No. 20-1559

In The
Supreme Court of the United States

JAMUL ACTION COMMITTEE, ET AL.,

Petitioners,

v.

E. SEQUOYAH SIMERMEYER, ET AL.,

Respondents,

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

PETITION FOR REHEARING AND REMAND

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PETITION FOR REHEARING & REMAND

The petition for a writ of certiorari in this case was filed on April 21, 2021. All the respondents (including the U.S. and Penn National) waived their right to respond on June 9, 2021. And the petition was denied on October 4, 2021.

Pursuant to Rule 44.2, Petitioner respectfully petitions for rehearing of this Court's October 4, 2021 Order (p. 9) denying their petition for certiorari. Rule 44.2 provides that rehearing of the denial of a petition for certiorari is appropriate: (1) when there are "intervening circumstances of substantial or controlling effect" or (2) when there are "other substantial grounds not previously presented."

Petitioners also request that this Court grant the petition for certiorari, vacate the Ninth Circuit decision and remand this case so these issues can be decided by the lower courts in the first instance. *Lawrence v. Chater*, 516 U.S. 163 (1996) (28 U.S.C. § 2106 "conferred upon this Court a broad power to GVR.")

As is outlined in detail below, both grounds for rehearing, and to grant the petition, vacate the decision and remand (GVR), are present here and include:

1. This Court's June 25, 2021 decision in *Yellen v. Confed. Tribes* (No 20-543) is an "intervening circumstance of substantial and control-ling effect;" and
2. The NIGC's lack of jurisdiction to approve an Indian casino on non-Indian land is a controlling and "substantial ground not previously presented."

PRELIMINARY STATEMENT

The immediate issue in this case is whether the Jamul Indian Village (JIV), a quarter-blood Indian group created in 1981, has tribal immunity sufficient to bar Petitioners' lawsuit challenging the National Indian Gaming Commission's (NIGC) approval, and Penn National Corporation's construction, of a large Indian casino in the small, rural community of Jamul, California.

In 1993, the Department of Interior (DOI) confirmed that the JIV is not, and has never been, a "federally recognized tribe." (Cert. Pet. App. G.) In fact, when given the option, the JIV chose not to seek federal recognition pursuant to 25 CFR Part 83. The DOI also confirmed that the JIV is not a historic tribe that preexisted the United States. (Id.) Thus, based on the common law jurisprudence of this Court, the JIV could not have "retained" tribal immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)

However, on September 28, 2020, the Ninth Circuit failed to heed this Court's jurisprudence and, instead, held that Congress had expanded the tribal immunity doctrine to cover non-historic tribes and recently "created" tribal entities, like the *JIV. JAC v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020). The Circuit Court held that Congress made this major change in 1994, "**in a flurry of legislative activity**," when it enacted three statutes which supposedly "eliminated the distinction between 'created' and 'historic' tribes" as it relates to "tribal sovereign immunity." *Id.* at 993 (emphasis added).

The Ninth Circuit's analysis is wrong. Congress did not expand this Court's tribal

immunity doctrine in 1994 to include non-historic tribes or created tribal entities. Also, the Ninth Circuit's decision is contrary to the decisions of this Court over the last 50+ years confirming that "tribal immunity" is a "retained right" and limited to tribal sovereigns that pre-existed the United States. If the Ninth Circuit's erroneous decision is not reversed, it will affect all tribes and expand the tribal immunity doctrine to the point of meaninglessness. *Upper Skagit Indian Tribe v. Lundgren*, 138 S.Ct. 1649, 1654 (2018). ("Deter-mining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes.") This Court or Congress, not a Ninth Circuit panel, should resolve such "grave questions."

Finally, it is important to note that the Ninth Circuit developed the theory that Congress expanded the tribal immunity doctrine to cover non-historic tribes and recently created tribal entities (including quarter-blood Indian groups like the JIV), on its own accord. It was not argued or briefed by the parties in the lower courts. And, although this "significant" change in tribal immunity law supposedly occurred in 1994, it has not been mentioned by this Court in the last 27 years. See *Michigan v. Bay Mills Indian Comm.,* 134 S.Ct. 2024 (2014). This case should be remanded so these important issues can be fully briefed and decided by the lower courts in the first instance. *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) (The Supreme Court is "a court of review, not of first view").

GROUNDS FOR REHEARING & REMAND

1. This Court's June 25, 2021 decision in *Yellen v. Confed. Tribes* is an "intervening circumstance of substantial and controlling effect" that warrants rehearing, reversal and remand of the Ninth Circuit's incorrect decision in *JAC v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020).

In *Yellen v. Confed. Tribe*s, this Court held that the use of the term "recognized" with respect to Indian tribes is not a "term of art" that equates with "federally recognized tribe." Instead, the Court reasoned that the term "'[r]ecognized' is too common and context dependent a word to bear so loaded a meaning wherever it appears, even in laws concerning Native Americans and Alaska Natives." (p. 17). This Court's conclusion in this regard, issued just four months ago, is controlling and binding on the Ninth Circuit. It directly contradicts the Ninth Circuit mistaken decision in *JAC v. Simermeyer* which should be reversed and remanded for evaluation consistent with *Yellen.*

The issue in *Yellen* was whether or not Alaska Native Corporations (ANCs) are "Indian tribes" under the Indian Self-Determination Act (ISDA) and, thus, eligible for funding under the Covid Aid, Relief, and Economic Security (CARES) Act. The ANCs eligibility for CARES funds was challenged by Confederated Tribes, and other tribes, who argued that ANCs are not entitled to CARES funds because they do not meet the ISDA definition of "Indian tribes."

The CARES Act describes a "Tribal government" as the "**recognized** governing body

of an Indian tribe" as defined by ISDA (42 U.S.C. §801(g)(5); emphasis added). And ISDA defines "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community [including ANCS] which is **recognized as eligible** for special programs and services provided by the U.S. to Indians because of their status as Indians." (25 U.S.C. §5304(e); emphasis added.)

The D.C. Circuit agreed with the Confederated Tribes that the ISDA "recognized as eligible" clause was a "term of art" that required a tribe to be a "federally recognized tribe" to receive CARES benefits. And the D.C. Circuit held ANCs were not entitled to CARES benefits because they were not "federally recognized tribes." *Confed. Tribes v. Munchin,* 976 F.3d 15 (Sept. 25, 2020).

On October 23, 2020, the Treasury Secretary, represented by the Solicitor, filed a petition for a writ of certiorari of the D.C. Circuit's decision. The Solicitor did not mention the *JAC v. Simermeyer* decision in their petition. But, it is worth noting that, because it was consistent with the D.C. Circuit's decision, the Confederated Tribes did cite the Ninth Circuit's decision in their Brief In Opposition (p. 18) contending that: "Just months ago, the Ninth Circuit recognized the transformative role of these statutes eliminating the privilege of certain tribal groups over others. See [*JAC v. Simermeyer*]."

This Court granted certiorari and reversed the D.C. Circuit's decision. The Court agreed with the Solicitor that, although ANCs are not "federally recognized tribes," they are "recognized as eligible" to receive financial aid under the CARES Act. Thus, this Court in *Yellen* established and affirmed the important

distinction between tribal entities "recognized as eligible" to receive federal aid or services and "federally recognized tribes." The Court held that the phrase "recognized as eligible" for services is generic and its "plain meaning" can vary in different contexts. It is not a "term of art."

This Court's *Yellen* decision is an "intervening circumstance" that is binding on the Ninth Circuit and it warrants rehearing, reversal and remand of *JAC v. Simermeyer.*

Nine months before the *Yellen* decision, the Ninth Circuit faced basically the same issue but reached the opposite conclusion in *JAC v. Simermeyer*. Since 1982, the DOI has published an annual list in the Federal Register entitled: "*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)); emphasis added). The Ninth Circuit, held that this list of "Indian tribal entities recognized and eligible" for BIA services is actually a list of "federally recognized tribes" – with tribal immunity. This is not correct.

Instead, on its face, the DOI list is a list of "Indian tribal entities" that are eligible for BIA services. It is not, and does not purport to be, a list of "federally recognized tribes" with tribal immunity. The DOI list includes many types of "Indian tribal entities" including "Indian tribes, bands, villages, communities and pueblos as well as Eskimos and Aleuts" and many Indian communities (like the JIV) that are admittedly not "historic tribes." The list also includes many California rancherias and Alaskan villages which are places or locations, not "federally recognized tribes." In fact, as noted in the petition for certiorari, and by this Court in

Yellen, for several years the DOI list included ANCs - which do not claim to be "federally recognized tribes" with tribal immunity. It is apparent that, given this context, the DOI list is not limited, by the phrase "recognized and eligible," to "federally recognized tribes."

The Ninth Circuit made basically the same mistake that was made by the D.C. Circuit with respect to the ISDA's definition of Indian tribes that was reversed by *Yellen*. Specifically, like the D.C. Circuit's misinterpretation of the ISDA "recognized as eligible" clause, the Ninth Circuit misinterpreted the "recognized and eligible" phrase in the title of the DOI list to mean "federally recognized tribes." The Ninth Circuit's misinterpretation should also be reversed.

This Court's 2021 decision in *Yellen v. Confed. Tribes*, and its determination that the word "recognized" was not a term of art equivalent to "federally recognized tribe," were obviously not available for the Ninth Circuit's review before it issued its 2020 decision in *JAC v. Simermeyer*. Indeed, if the *Yellen* decision had existed in 2020, it is likely that the Ninth Circuit would have followed it as precedent and would have issued a different decision.

The Ninth Circuit conclusion in *JAC v. Simermeyer* that the word "recognized" in the title of the DOI list is the same as "federally recognized tribe" is wrong and contrary to *Yellen*. It should be reversed and vacated and this case should be remanded so the Ninth Circuit has a chance to reconsider its decision consistent with this Court's decision in *Yellen v. Confed Tribes*.

2. **The NIGC's lack of jurisdiction to approve gaming on non-Indian land is a "substantial ground" that, although fully briefed years ago, was not decided by the lower courts. This case should be remanded and the lower courts should be directed to decide this key issue.**

When Congress enacted the Indian Gaming Regulatory Act (IGRA), it created the NIGC and vested it with regulatory oversight over gaming activities on "Indian lands." 25 U.S.C. § 2703(4)(A). But the NIGC has no jurisdiction to approve Indian gaming on land that does not qualify as "Indian land" under IGRA. As emphasized by this Court, the NIGC has the authority "to regulate Indian Gaming on Indian lands [as defined in IGRA], **and nowhere else**." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. at 2034 (emphasis added).

Congress also provided that NIGC's approvals of gaming management contracts or gaming ordinances are "final agency actions" subject to judicial review under the Administrative Procedures Act (APA). 25 U.S.C. § 2714.

Petitioners' underlying lawsuit is an APA challenge to the NIGC's approval of a gaming ordinance and management contract. The NIGC is the only necessary party to Petitioners' APA claims to enforce IGRA. *Portland Aud. Soc. v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989). (In an APA suit, "the governmental bodies charged with compliance" are the only necessary defendants.) In fact, in the Ninth Circuit, federal respondents conceded that "the United States is the only necessary party to APA suits challenging final agency actions." (Fed AB 37-38.) But, it is also important to note that the JIV was not a named

defendant or a necessary party to Petitioners' APA claims against the NIGC. Thus, even if valid, the JIV's claim of tribal immunity is not relevant to, and could not bar, Petitioners' APA claims or the lower courts' obligation to decide those APA claims.

On April 10, 2013, NIGC published a NEPA *"Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the Approval of a Gaming Management Contract."* (78 Fed. Reg.21398-21399 (April 10, 2013)) The NIGC described the casino project as follows: "The Gaming Management Contract, if approved, will allow SDGV to man-age the approved 203,000 square foot tribal gaming facility **to be located on the Tribe's Reservation, which qualifies as 'Indian lands' pursuant to [IGRA].**" (emphasis added). This determination, embedded in the SEIS, was a "final agency action" subject to judicial review. And it was the first time that the NIGC claimed that JIV had a reservation eligible for gaming under IGRA.

But the NIGC's SEIS notice, did not include a map or specific description of this supposed "reservation." Instead, the NIGC merely stated the casino was "reconfigured to fit the reservation." So, according to NIGC, the ultimate configuration of the proposed casino would define the boundaries of the claimed "reservation." (ER 341-344.) And, after construction started, it was discovered that the casino was being built on four separate parcels, including:

1. **Daley Parcel** (ER 255-258) – This 4.66 acre parcel was donated to the U.S. by the Daleys in 1978 for the benefit of individual half-blood Jamul Indians. (JIV did not exist in 1978.) It has not been taken into trust.

2. **Daisy Parcel** (ER 80-87) – This 4 acre parcel is owned by the JIV in fee. The elevated casino walkway, driveway and casino support structures were built on this parcel. It is fee, not trust, property.
3. **Graveyard Property** (ER 315-318) – This 1.372 acre parcel is now used for casino access. But, initially, it was conveyed to the U.S. by the Catholic Church "for an Indian graveyard and approach thereto."
4. **Casino Bearing Wall Easement** (ER 322-340)– After construction started, the WCB transferred an 80 foot easement to Penn National and JIV for a bearing wall to support the casino and parking structure.

None of these four properties on which the Jamul casino is located is an Indian "reservation" eligible for gaming as defined by IGRA. Consequently, over five years ago, Petitioners filed a motion for summary judgment (MSJ) on the Indian land and NIGC jurisdiction issues. (ER 216-350.) Specifically, Petitioners requested a judgment that none of the four properties on which the Jamul casino is located is a "reservation" eligible for gaming as that term is defined and used in IGRA and, therefore, the NIGC lacked the jurisdiction and authority to approve the gaming ordinance or gaming management contract. (ER 216-229).

In support of the MSJ, Petitioners filed a statement of undisputed facts and a Request for Judicial Notice of all the pertinent title documents with respect to each of the four casino properties. (ER 253-350.) Petitioner also submitted several documents from the JIV website that depict and confirm the Jamul casino

and related structures are located on the four separate properties. (ER 232-233.)

Although the Defendants did not file an opposition to Petitioners' MSJ in the district court or the Ninth Circuit, they were successful in convincing the district court to take it off calendar and to avoid deciding the MSJ on the merits for several years. And Petitioners' requests that the Court of Appeal decide the MSJ *de novo* were ignored by the Ninth Circuit in *JAC v.Simermeyer*.

As allowed by IGRA (25 U.S.C. § 2714), the MSJ was filed pursuant Petitioners' APA claim. It challenges the NIGC's authority to approve a gaming ordinance and management contract for a casino that was constructed on non-Indian land. The MSJ was briefed, unopposed and presented. And, despite their reluctance, it needs to be decided by the lower courts on remand.

All courts have a "virtually, unflagging obligation … to exercise the jurisdiction given to them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). "Abdication of the obligation to decide cases can be justified" only in "exceptional circumstances." *Id.* There are no circumstances here that justify the failure of the lower courts to decide Petitioner' MSJ. In fact, just the opposite is true. Plaintiffs' MSJ raises a question of "exceptional importance" which should be decided. Whether or not the JIV casino is constructed on a "reservation" eligible for gaming, as claimed by the NIGC in 2013, is the lynchpin issue in this case and it is not contingent on, or barred by, tribal immunity. The lower courts should be directed to decide the NIGC jurisdiction issue on remand.

Finally, if the MSJ is granted, and it is confirmed that the Jamul casino is not on Indian land, then it would violate California's Constitution (Cal. Const., art. IV, § 19, subds. (e) & (f)) and would be a public nuisance subject to abatement and potential damage claims. Cal. Penal Code § 11225(a)(1); see *Michigan v. Bay Mills Indian Comm*. 134 S.Ct. at 2035 ("the panoply of tools [available] can shutter, quickly and permanently, an illegal casino.") These issues should also be decided on remand.

CONCLUSION

For the forgoing reasons, Petitioners request that the petitions for rehearing and for a writ of certiorari be granted, that the Ninth Circuit decision be vacated, and that this case be remanded to the Ninth Circuit for: (1) reconsideration of the tribal immunity issue consistent with this Court's decision in *Yellen*, and (2) decision on Petitioners' pending motion for summary judgment on the NIGC jurisdiction and the Indian lands issues. .

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Dated: October 27, 2021

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

Dated: October 27, 2021.

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