No.

IN THE

SUPREME COURT OF THE UNITED STATES

SYLVIA DAVIS, as Guardian and Next Friend for Donnell E. Davis; DOSAR-BARKUS BAND OF THE SEMINOLE NATION OF OKLAHOMA; BRUNER BAND OF THE SEMINOLE NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; GALE NORTON, Secretary of the Interior, her agents, employees and successors; DAVID W. ANDERSON, Assistant Secretary of the Interior for Indian Affairs, his agents, employees and successors; GLORIA SPYBUCK, Superintendent, Bureau of Indian Affairs, Wewoka Agency; and JEANETTE HANNA, Regional Director, Bureau of Indian Affairs, Eastern Oklahoma Regional Office, her agents, employees and successors,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Franklin B. Velie*
SALANS
620 Fifth Avenue
New York, NY 10020
(212) 632-5500

Jonathan T. Velie
William P. Velie
VELIE & VELIE
210 East Main Street
Norman, OK 73069
(405) 364-2525

Attorneys for Petitioners

**Counsel of Record*

QUESTIONS PRESENTED

The Tenth Circuit affirmed the holding of the District Court for the Western District of Oklahoma which dismissed the claims of Petitioners. Petitioners, who are members of the Seminole Nation of Oklahoma of African and mixed African-Indian descent ("Estelusti"), brought the action against the United States, Department of the Interior, Bureau of Indian Affairs ("BIA"), and individual U.S. Government officials for systematically excluding them from Federal Funds which are common tribal property. The dismissal was on the grounds that the Seminole Nation ("Tribe") was an "indispensable" party under Fed. R. Civ. P. Rule 19(b), without whom the action could not proceed "in equity and good conscience." In the district court below and on appeal the Estelusti argued that the absent Tribe had no lawful or legitimate interest to assert, and the case could proceed in its absence. The Tenth Circuit's affirmance was made notwithstanding (i) a Treaty with the United States under which the Tribe divested itself of any power to discriminate against its Black members and which makes them equal members of the Tribe; (ii) a federal Statute in which Congress directed that a Judgment Fund voted for the Seminole Nation of Oklahoma be held in trust by the BIA and used "for common tribal needs"; and (iii) findings by the district court that the Government had colluded with the Tribe to deprive Black members of the Tribe of their rightful share in that Judgment Fund in clear violation of Congressional intent.

This case presents an important question of federal law regarding the purpose and proper application of Rule 19 decided by the Tenth Circuit in a fashion which conflicts with relevant authority from this Court, as well as important questions of federal law not decided by this Court, but which should be, regarding the rights of the Estelusti pursuant to Treaty and Statute, the role of Congress vis-à-vis Indian

rights and Indian sovereign immunity, and the power of a Federal Court, sitting in equity, to deal with acts of Government agents which discriminate against minority citizens because of their race.

Here, where the district court made findings that the BIA, together with Tribal leaders, colluded to divert federal funds that were Congressionally voted for the use of the Seminole Nation of Oklahoma for "common Tribal needs," in such a way that the funds were systematically kept from Black members of the Tribe, two questions are presented:

1. In making a Rule 19 determination of the "indispensability" of an absent party, may a court avoid deciding whether the absent party's claimed interest is "frivolous" or "legally protected" by asserting that such would be a determination of the merits of the dispute?

2. Under Rule 19, where the purported interest of the absent tribe – to discriminate against its Black members – has been divested (i) by Treaty which granted equal rights of such Black citizens to common tribal property, and (ii) by Federal Statute which awarded funds to the Seminole Nation of Oklahoma for "common tribal need," and directed the BIA in approving plans for the use of Funds to be sure to protect the rights of minority members of the tribes who are granted such federal funds, is that "interest" a legally protected one?

LIST OF PARTIES

The parties below are listed in the caption, with the following exception: as successor to the position of Assistant Secretary of the Interior for Indian Affairs, David W. Anderson has been substituted for former defendant Neil McCaleb.

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The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Davis v. United States*, 343 F.3d 1282 (10th Cir. 2003) ("*Davis II*"). The Tenth Circuit affirmed the April 25, 2002 decision of the United States District Court for the Western District of Oklahoma, reported at *Davis v. United States*, 199 F. Supp. 2d 1164 (W.D. Okla. 2002). The District Court's decision in *Davis II* was rendered after remand by the Tenth Circuit in an opinion reported at *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999) ("*Davis I*"). The District Court's initial decision, *Davis v. United States*, decided March 20, 1998, is not officially reported. *See* Appendices A - D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Tenth Circuit's opinion was rendered on September 10, 2003. The Petition for Panel Rehearing or Rehearing En Banc was denied on December 16, 2003. *See* Appendix E.

TREATY AND STATUTES INVOLVED

The relevant portions of the Treaty with the Seminole Indians, Mar. 21, 1866, U.S.-Seminole Nation of Indians, Art. II, 14 Stat. 755, 756 are set out in Appendix F. The relevant provisions of the Distribution of Funds to Seminole Indians, Public Law No. 101-277, Sections 2(a)(1), 4(a), 4(b), 8(a), 104 Stat. 143 (1990); 25 U.S.C. §122 ("Limitations on application of tribal funds"); and, Distribution of Judgment Funds Act, 25 U.S.C. §§1401-1408 are lengthy and therefore are set out in Appendix G.

STATEMENT OF THE CASE

Petitioners, plaintiffs/appellants below, are minority citizens (hereinafter referred to as the "Estelusti" or "Black Seminoles") of the Seminole Nation of Oklahoma (the "Seminole Nation" or "Tribe"). Petitioners brought this action in 1996 to remedy misconduct by the United States Department of the Interior, Bureau of Indian Affairs, and certain federal officials (the Government defendants are herein collectively referred to as "the BIA"), in the management of a Judgment Fund trust granted by Congress to the Seminole Nation. The BIA and certain Tribal leaders have prevented the Estelusti from participating in Judgment Fund programs because of their race. Petitioners sought a declaration that they are entitled to share in Judgment Fund programs and an injunction forbidding the BIA to disburse Judgment Funds in derogation of that right.

The District Court found that the Seminole Nation is an Indian tribe comprised of people of both Native American and African descent, formed after the European colonization of America. The Black Seminoles descend from escaped slaves who entered Florida in the 18th and 19th centuries and assimilated with the many distinct groups of Native Americans who had migrated to the region during the same period. Although some were nominally slaves of the Native Americans, many lived as free people, tilled their own fields, carried guns and were home owners. In time these Native Americans and people of African descent became known together as "Seminoles." In a war against the United States waged by the Seminoles, the Black Seminoles served as, *inter alia*, warriors, interpreters, negotiators and spies.

Following the end of the Seminole War (the army in its dispatches often referred to it as "the Negro War"), during 1838-42, many Seminoles, including the Estelusti, were

forcibly removed from their home in Florida to what is present-day Oklahoma along the "Trail of Tears."

In 1866, the Seminole Nation entered into a treaty with the United States ("1866 Treaty"). That treaty (App. F) provides:

> Inasmuch as there are among the Seminoles many persons of African descent and blood . . . these persons and their descendants . . . shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color . . . .

In 1950, the Tribe brought suit before the United States Indian Claims Commission to remedy the injustice of its forcible removal from Florida, and in 1976, judgment was rendered in favor of the Tribe. Thereafter, Congress appropriated a fund, a portion of which went to the Seminoles still living in Florida, and a portion of which was granted "to the Seminole Nation of Oklahoma." Pub. L. No. 101-277, §§ 2(a)(1), 4(a), 4(b), 8(a), 104 Stat. 143 (1990) (the "Distribution Act"). This fund (the "Judgment Fund") is held in trust by the BIA. By its terms, the Distribution Act required the Tribe to submit a usage plan ("Usage Plan") for these funds and that at least 80% of the Fund should be used for "common Tribal needs . . ."; interest on the balance could be distributed "per capita." (App. G at 92a.)

The Judgment Fund Act (App. G at 94a-96a) prescribes guidelines with respect to such funds held in trust by the BIA. It provides:

> The Secretary [of the Interior] shall prepare a plan which shall best serve the interests of all

those entities and individuals entitled to receive funds of each Indian judgment.

* * *

(b) Guidelines
In preparing a plan for the use or distribution of the funds of each Indian judgment, the Secretary shall, among other things, be assured that –

* * *

(2) The needs and desires of any groups or individuals who are in a minority position, but who are also entitled to receive such funds, have been fully ascertained and considered[.]

(App. G at 95a, 96a)

In 1990 and 1991, the Tribe and the BIA prepared a Usage Plan. Instead of a plan prepared by the Secretary, as contemplated by the Judgment Fund Act, the Usage Plan provided only that the Tribe would propose programs for BIA approval. (App. C at 60a-61a.) Beginning in 1991, the BIA began to approve programs, utilizing eligibility criteria prepared by the Tribe. The eligibility criteria excluded the Estelusti from all such programs.

The Estelusti brought the instant suit in January 1996, seeking, *inter alia*, a declaration that Congress did not authorize the exclusion of the Estelusti from Judgment Fund programs and an injunction barring further disbursements of Judgment Fund monies by the BIA for expenditures in a racially discriminatory fashion, contrary to the 1866 Treaty and the intent of Congress as expressed in the Distribution Act and the Judgment Fund Act. Federal jurisdiction was predicated on 28 U.S.C. §§ 1331 and 1362, in that it was a

civil action arising under the Constitution, laws, and a Treaty of the United States and was brought by officially recognized Indian bands. Jurisdiction to review agency action was pled under 5 U.S.C. §§ 702-703. Jurisdiction for declaratory relief was invoked pursuant to 28 U.S.C. §§ 2201-2202.

On March 20, 1998, the District Court dismissed the Estelusti's complaint under Fed. R. Civ. P. 19(b) for failure to join a supposedly indispensable party, the Tribe, which could not be joined because of sovereign immunity. (App. D at 88a.)

The Tenth Circuit reversed and remanded. (App. C at 75a.) It upheld the District Court's decision that the Tribe was a "necessary" party because, it explained, "Rule 19 . . . does not require the absent party to *possess* an interest; it only requires the movant to show that the absent party *claims an interest* relating to the subject of the action." (App. C at 67a) (internal quotation omitted; emphasis in original). The appellate court also stated that if an excluded party had only a "frivolous" claim of interest, it would not be a necessary party, nor could it be an indispensable one. (App. C at 67a.) The court rejected as premature, however, Petitioners' argument that, based on the 1866 Treaty and Congress's intent that the Estelusti share in the Judgment Fund, the supposed "interest" of the absent Tribe could not be a legally protected interest for purposes of Rule 19(a), stating that the Estelusti's argument assumed the facts to be determined by the lawsuit and "presupposes Plaintiffs' success on the merits." (App. C at 67a.)

The Tenth Circuit could not, however, review the holding that the Tribe was also an "indispensable" party, because the District Court had not performed a Rule 19(b) analysis. The case was therefore remanded with instructions to the District Court to make factual findings pursuant to Rule 19(b) and "to determine whether, in equity and good

conscience, Plaintiffs' Judgment Fund Award claim can proceed in the absence of the Tribe." (App. C at 75a.)

As instructed, the District Court made findings of fact before rendering its Rule 19(b) decision. The Court found that:

- Since at least 1976, "the BIA intended to exclude the Black Seminoles from the benefits of the Judgment Fund Award." (App. B at 31a.)

- "Despite the directive [of the Distribution Act] to utilize the [Judgment] funds for common tribal needs . . . the BIA and the Seminole Nation sought to exclude the Black Seminoles as beneficiaries of these programs." (*Id.* at 33a.)

- The BIA knew that any Usage Plan that excluded the Estelusti "would not receive the required Congressional vote," (App. B at 32a), and that "[the BIA's] exclusionary proposal would not be approved by Congress . . . ." (*Id.* at 32a.) Therefore, "the BIA assisted the Seminole Nation in formulating a plan that could prevent the Black Seminoles' participation in the Judgment Fund Award and still receive Congressional approval." (*Id.* at 32a.)

- To accomplish this goal, the BIA considered several options, including the possibility that a plan excluding the Estelusti might "slip[] through if Congress was busy with the Middle East crises on their minds." (*Id.* at 35a.)

- The Usage Plan created by the BIA and the Tribe innocuously required the Tribe to submit programs to the BIA for approval. (*Id.* at 35a-36a.) Thus, review of Judgment Fund programs would occur at the Agency level only.

- Congress approved the Usage Plan on or about March 30, 1991. Because the BIA kept its discriminatory intent secret (*Id.* at 32a), Congress was unaware of the scheme to exclude the Estelusti from Judgment Fund benefits. (*Id.* at 33a.)

- After the Usage Plan became effective, the Tribal Council submitted several Judgment Fund programs for BIA approval, which the BIA then approved. (*Id.* at 37a.) Each program so established contains the Eligibility Requirement that the beneficiary be "descended from a member of the Seminole Nation as it existed in Florida on September 18, 1823." (*Id.* at 36a.)

- Because the Black Seminoles were not expressly recognized as members of the Seminole Nation until the 1866 Treaty, the effect of the Eligibility Requirement is to exclude the Black Seminoles from participating in any Judgment Fund Program

that conditions participation on meeting the Eligibility Requirement.[1] (*Id.* at 36a.)

The District Court decided that the Tribe and the BIA would be prejudiced by adjudication in the Tribe's absence, and that such prejudice could not be lessened. (*Id.* at 47a.) It decided that a judgment against the BIA in the Tribe's absence would be ineffective. The District Court also determined that the Estelusti had no remedy other than this lawsuit, because pursuing Tribal remedies was futile in light of the discrimination that the Estelusti face in the Seminole government. (*Id.* at 49a.) Thus, despite the facts set forth above and "the Court's belief that plaintiffs should not be prevented from having their case tried on the merits," the District Court concluded that the Tribe was indispensable and dismissed the Estelusti's Judgment Fund claims. (*Id.* at 54a-55a.)

On appeal Petitioners again argued that the Tribe's interest was not a legally protected one, and thus the Tribe's absence should not prevent the case from going forward. The Tenth Circuit declined to address that issue and affirmed dismissal of the Complaint, holding that "the underlying merits" of the dispute "are irrelevant to a Rule 19 inquiry[.]" (App. A at 13a.)

In separate proceedings (not before this Court on the instant Petition), the Tribe sued the BIA in the District of Columbia seeking an order compelling the BIA to pay out portions of the Judgment Fund and to put the Fund under the control of the Tribe. When the Estelusti sought to intervene,

[1] The conclusion that the Estelusti were not members of the Tribe until 1866 is erroneous, but it accurately reflects the position of the BIA.

the BIA opposed the motion. The District Court refused to permit intervention. *See Seminole Nation v. Norton*, 206 F.R.D. 1 (D.D.C. 2001).

The Estelusti have thus been foreclosed from relief in any forum. In the Oklahoma action (the subject of the instant petition) the courts have dismissed based on the BIA's argument that the Tribe is absent. In Washington, D.C., where the Tribe was present, the BIA argued successfully against the Estelusti's intervention.

REASONS FOR ALLOWANCE OF THE WRIT

Although the notion of outright racial discrimination by the federal government seems today an anachronism, this case was brought to vindicate the rights of a long-oppressed and disadvantaged people, the Estelusti, whose only hope of a remedy from racial discrimination practiced against them is in this lawsuit. The Tribe has hidden its unlawful, discriminatory conduct behind its sovereign immunity, and the BIA has avoided judicial review of its unlawful, discriminatory conduct by asserting that the Tribe is an "indispensable" party.

The proper interpretation and application of Rule 19(b) is an important question, so that the equity powers of the federal courts are not limited by an inflexible reading of the Rule. Shortly after Rule 19 was amended, this Court cautioned against rigid application and instead counseled a "flexible" approach with "pragmatic considerations" being paramount. This Court has directed the lower courts to examine the facts of each case to make certain that the "interests" of absent parties "really exist." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). The Tenth Circuit has asserted that it will not examine a purported "interest" of an absent party because to do so would be to reach the merits of the action, and has

declared the merits of the underlying case to be irrelevant to a Rule 19 analysis. Review is needed to prevent misapplication of Rule 19 in the Tenth Circuit and in lower courts elsewhere.

Further, this case presents a question that has not, but should be, decided here: the rights of minority persons within Indian tribes in light of Treaty and legislation. The absent Tribe has, by Treaty, divested itself of the power to discriminate against its minority members on account of their race. The Estelusti are members of the Tribe and entitled to share equally in Tribal property, and the statutory framework providing for the holding in trust and distribution of the Judgment Fund shows that Congress intended the Fund to be used for common Tribal needs. The BIA and the Tribe colluded to create a plan by which the BIA would delegate to the Tribe the power to discriminate, and thus avoid the inevitable defeat by Congress that both knew would occur. Review is necessary to establish the boundaries of Indian sovereign immunity and self-government when Treaty and federal legislation prohibit the conduct at issue.

I. REVIEW IS WARRANTED AS THE DECISION OF THE COURT OF APPEALS ON AN IMPORTANT FEDERAL QUESTION – PROPER APPLICATION OF RULE 19 – CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Below, Petitioners argued that the interest of the absent Tribe was not a legally protected one: to discriminate against its Black members by excluding them from common tribal property, the Judgment Fund. The Court of Appeals summarily rejected the argument, asserting that it had already ruled in considering the absent Tribe's interest under Rule 19(a) that the Estelusti's approach "is untenable because it would render the Rule 19 analysis an adjudication on the

merits," and that the underlying merits are irrelevant to a Rule 19 determination. (App. A at 12a.) This holding is in conflict with the prior holding of this Court in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968) ("*Provident Bank*").

In *Provident Bank*, decided shortly after the Rule was amended to its current form, this Court made clear that Rule 19 "*commands* the courts to examine each controversy to make certain that the interests really exist." 390 U.S. at 119 (emphasis added). That "command" is what has been lost in the rigid application of Rule 19 by the Tenth Circuit. *See Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001), *citing Davis I.* Nothing in Rule 19 or in Supreme Court authority directs, or even permits, the federal courts to turn a blind eye to what is really at stake for the absent party. The Tenth Circuit's "rule" regarding the "merits" is without any support.[2] Rule 41(b) provides that a Rule 19 ruling is not an adjudication on the merits.

In *Provident Bank* this Court directed the federal courts to be "flexible" and "pragmatic" in applying Rule 19, pointing out that it derives from a rule of equity. The Court quoted former Chief Justice John Marshall's reminder that the rule that courts of equity require that all concerned parties be brought before the court so that the matter in controversy may be finally settled is

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[2] In the decision at issue here, the Tenth Circuit cites, as support for its rule, *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001). (App. A at 13a.) That case, in turn, cites *Davis I,* which merely held that a determination on the merits in that case – where no fact findings had yet been made – was premature, and went on to recite that the absent party's interest may not be a "patently frivolous" one. (App. C at 67a.)

> "an equitable rule, however, [that] is framed by the Court itself, and is subject to its discretion . . . . Being introduced by the Court itself, for the purposes of justice, [the rule] is susceptible of modification for the promotion of those purposes . . . . In the exercise of its discretion, the Court will require the plaintiff to do all in his power to bring every person concerned in interest before the Court. But, if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the Court cannot reach . . . ought not to prevent a decree upon its merits."

Id. at 120-21 (quoting *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166-168 (1825)).

The Court in *Provident Bank* evaluated at length the interest of the absent party in that case. *See* 390 U.S. at 113-116. The opinion states that the nonjoined party must have an interest that "really exist[s]," 390 U.S. at 119, and that substantive law may determine what interest the absent person "actually has." *Id.* at 125 n.22. Here, in contrast, the Tenth Circuit failed even to identify the supposed interest of the Tribe, let alone to consider whether that interest "really exists."

The *Provident Bank* Court rejected the lower court's holding that the right of a person "who may be affected" by the judgment in an action has a substantive right to be joined. *Id.* at 107, 118 n.13. *Provident Bank* did not suggest that adjudication of a matter in the absence of a party who could not be joined could not take place "in equity and good conscience," even if that party did have an interest to protect. Indeed, the Court described an adjudication that would bind

all parties as "[t]he optimum solution," 390 U.S. at 108, but not the only solution. The Court recognized that because the absent party could not be bound by the judgment, he might eventually have to relitigate the issue presented by his own interest, *id.* at 114, but it refused to permit considerations of "efficiency" to defeat the equitable, flexible purpose of Rule 19. *Id.* at 116.

This Court's decision in *Provident Bank* is that the question is not whether the absent party has an interest that is "adverse" to that of a present party, but whether in proceeding in his absence that party would be "harmed" by a judgment. *Id.* at 114. If the absent party would not be bound by the judgment, his interest could not be "harmed." *Id.* Regarding the absent party in *Provident Bank*, this Court observed that "the only possible threat" to his interest in an insurance fund was that the fund might be dissipated before he had an opportunity to assert his interest. *Id.* at 114-15. The court found this "threat" "neither large nor unavoidable." *Id.* at 115. Here, it cannot be said that the interest, if there be one, of the absent Tribe in the Judgment Fund is any larger. Petitioners show below in Point II that the supposed interest of the absent Tribe is not a legally protected one, as it is contrary to the Tribe's obligations pursuant to treaty, and to the intent of the Judgment Fund legislation.

The Tenth Circuit failed to take account of the District Court's findings that the BIA and Tribe and colluded to evade Congressional intent and to deprive the Estelusti of benefits voted for them by Congress. Instead, the Tenth Circuit blindly adhered to its rigid rule of holding that the merits of the dispute are "irrelevant." Where, as here, the District Court had further found, and the Tenth Circuit did not disagree, that the Estelusti had no other recourse than the instant suit, it is plain that justice has been defeated. This is in conflict with the holding of this Court in *Provident Bank*,

390 U.S. at 117 n.12, that Rule 19(b) may not be used to defeat justice.

In holding that Rule 19(b) may not be used to defeat justice, *Provident Bank*, 390 U.S. at 116 n.12, the Court's statement implies that the merits may be considered in a case, such as that presented here, where the merits of the absent party's supposed interest overlap with the merits of the dispute.

Where no determination relating to the merits could be made without a trial, a court may still weigh the interest of the absent party. *See, e.g., Idaho ex rel. Evans v. Oregon*, 444 U.S. 380 (1980). In that case, while this Court could not determine the merits of an argument made by Idaho without a trial, the Court considered the possible alternative outcomes and determined that neither outcome, given the asserted interest of the absent party, made it impossible to go forward with the case without the absent party.

In other cases, such as here, the question of the merit of the absent party's interest is not legally protected as a matter of law. No trial is necessary, and the issue may be determined preliminarily and as a legal matter under Rule 19. No such ruling constitutes an "adjudication of the merits." The absent party is not bound. *See Provident Bank*, 390 at 110; Rule 41. The defendant party, which is present, may either appeal, or if it claims material facts are in dispute, demand a trial.

If, as is universally held, a frivolous interest, or one that is not legally protected, cannot justify a Rule 19 dismissal,[3] then it follows that in order to determine whether

[3] *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) ("legally protectible interest"); *United*

(*continued on next page*)

to proceed in equity and good conscience without the absent party, a court must determine whether a claimed interest is frivolous or one not legally protected.

Application of Rule 19 as rigidly applied by the Tenth Circuit on the facts here defeated justice and gave judicial imprimatur to conduct that no court of equity would condone: racial discrimination by federal agents against minority citizens. This is conduct long held to be "odious." *See, e.g., Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *see also Brown v. Board of Education*, 349 U.S. 294 (1955).

(*continued from previous page*)
States v. San Juan Bay Marina, 239 F.3d 400, 406 (1st Cir. 2001) ("a party is necessary under Rule 19(a) only if they [sic] claim a 'legally protected interest' relating to the subject matter of the action"); *Rama Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996) (Rule 19 analysis must always begin with assessment of whether nonparty Tribes have a legally protected interest); *Yellowstone County v. Pease*, 96 F.3d 1169, 1171 (9th Cir. 1996) ("legally protected interest"); *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41 (2d Cir. 1996) (affirming lower court's ruling that joinder of absent party not required) (*citing Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983)) (absent party must claim a "legally protected interest"). *See also Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 959 (10th Cir. 2001) (Rule 19 excludes claimed interests that are "patently frivolous.") (*citing Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999)); *Keweenaw Bay Indian Cmty. v. Michigan*, 11 F.3d 1341, 1347 (6th Cir. 1993) (court not required to find a party necessary based on "patently frivolous claims"); *Wyandotte Nation v. City of Kansas City*, 200 F. Supp. 2d 1279, 1291 (D. Kan. 2002) (same); *Sierra Club v. Young Life Campaign, Inc.*, 176 F. Supp. 2d 1070, 1078 n.3 (D. Colo. 2001) (same).

II. REVIEW SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW NOT DECIDED BY THIS COURT, BUT WHICH SHOULD BE DECIDED, REGARDING THE RIGHTS OF MINORITY CITIZENS OF INDIAN TRIBES AND THE LIMITS OF TRIBAL SOVEREIGNTY AND SELF GOVERNMENT IN LIGHT OF TREATY AND STATUTORY LAW.

A. By Treaty The Tribe Has Divested Itself Of Power To Discriminate Against Its Minority Members On The Basis of Race.

There is no dispute in this case that Petitioners are members of the Seminole Nation of Oklahoma. By virtue of the 1866 Treaty, they are entitled to the rights of all citizens of the Tribe. Prior challenges mounted by the Tribe to the rights of the Estelusti to share in common Tribal property have been rejected by the courts.

In 1933, the United States Court of Claims held that the rights granted by the Tribe in the 1866 Treaty to the Estelusti were "all the rights" of a native member or citizen of the Seminole Tribe or Nation, including "rights in the soil and civil rights." *Seminole Nation v. United States*, 78 Ct. Cl. 455, 1933 WL 1802, at *8 (1933) ("*Seminole I*"). That decision was reaffirmed by the Court of Claims in 1940, in *Seminole Nation v. United States*, 90 Ct. Cl. 151 (1940) ("*Seminole II*"). In *Seminole II*, the Tribe sought a declaration that under the 1866 Treaty the Estelusti were entitled to political rights but not Tribal property rights. The court rejected that argument based on the express language of Article II of the 1866 Treaty. *Id.*, 90 Ct. Cl. 151.

Accordingly, it is *res judicata* against the Tribe that the Estelusti are entitled to share in common Tribal property.

B. Pursuant To Federal Law Common Tribal Property Belongs To All Current Members Of The Tribe.

Under well-settled law, Indian Claims Commission judgment fund awards belong to the tribal entity and not to individual Indians or their descendants, unless Congress specifies otherwise.[4] *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977) (Indian Claims Commission judgment fund awards are "tribal rather than individually owned property"). Common tribal property, in turn, belongs to all current members of the Tribe, and not to a subset of members descended from specific ancestors. Felix S. Cohen, *Handbook of Federal Indian Law* (1982) at 472 ("Tribal property is a form of ownership in common. * * * [It is] held in common for the benefit of all living members of the tribe, a class whose composition continually changes as a result of births, deaths and other factors."); *Cherokee Nation v. Journeycake*, 155 U.S. 196, 208-11 (1894) (newly-added members of a tribe are "equally with the native Cherokees . . . entitled to share in the profits and proceeds" from the sale

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[4] Pursuant to the Indian Claims Commission Act, Pub.L. No. 79-726, 60 Stat. 1049, under which the Judgment Fund was sought and awarded in the first instance, Congress has the exclusive authority to determine who among a Tribe's members may participate in a judgment fund award. *See, e.g., Cherokee Freedmen v. United States*, 195 Ct. Cl. 39, 1971 WL 17825 at *4 (1971) ("Congress . . . has taken upon itself . . . this function of defining the individuals or classes who are to share in a judgment under the Act.") *See also Delaware Tribal Bus. Comm,* 430 U.S. at 83 (upholding Indian Claims Commission Act; "the power over distribution of tribal property has 'been committed by the Constitution to Congress.'" (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

of land owned exclusively by the original members of the tribe).

The Estelusti are undeniably members of the Seminole Nation. *See Seminole Nation of Oklahoma v. Norton*, 223 F.Supp.2d 122 (D.D.C. 2002). Article II of the 1866 Treaty guarantees that the Estelusti shall "have and enjoy the rights of native citizens." (App. F.) It guarantees equal treatment which includes "equal rights in tribal property . . . ." *Seminole Nation v. United States*, 90 Ct. Cl. at 153. The Treaty remains in full force and is the supreme law of the land.[5] ("the Treaty of 1866 has not been abrogated by subsequent agreement or statute . . ."). (App. H at 129a.) There is no dispute in this record that the Estelusti are members of the Tribe. Thus, the Estelusti are entitled as a matter of law to share equally in the common Tribal Judgment Fund. It follows that, for purposes of Rule 19(b) analysis, the Tribe has no legally protected interest in excluding the Estelusti from the Judgment Fund.

The District Court suggested that the Tribe had an interest in how to govern its own programs, and how its money should be spent for benefits. (App. B at 47a-48b.) Such an interest, however, goes no further than choices as to how to spend the Fund - *e.g.*, guns versus butter, housing versus schools, or clothing versus medical care. Because of

[5] The 1866 Treaty further mandates that the Estelusti share in the Judgment Fund because 25 U.S.C. § 122 provides that: "No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law." (App. G at 93a.) Whatever, if any, "interest" a tribe may have in its sovereign self-governance, that tribal sovereignty is dependent on and subordinate to the federal government. *Washington v. Confederated Tribes of Colville Ind. Reserv.*, 447 U.S. 134, 154 (1980).

the 1866 Treaty and the Distribution Act and the Judgment Act, however, the Tribe has no lawful interest in excluding its Black citizens from all Fund programs.[6] A decree in this case that the BIA may approve no application for Judgment Funds made by the Tribe which discriminate against the Estelusti would not interfere with the Tribe's interest in making legitimate spending or self-governmental choices. Accordingly, the action can go forward in the absence of the Tribe without in any way harming any actual interest of the Tribe.

C. The Statutory Framework Establishes That Congress Intended The Fund To Go To All Members Of The Tribe.

The Judgment Act directed the BIA to hold the funds "in trust" and required the BIA to prepare a plan "which shall best serve the interests of all those entities and individuals entitled to receive funds." (App. G at 95a.) The Act further directed the BIA to be sure that "the needs and desires of any groups or individuals who are in a minority position, but who are also entitled to receive such funds, have been fully ascertained and considered," (App. G at 96a.)

The Distribution Act directed the BIA to hold the Fund in trust and to use at least 80 percent of it for "common tribal needs"; interest on the balance could be distributed "per capita." (App. G at 92a.)

There is no room in this statutory scheme for a reading of these statutes which permits systematic exclusion

[6] A tribe has the power to determine tribal membership unless limited by treaty or statute, *see U.S. v. Wheeler*, 435 U.S. 313, 322 n.18 (1978). There is no dispute on this record that petitioners are members of the Tribe because of the 1866 Treaty.

of a minority group, the Estelusti, from enjoyment of their rightful share of common Tribal property, held in trust for all members of the Tribe by the BIA.

D. The District Court's Findings Demonstrate That The Absent Tribe Has No Legally Protected Interest.

It is plain from the District Court's findings that the BIA and the Tribe knew they were breaking the law. The District Court found that "the BIA intended to exclude the Black Seminoles from the benefits of the Judgment Fund Award" (App. B at 31), and that "[d]espite the directive [of the Distribution Act] to utilize the [Judgment] funds for common tribal needs . . . the BIA and the Seminole Nation sought to exclude the Black Seminoles as beneficiaries of these programs." (App. B at 33.) The District Court further found *that the BIA knew that excluded the Estelusti "would not receive the required Congressional vote,"* and the *"exclusionary proposal would not be approved by Congress . . . ."* (App. B at 32 (emphasis added).) The District Court found that it was because it knew that an exclusionary Usage Plan would never receive the approval of Congress that "the BIA *assisted the Seminole Nation in formulating a plan that could prevent the Black Seminoles' participation in the Judgment Fund Award and still receive Congressional approval."* (App. B at 32.)

These findings that the Tribe itself, as well as the BIA, well knew Congress intended the Estelusti to share in the Fund. The BIA should not have been heard, in a court of equity, to claim that the absent Tribe had a legally protected interest.

Accordingly, when the facts are examined – as this Court in *Provident Bank* expressly stated they must be – it is plain that there is no right or interest which could be claimed

by the absent Tribe to systematically exclude minority members of the Tribe from sharing in the common Tribal property at issue here, the Judgment Fund. As a result, the Petitioners' claim against the BIA should have been allowed to proceed in the absence of the Tribe.

CONCLUSION

For all the foregoing reasons Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

Franklin B. Velie*
Dierdre A. Burgman
Christian K. Parker
Hemamalini Moorthy
Tiana A. Demas
Derek McNally
SALANS
620 Fifth Avenue
New York, NY 10020
(212) 632-5000

Jonathan T. Velie
William P. Velie
VELIE & VELIE
210 East Main Street
Norman, OK 73069
(405) 364-2525

Attorneys for Petitioners

*Counsel of Record