No. 11-80

In The
Supreme Court of the United States

GILA RIVER INDIAN COMMUNITY,
Petitioner,

v.

G. GRANT LYON

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

REPLY BRIEF FOR THE PETITIONER

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To be clear: the law in the Ninth Circuit, embraced by respondent, is that even when it is undisputed that sovereign immunity *bars suit against the United States*, federal courts can nevertheless plow ahead and both adjudicate and compromise the *United States'* title to *United States'* lands without the United States being a party to or even notified of the litigation—all based on a judicially minted, "somewhat incongruous" exception to Congress's express statutory reservation of sovereign immunity (Pet. App. 12a). On top of that, as the amici explain, Ninth Circuit law also allows the property rights of individual landowners to be

decided and eroded without *either* that individual *or* the United States as trustee participating in the case. *See* Brief for Amicus Curiae Indian Land Working Group in Support of Petition, No. 11-80; Amicus Curiae Brief for Kennard B. Johns and Melva Enos in Support of Petition, No. 11-80. Those would be extraordinary propositions of law under any circumstances. They are even more so here because they are in the teeth of this Court's precedent.

In the wake of *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008), the only basis proffered for perpetuating the Ninth Circuit's ad hoc outbalancing of sovereign immunity under Rule 19(b) is that this case involves the United States' sovereign immunity, while *Pimentel* involved a foreign sovereign. That "narrow[]" reading of *Pimentel* (Pet. App. 14a), however, has no foundation in *Pimentel* or this Court's precedent, and it has been rejected by the Federal Circuit and by the United States itself.

Finally, the essential predicate for the Ninth Circuit's presumption that petitioner can stand in for the United States is an equation of tribal and federal governmental interests in trust property that this Court rejected just last Term in *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011). Furthermore, that now-outmoded equation of interests does nothing at all to explain how petitioner's involvement could possibly substitute for the presence of individual landowners like the amici whose completely independent rights in completely separate pieces of property were compromised in their absence and without so much as a warning notice.

A. The Decision Conflicts With This Court's Law

The issue in this case is quite straightforward: When litigation indisputably "would impair the government's right[s]" in property, Pet. App. 9a, and when sovereign immunity indisputably bars federal courts from adjudicating the United States' rights, *id.*; 28 U.S.C. § 2409a(a), whether courts may nonetheless compromise the United States' title in the United States' absence based on a judicially devised exception to that sovereign immunity bar.

Unless, as the Ninth Circuit posited (Pet. App. 14a), *Pimentel* is confined to foreign sovereigns, then this Court's decisions prohibit such litigation. *Pimentel* held that, once a sovereign is a required party under Rule 19(a), sovereign-immunity protection for the legal interests at stake is a factor "'compelling by [itself]'" that mandates "dismissal of the action" under Rule 19(b). 553 U.S. at 863, 867. Allowing litigation to proceed in the absence of the required-but-immune sovereign vitiates the very purposes of immunity and is "itself an infringement on * * * sovereign immunity." *Id.* at 864. To put it simply, "[a] case may not proceed when a required-entity sovereign is not amenable to suit." *Id.* at 867.

This Court's decision in *Minnesota v. United States*, 305 U.S. 382 (1939), confirms that the same rule applies to suits seeking to compromise rights in Indian lands to which the United States holds title in trust. Because the United States "is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees," this Court held that "the right of way cannot be condemned without making it a party." *Id.* at 386. "[N]o effective relief," the Court underscored, "can be given

in a proceeding to which the United States is not a party," and "the United States is therefore an indispensable party to any suit to establish or acquire an interest in the lands." *Id.* at 387 n.1.

Twice more this Court held that cases must be dismissed when they seek to adjudicate property interests in which the United States has a direct stake, and sovereign immunity prevents joining the United States. *See Texas v. New Mexico*, 352 U.S. 991 (1957) (*per curiam*); *Arizona v. California*, 298 U.S. 558 (1936).

Respondent's answer to those cases, like the Ninth Circuit's decision, defies their basic holdings.

First, respondent's only answer to the *Texas* and *Arizona* cases is that they "involved disputes between States over water rights." Opp. 12 n.7. Indeed they did. But it is the legal rule applied that is relevant here and that respondent cannot distinguish. *Pimentel*, *Minnesota*, *Texas*, and *Arizona* foreclose as a matter of law the Ninth Circuit's ad hoc Rule 19(b) decision to strike the balance against sovereign immunity while compromising the sovereign's title. *Pimentel* leaves no room for that "discretion[ary]" balancing of factors (Opp. 13) because sovereign immunity is among the factors that are "compelling by themselves." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118-119 (1968); *see Pimentel*, 553 U.S. at 864, 869; *Minnesota*, 305 U.S. at 386-387 & n.1. Indeed, "[t]he court's consideration of the merits [i]s itself an infringement on * * * sovereign immunity," *Pimentel*, 553 U.S. at 864.

In short, the Ninth Circuit has reduced the United States' immunity under the Quiet Title Act to

nothing more than a procedural right to stand on the sidelines and watch its legal title be whittled away.

Second, equally misguided is the argument (Opp. 15) that "[the United States] may institute its own action against the Trustee." It is a strange conception of sovereign immunity that forces the government to choose between the equally sovereignty-compromising options of (i) allowing title to property to be compromised, or (ii) going to court. To hold that this choice does not "coerce" a sovereign into waiving immunity and litigating "would be to blind ourselves to reality." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 763-764 (2002). Sovereign immunity, in other words, prohibits proceedings like this by which the sovereign either "would effectively be required to defend [itself]" or would "substantially compromise its ability to defend itself at all." *Id.* at 762.

B. The Ninth Circuit's *Puyallup* Rule Has Overreached

Central to respondent's opposition (Opp. 18-21) is its invocation of *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983). That makes matters worse, not better. The Ninth Circuit itself confessed that this pre-*Pimentel*, judicially minted exception to the United States' sovereign immunity is "somewhat incongruous" with modern immunity principles. Pet. App. 12a. And respondent's citation (Opp. 21-22) of multiple pre-*Pimentel* cases from the Ninth Circuit and other circuits does nothing more than document the same doctrinal errors that were reversed in *Pimentel*.

The argument that *Puyallup* has worked just fine (Opp. 16-18), moreover, fails to come to grips with the

Ninth Circuit's profound repudiation of *Pimentel* and *Minnesota* in this case. Following the Ninth Circuit's adoption of *Puyallup*, Judge O'Scannlain had presciently warned that Rule 19(b) must mandate dismissal if "the court quite literally cannot give the plaintiff the interest that it seeks without simultaneously taking that interest away from the absent non-party." *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1502 (9th Cir. 1991) (O'Scannlain, J., concurring in part and dissenting in part). That warning was not heeded, however, as the Ninth Circuit has now used its *Puyallup* doctrine to accomplish the forbidden result of "giv[ing] the plaintiff the interest that is seeks" – an easement – by "simultaneously taking that interest away from the absent non-party" United States, *id.*[1]

That same failure to comprehend the sovereign-immunity principles at stake pervades respondent's reading of this Court's precedent. Not one of this Court's decisions cited by respondent (Opp. 7-8) involved litigation that would compromise the United States' title to land in the United States' absence. In fact, in two of the cases, the United States was a party, and thus they are completely off-point. *See United States v. Candelaria*, 271 U.S. 432 (1926); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919).

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[1] Respondent's suggestion (Opp. 21-22) that other Ninth Circuit pre-*Puyallup* decisions help its cause is baffling. because in neither *Skokomish Indian Tribe v. France*, 269 F.2d 555 (9th Cir. 1959), nor *Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016 (9th Cir. 1973), was the land or title already held in trust by the United States, and so, unlike here, adjudication would *not* "impair the government's right[s]" (Pet. App. 9a).

The other two did not involve land to which the United States held title. *See County of Oneida N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985); *Creek Nation v. United States*, 318 U.S. 629 (1943). Those distinctions make all the difference.

Finally, respondent's and the Ninth Circuit's heavy emphasis on whether petitioner, the named *defendant* in this action, was the "aggressor" (Pet. App. 12a; Opp. 18) because it filed a bankruptcy proof of claim simply underscores how far afield Ninth Circuit law has stretched. Certainly nothing in the Quiet Title Act nor any decision of this Court holds that the United States' sovereign immunity turns on or off based on the Alice-in-Wonderland-like judicial redubbing of a defendant as a constructive plaintiff, or an "Indian" or a "non-Indian" (Opp. 12) as the "aggressor" or non-aggressor.[2] All that should matter is whether the United States' title to property is being compromised in the United States' absence. *See Pimentel*, 553 U.S. at 871 (whether parties "press claims in the manner of a plaintiff" is irrelevant).[3]

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[2] *See Through the Looking-Glass*, The Complete Works of Lewis Carroll 196 (1939) ("'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what *I* choose it to mean-neither more nor less.'").

[3] Respondent's repeated references (Opp. 3, 5, 9, 19, 23, 24) to petitioner's "counterclaim" not only underscore the arbitrariness of the Ninth Circuit's "Indian" "aggressor" exception to the United States' sovereign immunity, since counterclaims are filed by defendants, but also overlooks that dismissal under Rule 19(b) necessarily would have ended the counterclaims as well. *See Pioche Mines Consol, Inc. v. Fidelity-Philadelphia Trust Co.*, 206 F.2d 336, 336 (9th Cir. 1953).

C. The Inter-Circuit *Pimentel* Conflict

Because *Pimentel* rejected, in specific terms, every step of the Ninth Circuit's analytical outbalancing of sovereign immunity, the court of appeals' bottom-line ruling was that *Pimentel* could be ignored because *Pimentel* is a "narrow[]" ruling limited to "foreign sovereign[s]." Pet. App. 14a. This case thus fundamentally presents the question of whether *Pimentel*'s holding about the role of sovereign immunity analysis in Rule 19(b) is confined to foreign sovereigns or applies to the United States as well. That is critical, for if *Pimentel* does apply, the Ninth Circuit's ad hoc weighing of the very same factors that *Pimentel* rejected necessarily collapses.

On that question, the Ninth Circuit's holding that *Pimentel* is limited to foreign sovereigns squarely conflicts with the Federal Circuit's decision in *A123 Systems, Inc. v. Hydro-Quebec*, 626 F.3d 1213, 1221 (Fed. Cir. 2010). Respondent does not deny or even answer that point.

The United States too has taken the opposite position. *See* Brief of Amicus Curiae United States of America at 28-31, *BGA LLC v. Ulster County*, (2d Cir. 2008) (No. 08-0596-cv) (arguing that *Pimentel* applies to federal sovereign immunity). Respondent argues (Opp. 23) that the United States is unconcerned with litigation that allows its title to property to be compromised in its absence and in defiance of the Quiet Title Act's bar to suit. The short answer is that neither the district court nor the Ninth Circuit bothered to notify the United States of the question presented or to seek its views.

To be sure, respondent is correct (Opp. 23) that the pre-deposition statement of an attorney

representing a paralegal in the Real Estate Services Office of the Bureau of Indian Affairs Western Regional Office said that "the United States has no interest" in the Section 16 "parcel of land." C.A. Supp. E.R. 255. But the sovereign immunity issue here concerns not Section 16, but the surrounding lands over which the easement was implied and in which the United States not only has an interest, but holds title. As to such lands, the position of the United States was clearly articulated to this Court in *Minnesota.* Brief for the United States, *Minnesota v. United States*, No. 73 (S. Ct. Nov. 7, 1938).

Similarly, while the amicus brief filed in *BGA, supra*, plainly reflects the considered views of the Solicitor General and thus of the United States government, *see* 28 C.F.R. § 0.20(c), and it equally plainly conflicts with the Ninth Circuit's ruling here, the non-filing or non-appearance as amicus that respondent cites (Opp. 23) does not require the action of the Solicitor General, and such absence says nothing about the United States' official litigating position on the question at issue.[4]

[4] Although a final determination against amicus participation by the Solicitor General would be a matter of public record as final agency action if such a decision had been made, respondent cites nothing to support its assertion that "the Solicitor General declined" to file (Opp. 23), and petitioner is aware of no such determination by the Solicitor General in this case.

D. The Ninth Circuit's *Puyallup* Rule Now Defies The Basic Due Process Rights Of Landowners

As the two briefs of amici explain, the harm inflicted by the Ninth Circuit's rule is not limited to the United States or petitioner. There is no dispute that the easement that was implied here runs across not only the land of petitioner, but also lands separately owned by private individuals and held in trust by the United States. Pet. App. 43a-44a. As explained by the two amici, the Ninth Circuit's failure to "give full effect to sovereign immunity," *Pimentel*, 553 U.S. at 865, resulted in the extraordinary holding that the property of individual landowners held in trust by the United States could be compromised without *either* the United States *or* the individual landowners being notified of or present in the litigation. That is an incredible and utterly indefensible rule of law as a matter of basic due process, not the "irrelevan[cy]" that respondent supposes (Opp. 7 n.4). And that aspect of the Ninth Circuit's decision underscores the serious implications of judicially crafted codicils to sovereign immunity principles that are so unhinged from legal rules and on-point precedent, like the *Puyallup* rule applied here.

E. The Ninth Circuit's Decision Warrants Vacatur Under *Jicarilla*

Finally, the essential predicate for the Ninth Circuit's decision was that "the government's interests" in the land "are shared and adequately represented by the Community," Pet. App. 14a, and thus that petitioner's presence was an adequate substitute for the United States. That cannot survive this Court's intervening decision in *United States v.*

Jicarilla Apache Nation, 131 S. Ct. 2313 (2011). In *Jicarilla*, this Court held that the United States' legal interests as trustee of Indian lands and the interests of a tribe are not coterminous and that, in fact, the administration of laws concerning tribal trust property is a distinctly sovereign function that the sovereign "has often structured * * * to pursue its own policy goals." *Id.* at 2324; *see also id.* at 2327 n.8 (government's trust relationship with tribes "does not correspond to the fiduciary duties of a common-law trustee"). In particular, when the United States holds land in trust for Indian tribes, "'the United States continue[s] as trustee to have an active interest'" of its own "in the disposition of Indian assets because the terms of the trust relationship embody policy goals of the United States." *Id.* at 2326. That "active interest" in avoiding an easement across United States-held lands was nowhere represented in this litigation.

Respondent's central response (Opp. 15) is that *Jicarilla* "did not even address Rule 19." That is true, but irrelevant. *Jicarilla* established a rule of law about the United States' distinct sovereign interests in trust property, and recognized that the United States shapes the Indian trust relationship as its own sovereign interests dictate.

It is that legal divergence that destroys the critical premise for the Ninth Circuit's equation of tribal and governmental interests in this case. An order granting certiorari, vacating the judgment below, and remanding for reconsideration in light of an intervening decision is proper if "there [is] a 'reasonable probability' that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation." *Tyler*

v. Cain, 533 U.S. 656, 666 n.6 (2001). That "reasonable probability" exists here because of the centrality of the now-displaced presumption of common interests to the court's analysis and its *Puyallup* rule. Furthermore, recognition of the United States' distinct legal interests could change the outcome because the Ninth Circuit has elsewhere held that the United States is an indispensable party to litigation involving Indian tribes in those cases where their interests are not coterminous. *See Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California v. City of Los Angeles*, 637 F.3d 993, 1001-1002 (9th Cir. 2011) (refusing to apply *Puyallup* and dismissing the case because a Tribe's litigation interest could result in a judgment that "'may as a practical matter impair or impede' the United States' ability to protect its interest"). The Ninth Circuit should be afforded the opportunity to bring its law into line with this Court's *Jicarilla* decision.

* * * * *

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted and the judgment either summarily reversed or the case set for plenary review. Alternatively, the Ninth Circuit's judgment should be vacated and the case remanded for further consideration in light of *United States v. Jicarilla Apache Nation*, No. 10-382.

Respectfully submitted.

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