No. 11-80

In The
Supreme Court of the United States

GILA RIVER INDIAN COMMUNITY,

Petitioner,

vs.

G. GRANT LYON,

Respondent.

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

AMICI CURIAE BRIEF OF KENNARD B. JOHNS AND MELVA ENOS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF *AMICI* AND BACKGROUND[1]

Amici Curiae, Kennard B. Johns and Melva Enos, are members of the Gila River Indian Community (the "Tribe"). Each owns land that is central to this litigation, but they were never joined and never served with any notice of the pending litigation aimed at acquiring easements over their lands.

Nearly a century ago, the Tribe, acting under the auspices of the Indian General Allotment Act of 1887, commonly known as the "Dawes Act," 24 Stat. 388, transferred roughly five percent of its land to various of its members. The purpose of the Dawes Act was to enable Native Americans to enjoy the valuable rights and entitlements of real property ownership by facilitating their acquisition of equitable title in individual parcels of land, with the United States government to retain legal title to each parcel. Thus, the Native Americans "were to be established as individual settlers on separate allotments of land gaining a livelihood by pastoral pursuits." *See Hopkins v.*

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[1] Pursuant to Rule 37.3(a), *Amici* Kennard B. Johns and Melva Enos certify that counsel of record for both Petitioner and Respondent have consented in writing to the filing of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file. *Amici* have lodged the consent letters, together with their proof of service, in this Court.

Pursuant to Rule 37.6, *Amici* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *Amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

United States, 414 F.2d 464, 467 (9th Cir. 1969) (citations omitted).

The annals of American history are replete with examples of inequities imposed on the aboriginal inhabitants of this nation and their descendants. The circumstances of this litigation are no exception. *Amici* are descendants of the original Dawes Act allottees whose land will be directly traversed by the easements that Respondent, G. Grant Lyon, seeks in this litigation. The practical effect of the easements, if upheld, will not merely be to interfere with the *Amici*'s pastoral use and enjoyment of their lands, as the Dawes Act intended, but to dilute the economic value of their lands since the easements would be utilized to push heavy traffic and regional infrastructure through *Amici*'s front yards and into what Respondent hopes will be transformed from a dairy farm into a higher-density housing development in Section 16. Yet, neither the district court nor Respondent even deigned to provide Mr. Johns or Ms. Enos, or any other member of the Tribe who holds equitable title to allotted land that will be affected by the easements, with notice of the underlying lawsuit out of which this Petition arises.

Lack of notice to and unwillingness to join *Amici* is even more perplexing given that *Amici*'s land is pivotal to this litigation. There are two non-public roads linking public highways to Section 16: (1) Murphy Road, which runs north-south, intersects Section 16 from the south; and (2) Smith-Enke Road which runs east-west along the southern border of Section

16. These non-public roads, in addition to passing through the Gila River Indian Community lands, pass directly through parcels owned by *Amici*. Mr. Johns, a Tribe member, is the equitable owner of two parcels of land that are traversed by the Murphy Road easement. Without an easement over Mr. John's property, Murphy Road provides no access to Section 16. Ms. Enos is the equitable owner of three parcels of land. One of her parcels would be traversed by both the Murphy Road easement and the Smith-Enke Road easement. Another parcel would be traversed by the Smith-Enke Road easement alone. Without easements over Ms. Enos' land, neither the Murphy Road nor the Smith-Enke Road easement would provide Respondent with access to Section 16.

Respondent, in the underlying action filed in the United States Bankruptcy Court for the District of Arizona, sought a judicial declaration that it had a perpetual easement over the full lengths of both roads. Despite the substantial effect that such declaratory relief would have on *Amici*'s parcels, Respondent did not name either *Amicus* as a party to the declaratory judgment action or serve either *Amicus* with notice of the filing or pendency of the action. The point is sufficiently remarkable to warrant repetition: neither *Amicus* received any notice of the instant litigation and they accordingly had no opportunity to participate in the judicial proceeding aimed at acquiring easements over their land. This oversight violates core values of due process underlying the Fifth Amendment. Respondent likely believes that he has unfettered access over *Amici*'s property even though he

failed to join them as party defendants or provide them with any notice of his intent to oust them of their rights and entitlements embodied in their equitable title to those parcels.

ARGUMENT

The Petition for Certiorari illustrates, as few can, the perils of vigorously objecting to joinder of the legal owner of all of the land at issue under Rule 19 of the Federal Rules of Civil Procedure. The purpose of Rule 19, which requires joinder of a party whose absence would prevent the existing parties from being granted complete relief, is to protect the legitimate interests of absent parties and to discourage duplicate litigation. *See United States v. Rose*, 34 F.3d 901, 908 (9th Cir. 1994). The Petition ought to be granted to address the Ninth Circuit's application of Rule 19 because that Rule, as interpreted and enforced by this Court, prevents the basic due process violation and injury that occurred here: Where the legal owner of property cannot be joined, a court must either join the equitable owners or provide them with notice that is reasonably calculated to alert them to the pending action that could adversely affect their use and enjoyment of their property. *See Jones v. Flowers*, 547 U.S. 220, 226 (2006). The relationship between the legal and equitable owners and between the equitable owners and those managing the property on their behalf has been and remains a constant source of confusion in the context of Rule 19. *See, e.g., School*

Board of Avoyelles Parish v. United States Dep't of Interior, No. 09-30660 (5th Cir. July 22, 2011). For example, another petition, raising a related issue, has been pending with this Court since January 28, 2011, awaiting the views of the Solicitor General. *See Navajo Nation v. Equal Employment Opportunity Commission*, No. 10-981.

Amici are equitable owners of parcels that will be adversely affected by the imposition of the easements at the heart of this lawsuit, yet they were never provided notice of the litigation. The Ninth Circuit held that neither notice to *Amici* nor their joinder was necessary to proceed with a declaratory action that could inherently extinguish their rights to portions of real property. Instead, the Ninth Circuit held, apparently in the alternative, either that *Amici* were not bound by the district court's decision and therefore their joinder was not necessary to proceed with the lawsuit, or that under Rule 19, the equitable owner of abutting property, *i.e.*, the Gila River Indian Community, could adequately represent *Amici*'s property interests in that the lawsuit and, by extension, Respondent could proceed against *Amici*'s land without providing the *Amici* with notice or an opportunity to be heard.

If *Amici* are not bound by the easements, as noted by the district court below, then Respondent continues to lack access to Section 16 because he has no easement over *Amici*'s property. However, this aside does not relieve a court of its Rule 19 obligations: If complete relief cannot be afforded a plaintiff without

joining a particular party, the court must join that party. *See* Rule 19(a)(1)(A). Without an easement over *Amici*'s land, Respondent has no access to his property and hence, no complete relief. The confusion surrounding the reach and scope of Rule 19 counsels in favor of granting the Petition: it underscores the need for greater judicial consistency in this area and the importance of treating the legal owner of real property as a necessary party to a lawsuit.

I. Under Due Process Principles, An Equitable Owner of Land Is Entitled to the Same Notice As the Legal Owner.

Amici were entitled to receive notice of the instant litigation as equitable owners of the allotted land at issue in the declaratory action, but received none. Justice Field, in the course of resolving a land dispute more than a century ago, emphasized "[t]hat there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter." *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). Justice Field concluded that notice and an opportunity to be heard constitute such a fundamental set of rights that "it is a principle of natural justice recognized as such by the common intelligence and conscience of all nations." *Id.*

The fact that *Amici* are equitable owners should not affect their right to notice of a lawsuit that could significantly and adversely affect their real property interests. For instance, in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), a bank which managed a consolidated trust sought to settle its accounts and so petitioned a court. Once the accounts were settled, individual trust beneficiaries would lose any ability to challenge the actions of the trustee during the period of the trust. The bank sought to notify as many beneficiaries as possible by mail but served the rest through publication. The Court concluded that given what was at stake, the bank's actions were insufficient to pass constitutional muster. The Court reasoned that the "proceeding does or may deprive beneficiaries of property . . . and hence notice and hearing must measure up to the standards of due process." *Id.* at 313. The beneficiaries of the trust at issue in *Mullane*, like *Amici* here, were equitable owners of the corpus.

Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) is equally instructive. In *Mennonite*, a county government, acting under Indiana law, sought to sell a parcel of property to pay delinquent property taxes. The county provided notice to the owner of the property, the mortgagor, who had failed to pay the property taxes, but did not provide notice to the lien holder (*i.e.*, mortgagee). In setting aside the Indiana law that authorized the sale without notice to a mortgagee, the Court observed that even though the mortgagee did not hold legal title, it nonetheless had

"a legally protected property interest, [and was] entitled to notice reasonably calculated to apprise him of a pending tax sale." *See also Robinson v. Hanrahan*, 409 U.S. 38 (1972) (per curiam) (holding that notice of automobile forfeiture mailed by state to petitioner's home while petitioner was incarcerated in county jail deemed insufficient); *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988) (holding that publication was inadequate to provide meaningful notice to creditor of estate).

In *Mullane*, *Mennonite*, *Robinson*, and *Tulsa* some attempt was made to provide notice, albeit constitutionally inadequate. Here, Respondent made no attempt whatsoever to alert *Amici* to the pending proceeding. Absent notice, Respondent has no easement and Rule 19, cannot cure this constitutional defect.

II. Rule 19 Is Not a Substitute for Due Process and Does Not Obviate the Need to Provide Notice.

The court of appeals appears to have held, with respect to the *Amici*, that since the Tribe could adequately represent *Amici,* their joinder was not required to adjudicate the case. *See Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1071 (9th Cir. 2010); (Appendix to Petition for a Writ of Certiorari ("App.") at 14-15). The court "[a]ssum[ed], without deciding, that the individual allotees [sic] were required parties under Rule 19(a)," but concluded that "the litigation could proceed without them under Rule

19(b). . . ." because their interests could be adequately represented by the Tribe. *Id.* The Ninth Circuit therefore failed to recognize that Rule 19(b) only allows a case to proceed without a required party if that person "cannot be joined. . . ." Fed. R. Civ. P. 19(b). And further, unlike Rule 24(a)(2), Rule 19 does not have an "adequate representation" exception.

As a preliminary matter, the Ninth Circuit correctly assumed that *Amici* were required parties under Rule 19(a). That provision states that a person who is subject to service of process and whose joinder would not deprive the court of subject matter jurisdiction "must be joined" as a party if either: (1) "in that person's absence, the court cannot accord complete relief among existing parties"; or (2) "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the persons absence may . . . impair or impede the person's ability to protect the interest. . . ." Fed. R. Civ. P. 19(a).

Here, there is no question but that *Amici* were subject to service of process in this case and that their joinder would not deprive the court of subject matter jurisdiction. The individual allottees and *Amici*, unlike the United States, could not assert sovereign immunity. Nor could the district court provide Respondent with complete relief without joining *Amici*, whose properties would be traversed by the claimed easements sought by Respondent; *Amici* claimed and continue to claim an interest in the property that is potentially impaired by the court's order. That is why the district court acknowledged that the individual

allottees would not be bound by the judgment below. *See Lyon*, 626 F.3d at 1071; (App. at 7). It is unclear whether the Ninth Circuit agreed with this aside. One point is clear though: the Ninth Circuit misapplied Rule 19 to both the legal owner and the equitable owners and as a result, guidance from this Court is necessary.

Specifically, although correctly assuming allottees were mandatory parties under Rule 19(a), the Ninth Circuit immediately reversed itself by concluding that "the litigation could proceed without [the allottees] under Rule 19(b)." *Lyon*, 626 F.3d at 1071; (App. at 15). The court apparently operated under the misunderstanding that the equitable factors of Rule 19(b), *see Republic of the Philippines v. Pimental*, 533 U.S. 581, 868-871 (2008), could excuse non-joinder of a required party who was subject to service of process and whose joinder would not deprive the court of subject matter jurisdiction. Yet, Rule 19(b) is explicitly limited to those rare circumstances where "a person who is required to be joined . . . cannot be joined. . . ." Fed. R. Civ. P. 19(b). The court can only apply its discretion, "in equity and good conscience," to excuse joinder when joinder is impossible. Fed. R. Civ. P. 19(b). Otherwise, like here, ordinary principles of notice and due process govern and *Amici* should have been allowed to protect their rights through joinder and notice. The Ninth Circuit's conclusion that the Tribe could adequately represent the allottees is not relevant under Rule 19. There is no rule of law that permits a judgment to be entered against an absent

party who has not been served, if that party's neighbor could provide adequate representation. The Ninth Circuit's "good neighbor" policy, while laudable sounding, is not part of this Court's due process jurisprudence. If it were, posting notice on a community bulletin would suffice, but it does not.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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