No.

In The Supreme Court of the United States

JAMUL ACTION COMMITTEE, JAMUL COMMUNITY CHURCH, DARLA KASMEDO, PAUL SCRIPPS, and GLEN REVELL,

Petitioners

v.

E. SEQUOYAH SIMERMEYER,
Chairman of the National Indian Gaming Commission; et al.,

Respondents

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

KENNETH R. WILLIAMS
Attorney at Law
980 9th Street, 16th Floor
Sacramento, CA 95814
Telephone: (916) 449-9980
Attorney for Petitioners

QUESTIONS PRESENTED

Petitioners' challenged the federal approvals of a management contract and gaming ordinance for an Indian casino in Jamul, CA. The Ninth Circuit dismissed Petitioners' lawsuit on the basis that the Jamul Indian Village (JIV), a quarter-blood Indian group, was a necessary party which could not be joined because it supposedly had tribal immunity. *JAC v. Simermeyer,* 974 F.3d 984 (9th Cir. 2020)

Tribal immunity is a common law doctrine established by this Court. It applies only to historic tribes which were "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 56 (1978). And only Congress has the plenary authority to change, limit or expand the doctrine of tribal immunity. *Michigan v. Bay Mills Indian Community,* 572 U.S. 782 (2014).

The JIV is not a historic tribe that pre-existed the U.S. It was first created as a half-blood Indian village in 1981. In 1982, it was added to the Bureau of Indian Affairs (BIA) list of "Indian tribal entities" eligible to receive services. In 1993, BIA Director Bacon confirmed that the JIV was not a historic tribe. At that time, it was a "created" tribe. But in 1996, the JIV became a quarter-blood Indian group.

The Ninth Circuit agreed that the JIV is not a historic tribe and that it is now a quarter-blood Indian group. But the Ninth Circuit also held that these facts are not relevant to tribal immunity because Congress "eliminated the distinction between 'created' and 'historic' tribes" in 1994, when it enacted three statutes:

- Pub. L. No. 103-263, Sec. 5(b) (May 31, 1994) - Act amending Section 16 of the Indian Reorganization Act of 1934. (Codified at 25 USC 5123(f)&(g).)

- Pub. L. No. 103-357, Sec.1 (Oct. 14, 1994) - Act amending 25 USC 1300f(a) to add a designation of the Pascua Yaqui Indians as a "historic Indian tribe."

- Pub. L. No. 103-454, Title I, Secs. 101&103 (Nov. 2, 1994) - Act known as the "Federally Recognized Indian Tribe List Act of 1994."

The questions presented by this petition are:

1. Whether, in 1994, Congress eliminated the distinction between "historic tribes" and "created tribes" and, thereby, eliminated the requirement that a tribe must have pre-existed the United States to have tribal immunity

2. Whether the JIV, which became a quarter-blood Indian group in 1996, is a federally recognized tribe, with tribal immunity, by virtue of the fact that it is still on the list of "Indian tribal entities" eligible to receive BIA services.

PARTIES TO THE PROCEEDINGS

The parties to the Ninth Circuit decision under review include:

A. Plaintiffs/Petitioners.

1. Jamul Action Committee (JAC) – a non-profit organization of citizens living in and around the rural unincorporated town of Jamul, California.
2. Jamul Community Church (JCC) – a community based Church located in the town of Jamul which is adversely affected by the JIV casino.
3. Individual Plaintiffs – Darla Kasmedo, Glen Revell, Paul Scripps and William Hendrix (who has since passed away) are all members of JAC.

B. Defendants/Respondents.

1. National Indian Gaming Commission (NIGC) - agency with jurisdiction over Indian land eligible for Indian gaming as defined by IGRA.
2. NIGC Chairman – at the time of the Ninth Circuit's decision, the Chairman was E. Sequoyah Simermeyer.
3. NIGC Chief of Staff – Dawn Houle issued the public notice in 2013 that first claimed the JIV had a "reservation" eligible for gaming under IGRA.
4. United States Department of Interior – cabinet level agency responsible for managing Indian affairs through the Bureau of Indian Affairs (BIA).
5. Secretary of the United States Department of Interior – at the time of the Ninth Circuit's decision, the Secretary was David Bernhardt.
6. Assistant Secretary of Interior for Indian Affairs – at the time of the Ninth Circuit's decision, the Assistant Secretary was Tara Sweeney.
7. BIA Director for the Office of Indian Gaming – Paula L. Hart.
8. BIA Regional Director for the Pacific Region – Amy Dutschke.
9. BIA Chief Environmental Division – John Rydzik.

C. Tribal Defendants/Respondents

10. JIV Council members and officials – Raymond Hunter, Charlene Chamberlain, Robert Mesa, Richard Tellow, and Julia Lotta.

D. Private Defendants/Respondents

11. Penn National Inc. – Financed the JIV casino.
12. San Diego Gaming Ventures – Managed the JIV casino.
13. C.W. Driver – Constructed the JIV casino.

RELATED PROCEEDINGS

A. **Jamul Action Committee et al. v. Stevens et al.**
Ninth Circuit No. 15-16021 (Interlocutory Appeal.)

On January 6, 2015, Plaintiffs filed a motion for preliminary injunction to protect the status quo and compel compliance with NEPA before the casino was constructed. On May 15, 2015, the district court denied JAC's motion. And on July 15, 2016, the Ninth Circuit upheld the district court's denial. *JAC v. Chauduri*, 837 F.3d 958 (9th Cir. 2016). Although petitioners did not seek immediate review in this Court, they reserved the right to seek review of that interlocutory decision, later if necessary. See *MLB Assoc. v. Garvey,* 532 U.S. 504. 509, n.1 (2001).

B. **Jamul Action Committee et al. v. Chauduri et al.**
Ninth Circuit No. 16-16442 (Dismissed Appeal.)

On August 8, 2016, the district court granted the Defendants' motions to dismiss five of the six claims for relief in Plaintiffs' complaint on the basis that the JIV is a necessary party which could not be joined of tribal immunity. The district court also dismissed the remaining claim for other reasons. JAC appealed because all the issues had been resolved. But on June 15, 2017, the Ninth Circuit dismissed Plaintiffs' appeal as premature because a final judgment had not been entered. At JAC's request, the district court entered a written judgment on July 31, 2017.

C. **Jamul Action Committee et al. v. Simermeyer et al.**
Ninth Circuit No. 17-16655 (Current Appeal.)

This appeal was filed two weeks after the judgment was entered on July 31, 2017. The Ninth Circuit upheld the district court decision to dismiss five of the six claims based on the JIV's alleged tribal immunity. The Ninth Circuit also held that JAC had waived the NEPA claim. This is incorrect. Although the NEPA issue was litigated and decided in the interlocutory appeal, it was reserved and not waived. And if the panel's opinion under review here is not reversed, and the JIV had tribal immunity then there was no jurisdiction to decide the NEPA issue and the earlier panel's decision is a "nullity." *Orff v. U.S.*, 358 F.3d 1137, 1149 (9th Cir. 2016).

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INTRODUCTION

This petition involves the scope and nature of the longstanding common law doctrine of tribal immunity as established by this Court. Specifically, for at least the last 100 years, this Court has held, that tribal immunity is a prior or "retained sovereign power" of those Indian tribes that pre-existed the United States and the 1789 Constitution. *Turner v. United States,* 248 U.S. 354 (1919).

But the Ninth Circuit, in the decision under review here, held the opposite. It held that Congress eliminated the requirement that an Indian tribe must be a pre-existing sovereign to have tribal immunity when it enacted three specific statutes in 1994. *JAC v. Simermeyer*, 974 F.3d 984, 993 (9th Cir. 2020). This is incorrect. Congress did not eliminate the requirement that a tribe must be a historic tribe to have tribal immunity. Nor did it expand tribal immunity to non-historic tribes.

"Before the coming of the Europeans, the tribes were self-governing sovereign political communities." *U.S. v. Wheeler*, 435 U.S. 313, 322-323 (1978). "Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of their sovereignty." But "Indian tribes have not given up their full sovereignty." And until Congress acts to limit the powers of Indian tribes, they "retain their existing sovereign powers." *Id.* Tribal immunity is one of the powers that tribes, as pre-existing sovereigns, "retained." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978).

On the other hand, although this Court "has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation." *Kiowa Tribe v. Manufacturing Tech.*, 523 U.S. 751, 759 (1998) (Emphasis added.) But, although Congress has the plenary authority to change, limit or expand the doctrine of tribal immunity, it hasn't done so here. See *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014).

The three 1994 public laws referenced by the Ninth Circuit do not explicitly (or implicitly) eliminate the requirement that a tribe must pre-exist the United States to have tribal immunity. In fact just the opposite is true. Pub. L. No. 103-263 (May 31, 1994) requires federally recognized tribes to be treated equally; it does not mention, much less eliminate, the distinction between "historic" and "non-historic" tribes. Pub. L. No. 103-357 (Oct. 14, 1994) designated the Pascua Yaqui Indians as a "historic Indian tribe" and, in effect, endorsed the historic/non-historic distinction. And Pub. L. No. 103-454 (Nov. 2, 1994), known as "Federally Recognized Indian Tribe List Act of 1994," codified the 25 CFR Part 83 process which requires a tribe to demonstrate it is "historic" to be federally recognized.

Congress, by enacting these three laws did not eliminate the requirement that a tribe must be a pre-existing sovereign to have retained tribal immunity. The Ninth Circuit's conclusion that these three laws expanded the doctrine of tribal immunity to non-historic or created tribes is wrong and should be reversed.

Finally, the situation in this case is even more problematic because, not only is the JIV not – and never was - a historic tribe, in 1996 it abandoned any claim or pretense that it may have had to being a "created" tribe under Section 19 of the Indian Reorganization Act of 1934 (IRA; 25 U.S.C. §5129) when it decided to lower its blood-quantum membership requirement from half Indian blood (allowed by Section 19) to quarter Indian blood (which has no basis in the IRA).

Since 1996, the JIV has been a quarter-blood race-based group of Indians. It no longer claims to be a "created" or "non-historic" tribe of half-blood Indians. Nor is it a federally recognized tribe entitled to tribal immunity or any other tribal privilege or preference. In 1974, this Court held that race based Indian groups, like the JIV, are not entitled to preferences reserved for federally recognized tribes:

> "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Morton v. Mancari*, 417 U.S. 535, 553, n. 24 (1974).

Thus, even if the three 1994 statutes referenced by the Ninth Circuit had eliminated the distinction between historic and non-historic tribes, they did not confer tribal immunity on racial groups of Indians like the JIV. Nor was it appropriate for the federal agencies involved in this case, to give preferences (including the right to build an Indian casino in Jamul) to such a group. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari that this Court review and reverse the decision and judgment of the U.S. Ninth Circuit Court of Appeals dated September 8, 2020, rehearing en banc denied on November 23, 2020.

OPINIONS BELOW

The September 8, 2020 opinion of the Ninth Circuit court of appeals (App. A, A1-25) is reported at 974 F.3d 984 (2020). The August 8, 2016 opinion of the district court (App. C, A27-40) is reported at 200 F. Supp. 3d 1042 (2016).

JURISDICTION

The Ninth Circuit denied a timely petition for rehearing, and judgment was entered, on November 23, 2020. (App. B, A26.). This Court has jurisdiction under 28 U.S.C. §1254(1). This petition is being filed within the 150 day extended deadline allowed by this Court's March 19, 2020 Order. (589 U.S.).

STATUTORY PROVISONS INVOLVED

A. 1994 Amendments to the Indian Reorganization Act

Pub. L. No. 103-263, § 5(b), 108 Stat. 707, 708-709 (May 31, 1994)

SECTIION 5(b) - Section 16 of the Act of June 18, 1934 (25 U.S.C. 476) is amended by adding at the end of the following new subsections (sic):

(f) PRIVILEGES AND IMMUNITIES OF INDIAN TRIBES; PROHIBITION ON NEW REGULATIONS - Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 [cite omitted] as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) PRIVILEGES AND IMMUNITIES OF INDIAN TRIBES; EXISTING REGULATIONS - Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect

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B. 1994 Amendments to the Pascua Yaqui Tribe Act

Pub. L. No. 103-357, § 1(a), 108 Stat. 3418, 3418 (Oct. 14, 1994)

SECTION 1. SOVEREIGNTY OF PASCUA YAQUI TRIBE. (a) IN GENERAL – Subdivision (a) of the first section of the Act entitled "An Act to provide for the extension of certain Federal benefits, services and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes" (25 USC 1300f(a) is amended by inserting after the first sentence the following:

> "The Pascua Yaqui Tribe, a historic Indian tribe, is acknowledged as a federally recognized Indian tribe possessing all the attributes of inherent sovereignty which have not been specifically taken away by Acts of Congress and which are not inconsistent with such tribal status."

C. 1994 Federally Recognized Indian Tribe List Act

Pub. L. No. 103-454, Title I, §§ 101 & 103, 108 Stat. 4791 (Nov. 2, 1994)

SECTION 101. SHORT TITLE

This title may be cited as the Federally Recognized Indian Tribe List Act of 1994.

SECTION 103. FINDINGS:

The Congress finds that:

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

(2) ancillary to that authority the United States has a trust responsibility to recognized 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 U.S. 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 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 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.

STATEMENT OF THE CASE

A. Jamul Indian Village.

Most of the California Indians living near Jamul are descendants of San Diego Mission Indians who decided not to relocate to one of the 20 reservations in Southern California created by Congress pursuant to the Mission Indian Relief Act of 1891. (26 Stat 712, January 12, 1891). Prior to 1980, although some of the Jamul Indians may have been "wards" of the federal government, the group itself was not a federally recognized tribe or separate Indian tribal entity eligible to receive services from the BIA. Nor did they have a separate reservation.

The Jamul Indian group's progress toward organizing itself as a half-blood Indian village, eager to receive BIA aid and services, can be discerned from the correspondence between the BIA California Regional Office and the BIA Washington D.C. Office between 1975 and 1979. (Apps. D&E, A41-43.)

In a memorandum, dated November 7, 1975, regarding the "Jamul Indians, Entitlement to Certain Bureau Services," Deputy BIA Commissioner Krenske noted that there are 20 Jamul Indians who "possess one-half or more degree Indian blood." Mr. Krenske then stated that pursuant to Section 19 of the IRA "certain benefits . . . are available to persons of one-half or more Indian blood even though they lack membership in a federally recognized tribe." He also volunteered that

"[i]f a land base materializes, the adult Indians residing on such trust land would then be entitled to organize pursuant to Section 16 of the IRA." (App. D, A41-42.)

Four years later, on April 10, 1979, the Superintendent of the Southern California Agency sent a memorandum to Commissioner Krenske notifying him that, in 1978, the "Acting Regional Director" accepted a gift of land from the Daleys "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary may designate." (App. E, A43.) After obtaining this parcel, the JIV organized as a half-blood Indian community and adopted a "constitution" in 1981. (App. F, A44-45.) In the Preamble the JIV called itself a "community government" (not a federally recognized tribe). Article III restricted membership to "Persons of ½ or more degree of California Indian Blood" who were connected in some way to JIV. "No person shall be a member of the Jamul Indian Village if he: (d) is less than one half (1/2) degree Indian blood." Art. III Sec. 2(d). (Id.)

The primary reason that the JIV organized as a half-blood Indian community was to obtain financial aid and services from the BIA. Consequently, in 1982, the JIV was placed on the BIA annual list of *"Indian Tribal Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs."* 47 Fed. Reg. 53130-53135 (Nov. 24, 1982). "Indian Tribal Entities" includes "within its meaning Indian tribes, bands, villages, communities and pueblos as well as Eskimos and Aleuts." Id. at 53130, fn. 1. The BIA list includes historic tribes as

well as non-historic tribes and created Indian villages like the JIV. The BIA candidly admits that its list includes entities in "which are not historical tribes." Id. at 53133. Thus, the BIA list is not limited to federally recognized tribes, with tribal immunity, as suggested by the Ninth Circuit.

The history and formation of the JIV half-blood community was explained by the BIA in 1993 when the JIV asked for permission to change the blood quantum membership requirement from one-half to one-quarter Indian blood. (App. G, A46-50.) Carol A. Bacon, Director of the BIA Office of Tribal Services, in a detailed letter informed the JIV that lowering the membership blood-quantum requirement – from half-blood to quarter-blood – would jeopardize the "very basis and foundation" of their organization. Ms. Bacon explained that, because the JIV was organized pursuant to the half-blood provision in Section 19 of the IRA, they are "forever" precluded from lowering the half-blood quantum requirement. "In other words once a half-blood Indian community, always a half-blood community."

Director Bacon further clarified the "origin of the Jamul Indian Village is different than that of a historic tribe." A historic tribe is "a community of people who have a continued as a body politic without interruption since time immemorial and retain powers of inherent authority." She reminded JIV they were not a historic tribe and that the JIV voluntarily chose not to seek recognition under 25 CFR Part 83. Therefore, according to Director Bacon, JIV is, at most, "a created

tribe exercising delegated powers of self-government" – it is not a historic tribe with inherent and retained sovereignty. (Id.) Nor does it have tribal immunity.

Director Bacon also cautioned the JIV that, if they lowered the membership blood-quantum requirement to quarter-blood, it would be "contrary to applicable Federal law and if adopted we [the BIA] would disapprove the constitution or any amendment that contained such language or intent." It would also jeopardize the rights of JIV and "its members to Federal benefits and services." Although the JIV did not directly contest or challenge Director Bacon's decision, it did not heed her caution or warning. As noted by the Ninth Circuit, in 1996 the JIV reduced its membership blood quantum requirement from half-blood or quarter-blood. (A7.)

B. Hollywood Casino of Jamul

Prior to 2013, the consistent position of the federal government was that the JIV did not have a reservation, much less a reservation eligible for Indian gaming under the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. §§ 2701 et seq. But that changed in April 2013, when the NIGC issued a "Public Notice" announcing they have "approved" a gaming facility and they intended to prepare a SEIS for a proposed gaming management contract between JIV and SDGV (a subsidiary of Penn National). (App. H, A51-54.) The NIGC states the management contract "would allow SDGV to manage the approved 203,000 square foot tribal gaming

facility to be located on the Tribe's Reservation, which qualifies as 'Indian Lands' pursuant to 25 U.S.C. § 2703 [IGRA]." (Emphasis added.)

This was the first time that the NIGC, or any federal agency, claimed that the JIV had a "reservation." But, the boundaries of this supposed "reservation" were not described in NIGC's notice. Instead, NIGC notice merely states the casino was "reconfigured to fit on the reservation." So the boundary of the casino defined the claimed "reservation." (App. H, A53.) And after casino construction started, it was discovered the casino was actually being built on four separate parcels – none of which is a "reservation" eligible for gaming as defined in IGRA. Also, consistent with the names of other casinos financed by Penn National across the country, this new casino was to be called the Hollywood Casino of Jamul.

Furthermore, because none of the four parcels on which the casino was to be constructed was a reservation eligible for Indian gaming, the NIGC lacked jurisdiction under IGRA to approve the gaming ordinance or management contract. *Michigan v. Bay Mills Indian Community* 134 S. Ct. 2024 (2014). And, finally, because the casino was constructed on non-Indian land, it is a public nuisance under California law and should be immediately abated. Cal. Penal Code § 11225. These facts triggered JAC's lawsuit to enjoin the construction of the Hollywood Casino of Jamul. JAC filed this lawsuit on September 15, 2013.

C. Second Amended and Supplemental Complaint (SASC)

The SASC, the operative complaint, includes six claims:

1. Violation of the Indian Gaming Regulatory Act.

This is an APA claim for a declaration that the NIGC lacked the authority to approve the JIV's proposed management contract and gaming ordinance.

2. Violation of the Indian Reorganization Act of 1934.

This is an APA claim for a declaration that the BIA lacked the authority to proclaim a reservation or take land into trust for the JIV under the IRA

3. Violations of United States Constitution.

The third claim for relief alleges two Constitutional violations: (1) violation of Equal Protection and (2) violation of Constitutional Federalism.

4. Violation of California's Constitution and laws.

This is a claim for damages against all defendants for constructing an illegal casino in rural Jamul in violation of California's public nuisance laws.

5. Violation of the National Environmental Policy Act.

This is a claim for declaratory and injunctive relief to compel the NIGC to comply with the NEPA before casino was approved or constructed.

6. Violation of the federal Compact – as federal law.

This claim sought to enforce the environmental review provisions (Section 10.8) of the California-JIV Compact as a matter of federal law.

D. The District Court Proceedings.

On December 21, 2015, the federal and non-federal defendants filed separate motions to dismiss the SASC. Defendants' arguments included the contention that the SASC was barred because the JIV was a necessary party who could not be joined because it allegedly had sovereign tribal immunity.

JAC filed oppositions to Defendants' motions to dismiss on April 8, 2016. JAC argued that the JIV, as a half-blood Indian group created in 1981, and which became a quarter-blood group of Indians in 1996, is not a historic tribe entitled to tribal immunity because it did not pre-exist the U.S. as a separate sovereign.

On August 8, 2016, the district court granted the Defendants' motions to dismiss five of the six claims for relief without leave to amend the SASC. The court held "[t]he JAC's first, second, third, fourth, and sixth claims must be dismissed because the Tribe is a necessary party and has not been joined." The district court dismissed those five claims "without leave to amend." (App. C, A27-40.) But the district court also found the JIV was "not a necessary party" to the fifth (NEPA) holding "it [JIV] had no legally protectable interest in the federal defendants' execution of a NEPA review."

The district court's determination that the JIV was not necessary to the NEPA claim was correct. And, for the same reason, the JIV is not necessary to the APA claims regarding the agency decisions that were subject to NEPA review.

E. The Ninth Circuit's Decision.

The Ninth Circuit heard this appeal on November 19, 2019, and issued its opinion on September 8, 2020. (App. A.)[1] The Ninth Circuit states that "JAC contends that [the JIV] is only is only a community of adult Indians, not a historic tribe with inherent sovereign authority . . . and is not protected by tribal sovereign immunity." This statement is partially correct.[2] But the Ninth Circuit then qualifies this statement by making several inaccurate statements designed to leave the impression that this issue has been presented and rejected by other courts.

First, the Ninth Circuit states that: "No tribunal has accepted this argument" that the JIV is not a historic tribe and therefore does not have has tribal immunity. (A5.) A more accurate statement would be the reverse; no court or tribunal has accepted the argument that non-historic tribal entity, like the JIV, has tribal immunity. The district court did not make this finding in this case. *JAC v.*

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[1] The Ninth Circuit identifies the petitioners as "two community organizations and several of their members." (A5.) This is not quite correct. Petitioners include one community organization, the Jamul Action Committee, and several of its members and a church - the Jamul Community Church.

[2] The Ninth Circuit also states that petitioners' claim that the land is not eligible for gaming under IGRA is also because the JIV is "only a community of adult Indians and not a federally recognized tribe." (A5.)This is incorrect. JAC's claim that the land is not eligible for gaming is based on the fact that it is not a "reservation" as claimed by the NIGC. Regardless of the JIV's status, the land on which the JIV casino is located is not a reservation eligible for gaming under IGRA.

Chadhuri, 200 F. Supp. 3d 1042, 1051 (2016). And, although the tribal immunity defense was raised, not even the earlier Ninth Circuit panel found that the JIV is entitled to tribal immunity when it decided the NEPA claim. *JAC v. Chauduri*, 837 F.3d 958 (9th Cir. 2016).

Second, the Ninth Circuit states that "JAC and other members of plaintiff organizations, [have not been deterred] from pressing similar claims in myriad actions before administrative agencies, state courts, and federal courts around the country since the early 1990s." (A5.) This is incorrect. This is the only federal lawsuit brought by JAC. And it is the only JAC lawsuit challenging the NIGC's approvals of a gaming management contract and ordinance for the Hollywood Casino of Jamul - as was specifically allowed by Congress when it enacted IGRA. 25 U.S.C. §2714. And it is the only lawsuit where JAC has made the claim that the JIV is not a historic tribe and therefore is not entitled to tribal immunity.[3]

Finally, the Ninth Circuit states that it hoped that its opinion in this case "will finally put an end to" the claims that the JIV does not have sovereign tribal immunity based on the following by holdings (A5-A6.):

[3] A point of clarification is also required with respect to the Ninth Circuit's discussion of the various *Rosales* lawsuits in Part B of its decision. (A7-A9.) The *Rosales* cases consist of lawsuits and administrative disputes between two factions of Jamul Indians regarding JIV leadership, elections and land over the last 30 years. None of the petitioners was a party to any of the *Rosales* cases.

- Although the JIV did not to seek recognition under 2 CFR Part 83, it became a "federally recognized tribe" in 1982, when it was included on the list of "Indian tribal entities" eligible to receive services from the BIA.
- Although the JIV was created as a half-blood tribal entity in 1981, and is not a historic tribe, in 1994 Congress eliminated the requirement that a tribe must pre-exist the United States to have tribal immunity. [4]
- Although the JIV is a created tribe, that became a quarter-blood group in 1996, it has "the same privileges and immunities, including tribal sovereign immunity, which historic federally recognized Indian tribes possess."
- The JIV tribal sovereign immunity extends to the JIV officials named as defendants in this case. (The Ninth Circuit did not address the fact that the private party defendants do not have, and could not have, tribal immunity.)

On October 23, 2020, JAC filed a timely petition for rehearing en banc to the Ninth Circuit. The Ninth Circuit denied the petition for rehearing on November 23, 2020. (App. B, A26.)

[4] It is important to note that the defendants did not argue that Congress eliminated the distinction between historic and non-historic tribes either at the district court or the circuit court levels. Nor was it briefed by the parties. Apparently this finding was the result of original research by the Ninth Circuit panel that heard this case. (It was not raised or claimed by the prior Ninth Circuit panel that decided the merits of the NEPA claim.) Furthermore, the legislative documents referenced and relied on by the Ninth Circuit in its opinion are not part of the record in this case.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's decision that, in 1994, Congress eliminated the prerequisite that a tribe must pre-exist the United States to have tribal immunity is wrong and should be reversed by this Court.

As summarized above, on July 1, 1993, BIA Director Carol A. Bacon wrote a letter to Raymond Hunter, the Chairman of the JIV regarding the proposal to lower the membership blood-quantum requirement from half-blood to quarter-blood. (App. G, A46-51.) Two months before she wrote her letter to the JIV, on April 30. 1993, Director Bacon testified before the House Subcommittee on Native American Affairs with respect to H.R. 734 which would establish the Pascua Yaqui Indians as a "historic" tribe. The Ninth Circuit claimed that this testimony triggered the Congressional enactment of the statutes in 1994 which eliminated the distinction between "historic" and "non-historic" tribes and, thereby, eliminated the requirement that a tribe must pre-exist the United States to have tribal immunity. The Ninth Circuit's version of events is wrong.

Director Bacon opposed H.R. 734 because the Pascua Yaqui – like the JIV - did not meet the criteria for a "historic" tribe. She testified that: "A historic tribe has existed since time immemorial and its powers are derived from its inextinguishable and inherent sovereignty." Instead of being a historic tribe, Director Baker testified that the Pascua Yaqui was a "community of adult Indians" residing together on trust land. It did not possess the same attributes of sovereignty

as a historic tribe. Director Bacon said that the distinction between historic tribes and non-historic tribes was based on a longstanding interpretation by the Department of Interior Solicitor of the Indian Reorganization Act of 1934.

The Chairman of the Subcommittee, Congressman Richardson, disagreed with Director Bacon's distinction between historic and non-historic tribes. He said the distinction between historic tribes and non-historic tribes was "anachronistic" and should be "eliminated." There was a short debate between Director Bacon and Congressman Richardson about these issues at the April 30, 1993 hearing. See *Hearing on H.R. 734 Before the Subcomm. on Native Am. Affs. of the H. Comm. on Nat. Res.* , 103d Cong. 80–96 (1993). But this debate did not result in any change in the language of H.R. 734. And it remained an interesting side-note in Congressional history until it was revived, and its impact overstated, by the Ninth Circuit 26 years later in its decision here.

The Ninth Circuit held that Director Bacon's "testimony triggered a flurry of legislative activity. Within a year, Congress eliminated the distinction between 'created' and 'historic' tribes, both as to the Pascua Yaqui Tribe specifically and as to other 'adult Indian communities' organized under the IRA." The Ninth Circuit states that Congress achieved this "reform" goal by enacting three measures:

- Pub. L. No. 103-263, Sec. 5(b) (May 31, 1994) An Act amending Section 16 of the Indian Reorganization Act of 1934. (25 USC 5123(f)&(g).)

- Pub. L. No. 103-357, Sec.1 (Oct. 14, 1994) An Act amending 25 USC 1300f(a) to designate the Pascua Yaqui Indians as a "historic Indian tribe."

- Pub. L. No. 103-454, Title I, Secs. 101&103 (Nov. 2, 1994) An Act known as the "Federally Recognized Indian Tribe List Act of 1994."

The Ninth Circuit then held that these legislative "reforms were designed, in large measure, to insure that Indian tribal entities" once recognized and included on the BIA list of Indian tribal entities eligible to receive BIA services "were not treated differently based on whether they were 'created' or 'historic' tribes." The problem with the Ninth Circuit's Congressional scenario is that it is not consistent with the facts or the language of the three bills. None of the three bills eliminated the distinction between "historic" and "non-historic" or "created" tribes.

First, the "technical" amendments to Section 16 of the IRA, adopted in May 1994, did not eliminate the distinction between "historic" and "non-historic" tribes as claimed by the Ninth Circuit. Those amendments, codified at 25 U.S.C. §5123(f)&(g), do not even mention, much less eliminate, the distinction between historical and non-historical or created tribes. Nor are they laws of general application. Instead, they are unambiguous administrative directives to federal "departments and agencies" to treat "federally recognized Indian tribes" equally "relative to other federally recognized tribes." These subsections do not require

"departments and agencies" to treat "federally recognized Indian tribes" and "non-historic" or "created" tribes or quarter-blood Indian groups equally.[5]

Second, despite the 1993 legislative debate between BIA Director Bacon and Congressman Richardson, and contrary to the Ninth Circuit's statement, the 1994 amendment to the Pascua Yaqui Act did not eliminate the distinction between historic and non-historic tribes. Instead, just the opposite is true. The amendment embodied the distinction by expressly designating the Pascua Yaqui Indians as a "historic Indian tribe" with "inherent sovereignty." Furthermore, if 25 U.S.C. §5123(f)&(g) had in fact had eliminated the distinction between historic and non-historic tribes in May 1994 – as held by the Ninth Circuit – then it would not have

[5] The Ninth Circuit relied on a partial quote from a July 1994 memorandum from the DOI Solicitor to the Assistant Secretary referenced in *Rosales v. BIA.*, 32 IBIA 158, 165 (1998). The full quote, as included in this IBIA decision, is:

> "In discussing this act [PL 103-263] in a July 13, 1994 memorandum to the Assistant Secretary – Indian Affairs, the Department's Solicitor stated that *the amendment was intended to end the distinction which has been drawn since at least 1936 between the powers of "historic" and "created" tribes.*" (*Italicized* portion quoted in the Ninth Circuit's decision.)

The July 13, 1994 Solicitor's memorandum is not a part of the record in this case. So there is no way to verify if the IBIA summary of this memorandum is correct. But if the Solicitor did, in fact, opine that 5123(f)&(g) eliminated the distinction between "historic" and "created" tribes, then his legal opinion was wrong and inconsistent with unambiguous language of those two subsections.

been necessary for Congress to enact a separate statute designating the Pascua Yaqui as a "historic" tribe five months later – in October 1994.[6]

Finally, in the third Act mentioned by the Ninth Circuit, Congress defined the term "federally recognized tribe." On November 2, 1994, Congress enacted the "Federally Recognized Indian Tribe List Act of 1994" which provides in part 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 denominated *"Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;"* or by a decision of a U.S. court;

Thus Congress found that a tribe could be recognized in one of three ways. And the only administrative way that a tribe can be recognized, that was authorized by Congress, is through the Part 83 process. And the Part 83 process requires a tribe to show that it was in existence 'from historical times until the present on a substantially continuous basis, 'American Indian' or 'aboriginal'." 25 C.F.R. § 83.7(a). In other words a petitioner seeking federal recognition under Part 83, had to demonstrate that it was a historic tribe that pre-existed the United States. The

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[6] The Ninth Circuit also mentions the October 3, 1994 House Report No. 103-781 that was prepared to accompany the then proposed Tribal List Act of 1994. Although not part of the record in this case, the report discusses a "recent letter" from the BIA stating that the BIA intended to differentiate "historic" and "created" tribes. The report then states, without any substantiation, that: "Because this dichotomy ran so clearly counter to the intent of Congress and was outside the Department's authority, Congress quickly enacted legislation prohibiting the distinction." (Citing PL 103-263.) As summarized above, this staff level characterization of PL 103-263 is wrong. It does not mention, much less eliminate, the distinction between historic and non-historic or created tribes.

Tribal List Act of 1994 reaffirmed the Part 83 requirement that a tribe must be a historic tribe to be recognized. Contrary to the Ninth Circuit's decision, it did not eliminate the distinction between historic and non-historic or created tribes.[7]

In summary, these three 1994 Acts of Congress do not come close to "explicitly" eliminating the requirement, established by this Court, that a tribe must be a pre-existing sovereign to have tribal immunity. *Kiowa Tribe v. Manufacturing Tech.*, 523 U.S. at 751. In fact, Congress "explicitly" reinforced the importance of legal distinction between "historic" and "non-historic" tribes in these three Acts.

B. The Ninth Circuit's decision that the BIA's list of "Indian tribal entities" eligible to receive services is actually a list of federally recognized tribes with tribal immunity is incorrect and should be reversed.

In the first paragraph of its decision the Ninth Circuit states that the JIV "has appeared on the BIA's published list of federally recognized Indian tribes ever since [1982]." And, apparently to emphasize this point, the Ninth Circuit cited every Federal Register which published the BIA list from 1982 to 2019. It is true that the JIV was included on the BIA's published list every year since 1982. But

[7] Also, the Ninth Circuit did not to address the follow-up letter sent to the Chairman of the Natural Resources Committee by Wyman D. Babby, Assistant Secretary for Indian Affairs, on January 14, 1994. Assistant Secretary Babby was responding to a request by Congressman Richardson, made at the hearing on H.R. 734, for a list of non-historic tribes. Assistant-Secretary Babby provided a list of tribes that were determined to be non-historic tribes "in the context of reviewing and approving their constitutions." The JIV was included on the list as a non-historic tribe.

the Ninth Circuit's characterization of the list as "the BIA's published list of federally recognized Indian tribes" is not correct for several reasons.

First, the BIA list itself does not claim to be an exclusive list of federally recognized tribes with tribal immunity. Instead, the title of the BIA list in 1982, and every year thereafter, is: *"Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs."* 47 Fed. Reg. 53130. Thus, on its face, it is a list of "Indian Tribal Entities" eligible for BIA services; it does not purport to be just a list of federally recognized tribes, with tribal immunity, as suggested by the Ninth Circuit. In fact, by its own terms, it is a list of several different types of "tribal entities" including "Indian tribes, bands, villages, communities and pueblos as well as Eskimos and Aleuts." Also the BIA candidly admits they included, as "eligible additional entities," many communities that are not "historic tribes." Id. The JIV's inclusion on the BIA list as a tribal entity or as a quarter-blood group does not make it is a federally recognized tribe.

Second, the BIA list is an "administrative list" that was never meant to be a list of federally recognized tribes. It was first put together in 1966 from BIA files. "According to the BIA, the 1966 list was not intended 'to be a list of federally recognized tribes as such." *Samish Indian Nation v. U.S.*, 419 F.3d 1355, 1359 (Fed. Cir. 2005). And, although the list was updated in 1969 to include tribes with an organization that had been approved by the Interior Department, "the BIA

employee who drew up the list had no authority to determine which groups would be accorded federal recognition." *Id.* That is still the case. BIA employees who compile the BIA lists may be able to determine which tribal entities are going to receive services from the BIA. But they have no authority to determine which tribal entity is entitled to federal recognition outside the Part 83 process.

Third, the BIA list, and the criteria to be on the BIA list, change every year and are often not meant to be a list of only federally recognized tribes. For example, in the 1995 BIA list referenced by the Ninth Circuit, the BIA states that it included Native Alaskan corporations despite the fact that they "are formally state-chartered corporations rather than tribes in the conventional, legal or political sense." 60 Fed. Reg. 9250 (Feb. 16, 1995). In other words, although they are not federally recognized tribes, Alaska corporations were put on the BIA list for the convenience of BIA officials. Tribal entities put on the BIA list for such reasons are often called "administratively created" tribes. The BIA claims that it has the unfettered discretion to make such "administrative" decisions. There is no process to review a BIA decision to include a tribal entity on the list or to exclude a tribal entity from the list. These BIA decisions are arbitrary at best. They should not be the basis on which federally recognized tribes are determined.

Fourth, the Ninth Circuit's conclusion that the BIA list of Indian tribal entities is actually a list of federally recognized tribes with inherent or retained

tribal immunity is directly contrary to the Tribal List Act of 1994. Congress enacted the List Act of 1994, in part, to curtail the arbitrary and uncertain practices of the BIA in developing its "administrative" list of Indian tribal entities entitled to receive financial aid and services. The List Act of 1994 specifically and clearly limited the list of federally recognized tribes to those recognized: (1) by Act of Congress, (2) as specifically set forth in 25 CFR Part 83 or (3) through an adjudicated court decision. (Pub. L. No. 103-454, (Nov. 2, 1994) Sec. 103(3).) Unlike the BIA administrative lists, the List Act of 1994 does not mention or allow the listing of non-historic tribes or unrecognized quarter-blood Indian groups or tribal entities listed for political or administrative reasons.

In summary, the BIA's published annual administrative lists of "Indian tribal entities" entitled to receive BIA services is not, and was never meant to be, an exclusive list of federally recognized tribes. And to treat such Indian tribal entities as federally recognized tribes with tribal immunity would likely revive the arbitrary chaos that Congress was trying to resolve when it enacted the List Act of 1994. The Ninth Circuit's conclusion that the BIA list of Indian tribal entities is a list of federally recognized tribes is wrong and overbroad and should be reversed.

C. The issues presented by this petition are of major importance involving the potential expansion of tribal immunity to include quarter-blood Indian groups, non-historic tribes and created Indian tribal entities.

As outlined above, the Ninth Circuit's opinion is based on two faulty premises. First, the Ninth Circuit mistakenly holds that Congress in 1994 eliminated the distinction between historic and non-historic tribes and, thereby, eliminated the requirement that a tribe pre-exist the United States to be covered by the doctrine of tribal immunity. Second, the Court incorrectly concludes that the annual BIA list of "Indian tribal entities" eligible to receive services from the BIA is actually a list of federal recognized tribes with tribal immunity. Either of these mistaken holdings of the Ninth Circuit by itself is probably sufficient for this Court to grant review. But when the two Ninth Circuit mistakes are combined then all "Indian tribal entities" on the BIA list would arguably be entitled to tribal immunity. If not reversed, the Ninth Circuit's faulty opinion will broaden the doctrine of tribal immunity beyond recognition and meaning. It will make it virtually impossible to adjudicate issues involving tribal entities or unrecognized groups of Indians if they all can assert tribal immunity and proceed with impunity.

This anomalous situation is evident from the facts of this case. The JIV was first created in 1981 as a half-blood tribal entity pursuant to Sections 16 and 19 of the IRA. Such a half-blood Indian community, with rights under the IRA, was

approved by this Court in *United States v. John,* 437 U.S. 634, 650 (1978). And Director Bacon concluded that, although it was not a historic tribe, the JIV could be listed as an Indian tribal entity as a half-blood created tribe. But Director Bacon cautioned that, if the JIV lowered its membership requirement to quarter-blood, it would jeopardize its right to remain on the list and "the rights of its members to Federal benefits and services." (A49.)

Despite Director Bacon's caution, the JIV lowered its blood quantum membership requirement to quarter-blood in 1996. At that point, the JIV abandoned its status as a "created" tribe under Sections 16 and 19 of the IRA and became a "racial group" of quarter-blood Indians. But such "racial" groups are not federally recognized tribes and are not entitled BIA preferences and benefits much less the right to a casino under IGRA. *Morton v. Mancari*, 417 U.S. at 553 n.24. See also *Rice v. Cayetano,* 528 U.S. 495, 519-520 (2000)

Despite the fact that the JIV is a racial group of quarter-blood Indians formed in 1996, and despite the fact that it did not have a reservation eligible for Indian gaming under IGRA, federal employees of the NIGC and BIA – in 2013 – facilitated and approved an Indian casino for the JIV. The principles of federalism should have checked this abuse by federal agencies and employees. *Gregory v. Ashcroft, Governor of Missouri,* 501 U.S. 452, 458 (1991). Neither the BIA nor the NIGC, nor their employees and officials, can make the JIV a federally recognized

tribe "by arbitrarily calling them an Indian tribe." *United States v. Sandoval*, 231 U.S. 28, 46 (1913). Nor do they have the power to give the right of tribal immunity, enjoyed only by historic tribes, to the JIV- a non-historic group of Indians that did not exist as a separate entity prior to 1981.

The proposed Hollywood Casino of Jamul would have ruined the environment and tranquility of rural Jamul California. JAC tried to protect its community by bringing this lawsuit challenging the illicit approvals of the BIA and NIGC of the gaming management contract and gaming ordinance and the illegal activities of federal employees which facilitated the construction of a large casino in Jamul on non-Indian land by an unrecognized group of quarter blood Indians. The proposed casino was a public nuisance under California law and a violation of California's constitution which prohibits Indian gaming on non-Indian land.

If JAC's lawsuit had been allowed to proceed on the merits, it is extremely likely that JAC would have prevailed. This is because of the undeniable fact that the four parcels of land on which the Jamul Hollywood Casino is located are not Indian land eligible for a casino under IGRA. Five years ago, early in this case, JAC brought a motion for summary judgment that the casino land is not Indian land eligible for gaming based on undisputed facts and title information with respect to each of the four parcels. Because the land was not Indian land as defined by IGRA, not only was it not eligible for a casino, the NIGC lacked

jurisdiction to approve a management contract and ordinance for a casino on non-Indian land. But, although defendants did not file oppositions to the motion, the lower courts never decided the issue. Instead, the lower courts' findings that the JIV had tribal immunity allowed the NIGC jurisdiction issue and the merits to be side-stepped.

The bottom-line is that there is now a large illegal casino in the middle of the rural Jamul community which is being operated by an unrecognized racial group of quarter blood Indians. And, as if adding insult to injury, the Ninth Circuit's finding that the JIV has tribal immunity – if not reversed – will allow this illegal casino to continue indefinitely as a public nuisance with impunity. Furthermore, if the Ninth Circuit decision is not reversed, we can expect non-historic and created tribal entities, with no reservation eligible for gaming, to follow the JIV's lead and open illegal casinos anywhere and everywhere with immunity and impunity.

CONCLUSION

For the forgoing reason the petition for a writ of certiorari should be granted.

Dated: April 20, 2021.

Respectfully submitted,

/s/ Kenneth R. Williams

KENNETH R. WILLIAMS
Counsel for Petitioners