authority to manage Indian affairs under 25 U.S.C. § 2 and 25 U.S.C. § 9. *See, e.g.*, *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137–38 (D.C. Cir. 1987).

In 1994, Congress enacted the List Act, which requires the Secretary of the Interior to annually publish a list "of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5131(a). The congressional findings preceding the substantive provisions of the List Act include the statement that "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations, . . . or by a decision of a United States court." Pub. L. 103-454, § 103(3), 108 Stat. 4791, 4791 (1994).

B. Factual and Procedural Background

1. CIN's previous efforts for federal recognition

CIN is a group that is not acknowledged as a federally recognized Indian tribe. In 1981, CIN submitted a petition for federal acknowledgment to the Bureau of Indian Affairs. SER-10. The Bureau of Indian Affairs identified deficiencies in the petition and gave CIN the opportunity to submit several revised petitions, so the petition was not placed under active consideration until 1994. SER-10.

In 1997, Interior published a notice of a proposed finding against federal acknowledgment for CIN. SER-03–05. A lengthy public comment period followed, during which Interior received comments from third parties, including the Quinault Indian Nation. After the third-party comment period, CIN had the opportunity to review and respond to those comments. In 2001, the Assistant Secretary – Indian Affairs issued a final determination concluding that CIN should be federally acknowledged. *Final Determination to Acknowledge the Chinook Indian Tribe/Chinook Nation*, 66 Fed. Reg. 1690, 1691 (Jan. 9, 2001). Although that determination was styled as a "final determination," it only became effective and final if no request for reconsideration was filed with the Interior Board of Indian Appeals within 90 days. *Id.* at 1694; *see* 25 C.F.R. § 83.11(a)(2) (1994) (prior regulation governing review of the Assistant Secretary's determination).

Three parties, including the Quinault Indian Nation, filed requests for reconsideration with the Interior Board of Indian Appeals. *In re Federal Acknowledgment of the Chinook Indian Tribe/Chinook Nation*, 36 I.B.I.A. 245, 245 (2001). The Board found that some issues raised in the proceedings were within its jurisdiction and some were

not. *Id.* at 247–52. As to the issues within the Board's jurisdiction, the Board affirmed the Assistant Secretary's final determination. *Id.* at 250. As to the issues outside of the Board's jurisdiction, the Board referred those issues to the Secretary of the Interior under 25 C.F.R. § 83.11(f) (1994). That regulation provides that if the Board finds that parties have alleged grounds for reconsideration outside of its jurisdiction, it shall send the request for reconsideration to the Secretary, who has the discretion "to request that the Assistant Secretary reconsider the final determination on those grounds." *Id.* (quoting 25 C.F.R. § 83.11(f)(2) (1994)). The Board referred nine issues to the Secretary for the Secretary to determine if those issues warranted reconsideration. *Id.* at 252.

After receiving further comments from both CIN and the Quinault Indian Nation, former Secretary of the Interior Gale Norton referred eight of the nine issues back to the Assistant Secretary – Indian Affairs for reconsideration. SER-89–94.

In 2002, the Assistant Secretary – Indian Affairs issued a "Reconsidered Final Determination Against Federal Acknowledgment" concluding that CIN failed to demonstrate that they were entitled to

federal acknowledgment under the Part 83 regulations. *Reconsidered Final Determination to Decline to Acknowledge the Chinook Indian Tribe/Chinook Nation*, 67 Fed. Reg. 46204 (July 12, 2002).

First, the Assistant Secretary found that CIN had not shown that it was "identified as an Indian entity by external observers on a substantially continuous basis between 1873 and 1951." *Id.* at 46205. Second, the Assistant Secretary found that CIN did not present evidence of social interaction at a level sufficient to meet the criterion for federal acknowledgment. *Id.* Finally, the Assistant Secretary found that CIN had not shown that it exercised political influence over their members from historical times to present. *Id.* at 46205–06.

Thus, the Assistant Secretary concluded that CIN was not a federally acknowledged Indian tribe within the meaning of federal law. *Id.* at 46206. That determination superseded the 2001 determination and was final and effective upon publication. *Id.* CIN did not seek judicial review of that determination.

2. This lawsuit and the proceedings below

In 2017, CIN filed the present lawsuit. CIN presented eight claims in its complaint. ER-229–45. Relevant here is CIN's first claim, which

sought "a declaration from [the district court] that the [CIN] is [a] federally recognized tribe," an injunction ordering Interior to "provide [CIN with] benefits accorded to federally recognized Tribes," and an order appointing a special master to oversee this process. ER-231–32.

In 2018, the district court granted Interior's motion to dismiss this claim for declaratory judgment that CIN is a federally recognized tribe. ER-50. The court first recognized that "[i]t is well-established precedent that issues of tribal acknowledgment present non-justiciable political questions." ER-36. The court rejected Plaintiffs' assertion that the statement in the findings section of the 1994 List Act noting that "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations, . . . or by a decision of a United States court" established a right of action for a judicial determination of tribal acknowledgement. *See* Pub. L. 103-454, § 103(3). On that score, the district court examined the only other case directly addressing the question of whether the congressional findings in the List Act empower federal courts to unilaterally recognize Indian tribes. ER-37 (citing *Shinnecock Indian Nation v. Kempthorne*, No. 06-CV-5013, 2008 WL 4455599 (E.D.N.Y.

Sep. 30, 2008)). The district court found *Shinnecock's* holding persuasive. In *Shinnecock*, the court held that that the congressional findings in the List Act do not create substantive rights, but rather summarize the historical practices of the political branches to adopt judicial determinations of tribal status on an ad hoc basis. *See* ER-37–38 (citing *Shinnecock*, 2008 WL 4455599 at *16–17).

The district court further agreed that the "Congressional findings accompanying the List Act do not authorize 'a tribe to completely bypass the recognition procedure established by the political branches and create a government-to-government relationship through judicial fiat.'" ER-39 (quoting *Shinnecock*, 2008 WL 4455599 at *2). Thus, the district court adhered to the "well-established legal principle that the issue of federal acknowledgment of Indian tribes is a quintessential political question that must be left to the political branches of government and not the courts." ER-39. The district court dismissed CIN's first claim for lack of subject-matter jurisdiction. ER-40.

The district court litigation proceeded on the other claims until 2024. In 2024, the district court issued a final judgment dismissing CIN's first claim and adjudicating CIN's remaining claims not relevant

to this appeal.[1] ER-22. CIN filed a notice of appeal as to the court's dismissal of its first claim. ER-21.

SUMMARY OF ARGUMENT

1. The district court correctly dismissed CIN's claim seeking a judicial declaration that CIN is a federally recognized Indian tribe as a nonjusticiable political question. The Supreme Court, this Court, and other courts of appeals have consistently held over the course of more than 100 years that issues of tribal recognition are quintessential political questions committed to Congress and the Executive branch. The congressional findings in the List Act of 1994 do not alter this well-established law. And, as every other court to consider the issue has concluded, those findings do not create a cause of action for putative tribes to obtain federal recognition in the first instance in federal court. The district court correctly held that CIN's claim raises a nonjusticiable political question, and this Court should affirm that judgment.

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[1] One of those claims challenged the portion of the Part 83 regulations that barred putative tribes from re-petitioning for federal acknowledgment after their petitions had previously been denied. On July 12, 2024, Interior published a proposed revision to the regulations that would allow re-petitioning in limited circumstances. *Federal Acknowledgment of American Indian Tribes*. 89 Fed. Reg. 57097, 57100 (July 12, 2024).

2. In the alternative, even if CIN's claim presents a justiciable question, the six-year statute of limitations in 28 U.S.C. § 2401(a) bars the claim. Interior issued a final decision denying federal acknowledgment to CIN in 2002 and CIN did not file suit until 2017. Thus, any right of action—whether under the List Act or the Administrative Procedure Act—accrued no later than 2002. This Court can affirm on the alternative ground that CIN's claim is time-barred.

STANDARD OF REVIEW

This Court reviews an order dismissing a plaintiff's claims as nonjusticiable political questions de novo. *Defense for Children International-Palestine v. Biden*, 107 F.4th 926, 930–31 (9th Cir. 2024). The Court may affirm the district court's dismissal on any ground supported by the record. *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014).

ARGUMENT

CIN's claim that the court has authority to unilaterally grant it tribal status is barred for two reasons. First, the district court correctly held that it lacked subject-matter jurisdiction to hear the claim because the question of whether CIN is entitled to federal recognition is a

nonjusticiable political question. Second, even if the Court finds that CIN's claim is justiciable, the six-year statute of limitations bars CIN's claim because Interior issued a final decision denying federal recognition to CIN in 2002, and CIN did not file suit until 2017. This Court should affirm the district court's dismissal.

I. The district court correctly held that CIN's claim is a nonjusticiable political question.

This Court should affirm the district court's dismissal because the district court correctly found that it lacked subject-matter jurisdiction to consider CIN's claim, which raises a nonjusticiable political question. CIN's only argument as to why the court has jurisdiction to consider its claim relies on the congressional findings in the List Act, which the district court correctly determined do not create a substantive right of action against the United States for a judicial declaration of federal recognition.

A. CIN's claim that it is entitled to federal recognition is a nonjusticiable political question.

Federal courts lack jurisdiction to decide "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170

(1803); *see also Defense for Children Int'l*, 107 F.4th at 930 (courts lack subject-matter jurisdiction to decide political questions because the political-question doctrine is a limit on the powers of the judiciary). The political-question doctrine thus excludes from judicial review "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). The doctrine is a function of the separation of powers and reflects that "federal courts decide only matters of law, with the elected branches setting the policies of our nation." *Defense for Children Int'l*, 107 F.4th at 930.

The Supreme Court has repeatedly held that issues of tribal recognition are quintessential nonjusticiable political questions. *See, e.g.*, *Holliday*, 70 U.S. at 419 (explaining that the Court must follow "the action of the executive and other political departments of the government, whose more special duty it is to determine" questions of tribal organization); *Sandoval*, 231 U.S. at 46 (holding that "questions whether, to what extent, and for what time [Indian groups] shall be recognized and dealt with as dependent tribes . . . are to be determined

by Congress, and not by the courts."); *Baker v. Carr*, 369 U.S. 186, 215 (1962) ("This Court's deference to the political departments in determining whether Indians are recognized as a tribe, while it reflects familiar attributes of political questions, also has a unique element in that 'the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.'" (citation omitted)).

This Court, as well as other courts of appeals, have also repeatedly recognized this rule. *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015) (en banc) ("[F]ederal recognition of a tribe [is] a political decision made solely by the federal government . . . ."); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1276 (9th Cir. 2004) (finding that, although certain types of claims are not barred, "a suit that sought to direct Congress to federally recognize an Indian tribe would be non-justiciable as a political question."); *Miami Nation of Indians of Indiana v. U.S. Dep't of the Interior*, 255 F.3d 342, 347 (7th Cir. 2001) ("[T]he action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review."); *Wyandot Nation of Kansas v. United States*, 858 F.3d

1392, 1401–1402 (Fed. Cir. 2017) (noting the "long history making clear that tribal recognition is a political question committed to the political branches"); *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1126 (10th Cir. 1979) ([T]he power [over tribal relations] has always been deemed a political one not subject to the control of the judicial branch of government.").[2]

The significant consequences that flow from federal acknowledgment reinforce why that determination is committed to the political branches. Federal acknowledgment "is one of the most significantly consequential actions [Interior] takes in any context." *Federal Acknowledgment of American Indian Tribes*, 87 Fed. Reg. 24908, 24914 (Apr. 27, 2022). It establishes a government-to-

[2] The D.C. Circuit applies similar reasoning and reaches the same result through application of the exhaustion doctrine. *See, e.g.*, *James*, 824 F.2d at 1137–38. That court recognizes that "Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations," and Interior has established a regulatory scheme to determine which Indian groups are to be acknowledged by the federal government as tribes. *Id.* at 1137. In this circumstance, exhaustion of administrative remedies is required. *Id.* The D.C. Circuit also reasons that, given the complexity of the issue and Interior's "significant expertise and experience in evaluating recognition claims," allowing Interior to make these determinations respects Congress's choice to delegate the decision to the agency, protects agency autonomy, and promotes judicial economy. *Mdewakanton Band of Sioux in Minn. v. Haaland*, 848 F. App'x 439, 440 (D.C. Cir. 2021).

government relationship between the United States and the tribe, which is by itself highly consequential. Federally recognized tribes have sovereign immunity, can exercise jurisdiction in Indian county, can administer funds under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450–450n, and establish gaming facilities as permitted under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721, among other things.

Under this precedent, CIN's claim that the court should issue a declaratory judgment that CIN "is [a] federally recognized tribe" and should order Interior to place CIN on the list of federally recognized tribes, ER-231, is barred because it raises a nonjusticiable political question. The district court correctly found that it did not have subject-matter jurisdiction to determine whether CIN is entitled to federal recognition as an Indian tribe.

B. The congressional findings in the List Act do not create substantive rights or permit courts to recognize tribes by judicial fiat.

Against the backdrop of uniform caselaw holding that a request for tribal recognition poses a nonjusticiable political question, CIN points only to the congressional findings in the List Act to argue that

this Court nonetheless has jurisdiction to hear their claim. The 1994 List Act requires the Secretary of the Interior to annually publish a list of all Indian tribes "*which the Secretary recognizes* to be eligible" for the programs and services provided to federally recognized tribes. 25 U.S.C. § 5131(a) (emphasis added). But according to CIN, the List Act's findings referencing tribal recognition "by a decision of a United States court" means that federal courts also must have jurisdiction to adjudicate and declare tribal status and to compel the Executive branch to recognize the group as eligible for federal programs and services. *See* Pls' Br. 1. That argument is wrong.

Congressional findings do not by themselves create substantive rights or causes of action. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Congressional findings cannot be read in isolation, and a general statement of congressional findings, by itself, is generally "too thin a reed" to create substantive rights. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 (1981) (holding that congressional findings that "[p]ersons

with developmental disabilities have a right to appropriate treatment," when read in context of other more specific provisions of a statute, did not create substantive rights but merely expressed congressional preference for certain kinds of treatment); *see also Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994) ("We also think that the quoted statement of congressional findings is a rather thin reed upon which to base a requirement of economic motive neither expressed nor, we think, fairly implied in the operative sections of the Act.").

CIN must point to some clear language in the substantive portion of the List Act that overcomes the 100+ years of precedent discussed in Section I.A and authorizes courts to entertain suits to determine tribal status and require the Executive branch to recognize a tribe. But it has not done so. Nothing in the List Act suggests that Congress intended the congressional findings to sweep aside all pre-1994 jurisdictional barriers and allow courts to recognize tribes by judicial fiat.

Rather, § 104 of the List Act—the only substantive provision of the statute—creates only the requirement that the Secretary of the Interior publish an annual list of federally recognized tribes. 25 U.S.C. § 5131(a). Nothing in the statute evinces any congressional intent to

relinquish Congress's plenary authority over issues of federal recognition. Nor does CIN point to any legislative history that supports such a sweeping interpretation of the nonsubstantive provisions of the Act. Absent any support in the substantive provisions of the List Act or the legislative history of the Act, this Court should not read the congressional findings in the List Act to implicitly overturn 100 years of Supreme Court precedent that questions of tribal recognition are "to be determined by Congress, and not by the courts." *Sandoval*, 231 U.S. at 46.

The congressional findings in the List Act, in context with the Act's substantive provisions, are best read as describing historical practice, not vesting courts with newfound jurisdiction to recognize tribes. Prior to the promulgation of the Part 83 regulations in the late 1970s, the federal government recognized Indian tribes on a case-by-case basis. *Kahawaiolaa*, 386 F.3d at 1273. Some tribes were recognized by congressional action, some by various forms of administrative determination, and others by cases brought in the courts where tribal status was an element of the claim. *Shinnecock*, 2008 WL 4455599, at *17 (citing the Official Guidelines to the Part 83 regulations).

When Interior adopted the Part 83 regulations it abandoned any practice of case-by-case tribal-recognition determinations, but it remained true that United States courts had previously clarified the tribal status of certain groups, for limited purposes. *See, e.g.*, *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (holding that nothing in the Indian Nonintercourse Act suggests that the term "tribe" is read to exclude non federally recognized tribes and holding that the United States had a limited trust relationship with a then-unrecognized tribe under the Indian Nonintercourse Act). So Congress's factual finding that Indian tribes "presently may be recognized . . . by a decision of a United States court" is best read as just that—a factual finding describing the historical background in which tribes were recognized on an ad hoc basis, such as by a court determining or confirming tribal status for a specific purpose.

Even if the congressional findings in the List Act are a description of the state of the law in 1994 rather than a description of historical practice, the findings still do not create a free-standing cause of action for CIN to assert a federal recognition claim against the United States in federal court. Certainly, putative tribes may seek judicial review

challenging Interior's final agency actions denying tribal-recognition status. *See Agua Caliente Tribe of Cupeño Indians of Pala Reservation v. Sweeney*, 932 F.3d 1207, 1216 (9th Cir. 2019) (explaining that a tribe may petition Interior for recognition and that the Assistant Secretary's final decision on that petition is a final agency action under the APA, which may be challenged in federal court). So it is true that "a decision of a United States court" might ultimately lead to recognition where: (1) a tribe petitioned Interior for federal acknowledgment; (2) Interior denied that petition; (3) the tribe sought judicial review of that final decision; (4) a court found that Interior's decision to deny the petition was arbitrary and capricious; and (5) Interior determined on remand from the court that the tribe was entitled to federal acknowledgment.

But that is not what happened here. CIN does not bring an APA challenge to Interior's final decision denying it federal recognition (nor could it, because the statute of limitations has long since run on any such claim). Rather, CIN argues that it may, independent of Interior's administrative process, bring a claim for federal recognition by judicial fiat. But as explained above, the List Act creates no such claim or right of action. Notably, no court has decided tribal status other than through

APA review of Interior's acknowledgment decisions since the Part 83 process was established in 1978 *Cf. James*, 824 F.2d at 1138 (holding that a putative tribe must exhaust its administrative remedies through the Part 83 process before adjudicating its federal status in court); *Mackinac Tribe v. Jewell*, 829 F.3d 754, 757 (D.C. Cir. 2016) (same).

Every court that has considered the List Act's congressional findings has correctly found that they do not create a cause of action for tribal recognition by judicial fiat. As the district court explained, in *Shinnecock*, the Eastern District of New York thoroughly rejected the argument CIN makes here. *See* ER-37–38.

The District Court for the District of Columbia contemporaneously rejected a similar claim in *Burt Lake Band of Ottawa and Chippewa Indians v. Zinke*, 304 F. Supp. 3d 70 (D.D.C. 2018). There, the court held that the List Act did not provide an independent cause of action by which a putative tribe could seek federal recognition and held that the court did "not have free-standing authority to by-pass the entire federal recognition process and order the agency to add plaintiff to the List [of federally recognized tribes]." *Id.* at 81.

And the D.C. Circuit rejected an analogous argument in *Kanam v. Haaland*, No. 22-5197, 2023 WL 3063526 (D.C. Cir. Apr. 25, 2023). In *Kanam*, the court noted that "plaintiffs do not explain how a congressional finding in the List Act—describing how tribes previously were recognized—could impose any mandatory duty on Interior." *Id.* at *1. Like the district court in this case, the D.C. Circuit concluded that the congressional findings in the List Act "are not a statement of what the law is, but rather a summary of the processes by which tribes were recognized prior to the adoption of the Part 83 acknowledgment regulations." ER-38; *see also Mdewakanton Band*, 848 F. App'x at 440 ("But the Act does not thereby empower a court to rely on evidence of pre-Act congressional acknowledgment to mandate recognition of a tribe that has not completed the Part 83 process."). The Tenth Circuit has also recognized that "the limited circumstances under which ad hoc judicial determinations of recognition were appropriate have been eclipsed by federal regulation." *W. Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1056 (10th Cir. 1993); *see also United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 550–51 (10th Cir. 2001) (exhaustion of administrative remedies is required when a

plaintiff "attempts to bypass the regulatory framework for establishing that an Indian group exists as an Indian tribe").

CIN's arguments attempting to distinguish this caselaw are wrong. CIN argues that the *Shinnecock* decision was erroneous (it does not address the other cases), but it points to nothing in the List Act that indicates that the court misread the congressional findings. *See* Pls' Br. 27–28. CIN argues that the fact that the findings state that Indian tribes "presently" may be recognized by a decision of a United States court means that they necessarily state the present state of the law. Pls' Br. 28. But, as explained above, the findings are best read as a factual description of historical practice, not a newfound grant of jurisdiction permitting courts to adjudicate tribal status.

CIN cites several cases that it claims "apply[] the List Act findings," Pls' Br. 22, but none of those cases involve a putative tribe seeking federal recognition from a court. *Frank's Landing Indian Community v. National Indian Gaming Commission*, 918 F.3d 610 (9th Cir. 2019), concerned whether the non-federally recognized Frank's Landing Indian Community was eligible for gaming under the Indian Gaming Regulatory Act. *Id.* at 612. This Court cited the List Act's

congressional findings in its factual background discussion, but it did not hold that the findings created a cause of action for a putative tribe to seek recognition in federal court. *Id.* at 614. Likewise, the Tenth Circuit cited the List Act's findings in its background discussion in *Cherokee Nation of Oklahoma v. Norton*, 389 F.3d 1074, 1076 (10th Cir. 2004), but that suit did not seek a declaratory judgment of federal recognition; rather, it sought APA review of Interior's decision to recognize a tribe. *Id.* at 1077–78.

Similarly, the district court in *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212 (D.D.C. 2016), cited the List Act findings only as part of a background discussion of legislative history reflecting Congress's concern with Interior "derecognizing" tribes. *Id.* at 301; *see also United States v. Livingston*, No. CR-F-09-273, 2010 WL 3463887, at *12 (E.D. Cal Sep. 1, 2010) (discussing the List Act's findings in the context of the former policy of terminating tribal recognition).

CIN also complains that the district court failed to address an unreported district court opinion, *Gristede's Foods, Inc. v. Unkechauge Nation*, No. 06-CV-1260, 2006 WL 8439534 (E.D.N.Y. Dec. 22, 2006).

But in that case—which did not involve the United States—the district court specifically noted that the putative tribe was "not affirmatively seeking federal recognition" from the court but rather a determination of tribal status for the limited purpose of its sovereign immunity defense. *See Gristede's Foods, Inc. v. Unkechuage Nation*, 660 F. Supp. 2d 442, 469 (E.D.N.Y. 2009). The court determined that it had jurisdiction to address this more limited determination. *Gristede's Foods*, 2006 WL 8439534, at *3–*4. In contrast, CIN does affirmatively seek federal recognition from the court, and thus falls on the wrong side of the *Gristede's Foods* court's distinction. That case does not aid CIN.

Finally, CIN cites *Jamul Action Committee v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020) for the proposition that this Court views the List Act's findings as "substantive law." Pls' Br. 24–25. But that case concerned a challenge to the status of a tribe that was included on Interior's list of recognized tribes, and the *Jamul* court relied on the List Act to reject any distinctions among the rights and privileges afforded to tribes on the List. *Jamul*, 974 F.3d at 993. The *Jamul* court nowhere suggested that the congressional findings create a substantive right to seek tribal recognition in court.

In sum, none of the cases that CIN cites stand for the proposition that the List Act's congressional findings create a substantive right to seek tribal recognition in court. In fact, every court to squarely address this issue has rejected this argument. *See supra* at 24–26.

CIN's remaining argument is that the congressional findings in the List Act must create substantive rights because otherwise the Department of Interior has no statutory basis by which to recognize tribes or issue its Part 83 regulations. Pls' Br. 12–17. As an initial matter, this back-door attack on Interior's regulatory authority argument is forfeited. Nowhere in its district-court briefing did CIN raise the argument that Interior lacked authority to promulgate the Part 83 regulations. *See* SER-107–13. Absent exceptional circumstances, this Court does not "consider arguments raised for the first time on appeal." *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1213 (9th Cir. 2020). The Court should decline to consider this issue on appeal.

Nor is the question of Interior's authority to promulgate the Part 83 regulations properly before the Court. That is because CIN's claim on appeal does not challenge the validity of the Part 83 regulations or

any decision of Interior taken under those regulations but rather asserts a statutory right to have the district court decide the recognition question in the first instance, wholly independent of the Part 83 process. And to the extent CIN *is* challenging Interior's final recognition decision—either on the ground that the Part 83 regulations are ultra vires or on any other basis—that claim is time barred. *See infra* at 34–37.

But if the Court were to reach CIN's argument, it should reject it. Exercising its "plenary power over Indian affairs," *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998), Congress granted Interior broad authority over Indian affairs, including the authority to issue the Part 83 regulations. First, 25 U.S.C. § 2 instructs that the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, shall "have the management of all Indian affairs and of all matters arising out of Indian relations." Second, 25 U.S.C. § 9 permits the President to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs." Together, these statutes delegated to the executive branch the

power to establish the criteria for recognizing a tribe. *Miami Nation*, 255 F.3d at 345.

Courts have consistently found that Interior has statutory authority to issue the Part 83 regulations. *See, e.g.*, *id.* at 346 (holding that an argument that the Part 83 regulations were not authorized by Congress was "clearly incorrect"); *James*, 824 F.2d at 1138 ("Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. Regulations establishing procedures for federal recognition of Indian tribes certainly come within the area of Indian affairs and relations."); *see also Agua Caliente Tribe*, 932 F.3d at 1214 (citing 25 U.S.C. § 9 in its discussion of the history of the Part 83 regulations). As the Seventh Circuit observed in *Miami Nation*, Interior possesses this authority even though these statutes do not set forth "any criteria to guide the exercise of that power." 255 F.3d at 345; *see also id.* at 346–47 (observing that it is not clear that the Executive's recognition authority has to be specifically authorized by Congress given that recognition of tribes is "traditionally an executive function.").

Indeed, the substantive provisions of the List Act acknowledge Interior's authority to federally recognize tribes. 25 U.S.C. § 5131(a). The List Act instructs the Secretary of the Interior to publish a list of all Indian tribes "which *the Secretary recognizes* to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *Id.* (emphasis added). This acknowledgment that the Secretary may recognize tribes further undermines CIN's argument that the List Act's congressional findings must be the source of the Interior's federal recognition authority. Pls' Br. 12; *see also* 25 U.S.C. § 5130(2) (defining an "Indian tribe" as a community "that the Secretary of the Interior acknowledges to exist as an Indian tribe"); *Frank's Landing*, 918 F.3d at 619 (explaining that, in light of § 5131, Congress "was knowledgeable about Interior's longstanding Part 83 regulations").

CIN also argues that no statute other than the List Act's congressional findings provides an "intelligible principle" to guide Interior's exercise of authority in recognizing tribes. Pls' Br. 15–16 (citing *Gundy v. United States*, 588 U.S. 128, 146 (2019) (plurality decision)). Again, this argument is forfeited because CIN did not raise it

in district court. Nor is a constitutional challenge to Interior's regulations properly considered in a suit that does not challenge those regulations or any decision thereunder. This Court should decline to consider it on appeal.

But if the Court were to address the issue, it has already explained that Interior "exercised its delegated authority" when it promulgated the Part 83 regulations, *Kahawaiolaa*, 386 F.3d at 1273, and need not reconsider that conclusion here. And as the Seventh Circuit observed in *Miami Nation*, given the Executive's exclusive authority to recognize foreign nations as well as its treaty power, the usual standards for congressional authorization may not apply. 255 F.3d at 345, 346–47. *See also Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1037 (E.D. Cal. 2012) (holding that the delegation of authority to Interior to promulgate the Part 83 regulations did not violate the nondelegation doctrine based on the "centuries of history and judicial opinions adjudicating and upholding" the regulations).

In any event, CIN incorrectly asserts that 25 U.S.C. §§ 2 and 9 cannot delegate federal-recognition authority to Interior because they delegate to Interior the management of all Indian affairs, "which is a

broader portfolio tha[n] the Constitution gives Congress to regulate 'Commerce . . . with the Indian Tribes.'" Pls' Br. 16. The Supreme Court has repeatedly rejected this argument, holding that Congress's power under the Indian Commerce Clause "encompasses not only trade, but also 'Indian affairs.'" *Haaland v. Brackeen*, 599 U.S. 255, 278 (2023) (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)).

In sum, the district court correctly held that the congressional findings in the List Act do not permit CIN to seek federal recognition by judicial fiat. This Court should affirm the district court's dismissal.

II. Any claim that Interior improperly denied CIN's request for federal recognition is barred by the statute of limitations.

If the Court determines that the district court erred in dismissing CIN's claim as barred by the political question doctrine, it may nonetheless affirm the dismissal on the grounds that CIN's claim is barred by the statute of limitations.

Every civil action commenced against the United States is barred "unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). A claim "accrues" when "the plaintiff

has the right to assert it in court"; in the case of the APA, "that is when the plaintiff is injured by final agency action." *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. ___, 144 S. Ct. 2440, 2448 (2024). Thus, CIN must file suit within six years of when it was first injured and had a right to assert a claim in court.

An APA challenge to Interior's 2002 denial of its petition for recognition would have been the proper avenue to address the issues in this suit. *See Agua Caliente Tribe,* 932 F.3d at 1216. Although CIN does not frame its claim under the APA (presumably because it knows such a claim would be time-barred), if this Court treats CIN's federal-recognition claim as an implicit APA challenge to Interior's denial of their petition, that claim is barred by the six-year statute of limitations. Interior published notice of its decision to deny CIN's petition for acknowledgment on July 12, 2002. *Reconsidered Final Determination To Decline To Acknowledge the Chinook Indian Tribe/Chinook Nation*, 67 Fed. Reg. 46204 (July 12, 2002). It was at that point that CIN was injured by final agency action and had the right to challenge that action in court. *See* 25 C.F.R. § 83.44. Thus, the six-year statute of limitations on any claim challenging that action elapsed on July 12, 2008. CIN now

(presumably) asks the district court to override Interior's determination, but that claim is long-since barred by the statute of limitations.

Even if this Court assumes that CIN has a non-APA cause of action to seek federal recognition under the List Act, that claim would also be barred by the six-year statute of limitations. A non-APA claim against the federal government accrues when the claim is "perfected," in other words, when plaintiffs "knew or should have known the facts upon which their claims are based." *Sisseton-Wahpeton Sioux Tribe, of Lake Traverse Indian Reservation, N. Dak. & S. Dak. v. United States*, 895 F.2d 588, 594 (9th Cir. 1990).

If CIN is asserting that it qualified for federal recognition as of 1851, it knew or should have known the facts upon which this claim is based is 1995, when Interior first left CIN off the list of federally acknowledged tribes. *See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 60 Fed. Reg. 9250 (Feb. 16, 1995). At the very latest, CIN's claim to federal recognition was "perfected" when Interior denied its petition for federal acknowledgment in 2002 because by that time, CIN "knew or should

have known" the facts upon which its claim for recognition was based. *Sisseton-Wahpeton Sioux Tribe*, 895 F.2d at 594. Under any formulation, CIN's claim is time-barred by the six-year statute of limitations.

CONCLUSION

For these reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

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ADDENDUM

25 U.S.C. § 5131

Publication of list of recognized tribes

(a) Publication of list

The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) Frequency of publication

The list shall be published within 60 days of November 2, 1994, and annually on or before every January 30 thereafter.

Pub. L. 103-454, § 103 (1994)

Findings

The Congress finds that—

(1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;

(2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;

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

(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;

(5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;

(6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;

(7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and

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