No.

In the

Supreme Court of the United States

WALTER ROSALES; MARIE TOGGERY;
KAREN TOGGERY,

Petitioners,

v.

KEAN ARGOVITZ RESORTS, INC., a limited liability company; LAKES GAMING, INC., a publicly traded company; KEAN-ARGOVITZ RESORT-JAMUL, LLC, a Nevada limited liability company; LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, a Delaware limited liability company,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a private conspiracy by non-Indian gaming corporations is actionable under 42 U.S.C. 1985(3), where it deprives the Petitioners of the right to vote because Petitioners are Indians and members of a tribal political faction?

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The decision of the United States Court of Appeals for the Ninth Circuit, dated May 21, 2002, is set forth in the Appendix ("App.") p. 1a. The opinion of the United States District Court for the Southern District of California, dated April 18, 2001, is set forth in the Appendix at 3a – 15a.

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Ninth Circuit issued its Decision in this case on May 21, 2002. This Petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves 42 U.S.C. 1985(3), 18 U.S.C. 597, and 25 U.S.C. 2710(d)(1) and (2)(A) and (B), and 25 U.S.C. 2711(e)(2), the relevant portions of which are set forth verbatim in the Appendix at pp. 16a – 20a.

STATEMENT OF THE CASE

Introduction

Petitioners allege that the non-Indian Respondent corporations have conspired to unlawfully pay a reported $100,000 a month to deprive the Petitioners of their right to an undiluted vote in federal tribal elections at the Jamul Indian Village. Petitioners further allege that the Respondents' conspired to interfere with their right to vote, because Petitioners are Indians, and members of the tribal political faction that supports Petitioner ROSALES' election as Chairman of the Village, and opposes building a casino on land where the Petitioners' homes now stand and their ancestors are buried.

Respondents' "invidiously discriminatory animus" has already unlawfully and unduly influenced sufficient Village

votes to raze the Petitioners' homes and displace their families. The non-Indian Respondents' unlawful contributions evidence both a "racial and otherwise class-based invidiously discriminatory animus," because the Petitioners are Indians, and members of the political faction within the Village that supports ROSALES' election and is opposed to constructing a Class III gaming casino on the site of their homes.

Contrary to Indian gaming's public relations campaign, not all Native Americans believe that Indian gaming is the new white buffalo, in the stampede to build a casino money machine on every Native American doorstep. Many, like the Petitioners here, believe that Indian gaming trades one form of federal economic assistance for another. They further believe that the recipients of the ill gotten gains of gaming remain chained to a greed driven, predatory vice, scientifically designed to squeeze the last available dollar from every player, which merely re-distributes income from those ill-prepared to resist the temptations of un-earned gaming windfalls, so that the Respondents may profit from what is skimmed from those who can least afford to gamble with their livelihood.[1]

Non-Indian Respondents have no right to dilute the Petitioners' vote in federal tribal elections at the Village, or otherwise violate federal election laws, by making, or soliciting, an expenditure in consideration of a vote, or the withholding of a vote, in any federal tribal election. 18 U.S.C. 597. None of the Respondents have any right to make contributions of money, property, and other consideration in an attempt to "unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity." 25 U.S.C. 2710(d)(2)(B)(ii) and 2711(e)(2). Nor do Respondents have any right to discriminate against Petitioners by depriving Petitioners of the right to an undiluted vote, lawful use of their homes, and

[1] So concludes the National Gambling Impact Study Commission, in its 1999 report to the President and Congress, which also finds there are more than 15 million problem gamblers, 13% of the total; half the profits are raked in from the top 5% of heavy players, who are disproportionately those who can least afford the habit, and are the least educated about their problem.

the benefit of their contracts, in the headlong rush to build a Class III gaming casino.

This case presents a unique opportunity, in the limited context of Indian political factions, for the Court to further define the type of "racial or otherwise class-based invidiously discriminatory animus" that may be remedied by a cause of action for damages under 42 U.S.C. 1985(3). It also provides the Court with the opportunity to answer the long-standing question as to the scope of the protection afforded by 42 U.S.C. 1985(3), and to resolve the conflicts among the circuit courts of appeals, concerning these important questions of federal law.

Background

On April 22, 1998, Chief Judge of the Interior Board of Indian Appeals (IBIA), Kathryn Lynn, found in favor of Petitioners' claim that there had not been a lawful election at the Village since 1992.

> The Board concludes that, in the absence of proof that only tribal members voted and/or were elected to office in any of the three elections at issue in this appeal, Departmental recognition of the results of any of the elections would violate the Village's constitution. It therefore ... reverses that part of the [Regional director's] decision which recognized the results of the 1995 tribal election... The Board is aware that this decision will continue the Village's leadership controversy. In effect, the decision reinstates the officers elected in the 1992 tribal election, which is the last election that is not before the Board in this appeal. 32 IBIA 167.

Judge Lynn further remanded, and later consolidated in Case No. 00-28-A, the appeals of the Bureau of Indian Affairs ("BIA")' failure to recognize the lawful results of the 1995, 1997, 1999, and 2001 elections, in which Petitioner ROSALES was elected Chairperson of the Jamul Indian Village. On remand, the administrative record demonstrates

that the Regional Director violated Judge Lynn's remand order, by failing to "assist the Village's actual members in addressing their membership and leadership problems in light of this decision," 32 IBIA 168, refusing to meet with the Petitioners, and failing to consider the "proof that only tribal members voted and/or were elected to office" in the 1995, 1997, 1999 and 2001 elections. These violations of Judge Lynn's remand order by the Regional Director remain on administrative appeal in IBIA No. 00-28-A.

In addition, Chief Judge Lynn also found that subsequent decisions by the BIA Regional Director to ignore Petitioner ROSALES' election, and recognize the results of elections in which non-members voted, have no force or effect, once an appeal is filed with the IBIA. The IBIA has repeatedly held that "once an appeal is filed with the [IBIA], the BIA loses jurisdiction over the matter except to participate in the appeal as a party. See *Hammerberg v. Acting Portland Area Director* 24 IBIA 78 (1993)," "because the identity of those individuals who should be recognized as the governing body for the Village is the central question in this appeal." October 26, 1996, Order in Case No. 97-7-A.

Since the remand of what the IBIA describes as "the membership and leadership"dispute has not yet reached a final decision, the only government of the Jamul Indian Village that has been lawfully recognized, by the ranking member of the U.S. government and the Department of Interior, is that elected by the Jamul Indian Village General Council in 1992. The results of all subsequent "elections" held by any faction at the Village remain on appeal with the IBIA in Case No. 00-28-A.

During the pendency of these appeals, the four Respondent corporations, as alter egos of each other, entered into a Memorandum of Agreement Regarding Gaming Development and Management Agreements on February 15, 2000, for the purpose of building a casino, with the faction of the Village, that opposes the election of Petitioner ROSALES, and the faction whose elections have already been found by the IBIA to have violated the Jamul Indian Village constitution.

In addition, the Federal Register provides judicial notice that a Class III gaming ordinance has not been adopted, as required by 25 U.S.C. 2710(d)(1)(A)(i), nor has any proposed Class III gaming ordinance been approved by the Chairman of the National Indian Gaming Commission ("NIGC"). 25 U.S.C. 2710(d)(1)(A)(iii) and 2710(d)(2)(A) and (B).[2]

Nor could a Class III gaming ordinance have lawfully been approved during the negotiations with the Respondent corporations, since the IBIA has already determined that the BIA/NIGC can take no further action with regard to the Village while the IBIA appeals remain pending, and since the IBIA has also determined that there have not been any lawful elections at the Village since 1992.

Procedural History

Petitioners' Complaint was filed on September 22, 2000. An Answer was filed on behalf of two individual defendants, Kevin Kean, and Jerry Argovitz, who, due to amendment, are no longer parties in this case. Petitioners filed a First Amended Complaint against the four corporate Defendants remaining in this case, KEAN ARGOVITZ RESORTS, INC., LAKES GAMING, INC., KEAN-ARGOVITZ RESORTS-JAMUL, LLC, LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, on November 16, 2000.

The four corporate Defendants moved to dismiss the First Amended Complaint on December 19, 2000. The trial court rendered an order granting the motion to dismiss with leave to amend the Petitioners' civil rights claims on February 2, 2001.

The Petitioners filed a Second Amended Complaint against the four corporate Defendants on February 28, 2001. App. at pp. 21a – 48a. The four corporate Defendants filed a motion to dismiss the Second Amended Complaint pursuant

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[2] Class III gaming is defined as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. 2703(8). Generally, Class I gaming is typically identified as social games solely for prizes of minimal value. See 25 U.S.C. 2703(6). Class II gaming is usually associated with games of chance such as bingo. See 25 U.S.C. 2703(7)(A).

to F.R.C.P. Rule 12(b)(6) on March 12, 2001. The Petitioners filed an opposition to the Defendants' motion to dismiss on March 26, 2001.

The trial court granted the Defendants' motion to dismiss pursuant to F.R.C.P. Rule 12(b)(6), and denied Petitioners leave to further amend their Second Amended Complaint, on April 18, 2001. App. pp. 3a – 15a. Petitioners timely filed a notice of appeal of that order to the United States Court of Appeals for the Ninth Circuit, on May 1, 2001. The United States Court of Appeal for the Ninth Circuit affirmed the District Court's decision in an unpublished memorandum decision, on May 21, 2002. App. pp. 1a – 2a.

Statement of Facts

Petitioners, WALTER ROSALES, MARIE TOGGERY, KAREN TOGGERY, are Indian residents of San Diego County, and are enrolled members and residents of the Jamul Indian Village, a tribal governmental entity of Kumeyaay Indians, recognized by Congress, governed by a Constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq., and located in Jamul, California.[3]

Respondents, KEAN ARGOVITZ RESORTS, INC., LAKES GAMING, INC., KEAN-ARGOVITZ RESORTS-JAMUL, LLC, LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, are alleged to be the agents and the alter-egos of each other, and operated by non-Indians.

The following is a summary of the facts alleged in Petitioners' Second Amended Complaint, concerning their claims for relief under 42 U.S.C. 1985(3). App. pp. 21a – 48a.

Respondents are alleged to have unlawfully conspired to unduly influence the tribal electorate, with payments reported to be $100,000 a month, to attend the Village meetings, to vote to bulldoze the Petitioners homes in order to build a casino, and otherwise interfere with the Petitioners' contracts and federal benefits. App. pp. 26a – 28a.

[3] MARIE TOGGERY died during the pendency of the appeal to the United States Court of Appeals for the Ninth Circuit. Her surviving claims are now being prosecuted by the representative of her estate, Karen Toggery.

Petitioners allege that these illegal contributions by the Respondents, were made to discriminate against the Petitioners, because of their race and their membership in the political faction of the tribe, which opposes building a casino where their homes now stand, and which elected Petitioner ROSALES Chairman of the Village. App. pp. 26a – 28a, and 44a. The purposeful effect of these illegal contributions has been to dilute the legitimate members' vote, and deny the Petitioners' political faction a majority, in all subsequent tribal elections. App. pp. 28a and 44a.

In addition to paying the electorate to wrongfully eject the Petitioners from their homes, and to otherwise interfere with the Petitioners' contracts and federal benefits, the Respondents have also been making these payments, in an attempt to unduly influence those voting to adopt a Class III gaming ordinance, at some unspecified time in the future. App. pp. 27a – 28a, 44a – 45a.

The Respondents' contributions violate the Indian Gaming Regulatory Act and the Tribal-State Compact offered by California Governor Gray Davis to Jamul. IGRA specifically prohibits a prospective management contractor from unduly interfering and influencing, or attempting to unduly interfere or influence, for its gain or advantage, any decision or process of tribal government, relating to Class III gaming activities. 25 U.S.C. 2711(e)(2) and 2710(d)(2)(B)(ii).

The Tribal-State Compact offered by California Governor Gray Davis to Jamul specifically prohibits the contribution of more than $25,000 in any given year, prior to the licensing of any "Gaming Resource Supplier," or "Financing Source." Compact, Sec. 6.4.5 and 6.4.6; excerpted at App. pp. 19a and 20a. See also, 65 F.R. 31189. Section 6.1 of the Tribal-State Compact provides that none of the Respondent corporations can be so licensed, in the absence of a lawfully adopted Class III gaming ordinance approved by the Chairman of the NIGC. App. pp. 19a. The Federal register confirms that no Class III gaming ordinance has been approved by the NIGC.

The Respondents have also been making these illegal payments to the faction of the Village opposed to the

Petitioners holding office, contingent upon that faction depriving the Petitioners' of their homes and depriving the Petitioners of their federal benefits as Native Americans. App. pp. 27a, par. 19.

Since on or about September 30, 1999, the Respondents have been paying the Petitioners' political opponents, while they have verbally threatened the Petitioners and their children with physical harm on more than one occasion, used racially derogatory and ancestral slurs against the Petitioners to harass and intimidate them, thrown rocks at the windows of Petitioners' houses and vehicles, and are believed to have burned down one of the Petitioners' trailers and set a truck on fire adjacent to another Petitioner's house. App. pp. 27a, par. 20, and 44a, par. 77.

The non-Indian Respondents thereby have invidiously discriminated against the Indian Petitioners, due to their race, and due to their membership in the tribal political faction, which opposes building a casino on the site of their homes, and which elected Petitioner ROSALES Chairman of the Village. App. pp. 44a – 45a.

The non-Indian Respondents thereby have invidiously discriminated against the Indian Petitioners by unduly interfering with their quiet enjoyment of their homes and contracts rights, and by unduly interfering with the Petitioners' right to exercise their elective franchise free from dilution and undue influence. App. pp. 44a - 45a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The Ninth Circuit decision in this case is in conflict with the decisions of other courts of appeals and district courts, which hold that a cause of action is stated under 42 U.S.C. 1985(3), based upon a conspiracy to deprive the Petitioners of the right to vote, because of their race and membership in a recognized political faction. See for e.g., *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975) *cert. denied*, 424 U.S. 958 (1976); *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *mod. on other grounds*, 446 U.S. 754 (1980); *Thompson v. New York*, 487 F. Supp. 212 (N.D.N.Y. 1979); *see also*, *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975); *Keating v. Carey*, 706 F.2d 377 (2nd Cir. 1983); and *Stevens v. Rifkin*, 608 F. Supp. 710 (N.D. Cal. 1984).

In *Griffin v. Breckenridge* 403 U.S. 88 (1971) ("*Griffin*"), this Court determined that a complaint based on 42 U.S.C. 1985(3), against a private conspiracy, i.e. a conspiracy not involving state action, states a cause of action, if the complaint alleges:

> that the defendants did (1) 'conspire or go in disguise on the highway or on the premises of another' (2) 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.' It must then assert that one or more of the conspirators (3) did, or caused to be done, 'any act in furtherance of the object of (the) conspiracy,' whereby another was (4a) 'injured in his person or property' or (4b) 'deprived of having and exercising any right or privilege of a citizen of the United States.' 403 U.S. 88, 102-103.

Griffin also holds that a deprivation of equal protection may be redressed under Section 1985(3), where there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action." *Id.*, at 102. The Ninth Circuit's comment that: "No post-*Griffin* court has found that Sec. 1985(3) is limited exclusively to racial situations," is still true today. *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 719 (9th Cir. 1981).

As Justice Scalia noted in *Bray v. Alexandria Women's Health Clinic ("Bray")*, 506 U.S. 263, 268 (1993), this Court has "not yet had occasion to resolve the 'perhaps'." Following *Bray*, the full range of "otherwise class-based, invidiously discriminatory animus" that is actionable under 42 U.S.C. 1985(3), still remains to be defined by this Court.[4]

On more than one occasion, this Court has refused to reject, and has refused to retreat from, its original holding in *Griffin*, that Section 1985(3) protects against other than purely racial class-based conspiracies. *Bray*, 506 U.S. at 268; and *United Bhd. of Carpenters & Joiners, Local 610 v. Scott ("Scott")*, 463 U.S. 825, 836 (1983). Rather, this Court merely held that the alleged classes in *Bray* and *Scott* were not protected classes under Section 1985(3). Similarly, this Court has never rejected the views of Justices O'Connor, Stevens, and Blackmun that Section 1985(3) is not limited to purely race-based conspiracies, particularly in light of the legislative history that Justice White acknowledged, "has been marshaled in support of the position that Congress meant to forbid wholly non-racial, but politically motivated conspiracies." *Scott*, 463 U.S. at 836.

[4] See, for e.g., *Burns-Toole v. Byrne*, 11 F.3rd 1270, 1275-76, n. 25 (5th Cir.1994), *cert. denied*, 512 U.S. 1207 (1994), "Subsequent decisions [*Scott* and *Bray*] have refused to delineate [1985(3)'s] outside boundaries;" and *Harrison v. KVAT Food Mgmt., Inc.*, 766 F.2d 155, 157-59 (4th Cir. 1985), acknowledging "considerable controversy" over the scope of 1985(3); see also, Justice Meskill's concurring and dissenting opinion in *Keating v. Carey*, 706 F.2d 377, 393 (2nd Cir. 1983), in which "the reported decisions demonstrat[ing] the range of views held by the federal courts over the scope of this section," are referred to as a "sea of confusion."

However, the "difficult question" that Justice White described at one end of the potential range of actionable animus, as to "whether section 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means," 463 U.S. at 836, does not require answer in this case, because the invidiously discriminatory conspiracy in this case, is not the "wholly non-racial, but politically motivated conspiracy,"described in *Scott*, 463 U.S. at 836. Therefore, the "constitutional shoals that would lie in the path of interpreting section 1985(3) as a general federal tort law," are avoided in this case in the same manner as they were in *Griffin*, at 102, by the fact that it is the combination of "some racial" and political animus that caused the invidious discrimination that compels remedy under 1985(3).

This case provides the Court with the opportunity to decide, along with the majority of circuit courts of appeals and district courts cited above that have considered the question, that a private conspiracy to invidiously discriminate against a recognized political faction, caused by a combination of racial and political motives, is actionable under 42 U.S.C. 1985(3). As the Seventh Circuit held in *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), *mod. on other grounds*, 446 U.S. 754 (1980): "The statute was intended, perhaps more than anything else, to provide redress for victims of conspiracies impelled by a commingling of racial and political motives.[fn. omitted] And this is precisely the sort of conspiracy alleged by plaintiffs in this case."[5] Just as this Court refused to ignore the combination of racial and political animus in *Hampton*, against members of the Black Panther Party because they were black; this Court cannot ignore the combination of racial and political animus by the non-Indian Respondents against the Petitioners' tribal faction because they are Indian.

[5] See, Comment, Private Conspiracies to Violate Civil Rights, *90 Harv. L. Rev.* 1573, 1728 (1977), cited in *Hampton*, "the legislative history behind section 1985(3) points unmistakably to the conclusion that discrimination on (the basis of political beliefs or affiliations) was intended to be actionable."

Here, the Petitioners have properly plead that a private conspiracy of non-Indian gaming corporations has deprived them of the right to vote in federal tribal elections, because they are Indians, and because they are members of a political faction, which is opposed to building a casino on the site of their homes, and which supports Petitioner ROSALES' election as Chairman of the Village. App. pp. 26a – 28a, and 44a."

Petitioners further allege that Respondents' overt acts violating 25 U.S.C. 1302(8) and 42 U.S.C. 1985(3), were coupled with disparaging racial remarks concerning the Petitioners' respective degrees of Indian blood, including, but not limited to, referring to them as 'half blood Indians' and 'a half blood community.' App. pp. 27a, and 44a.

Petitioners allege that the Respondents' paid a reported $100,000 per month to the Petitioners' political opponents contingent upon voting to raze the Petitioners' homes and denying them the equal benefits of their contracts and usufructuary property rights in the Village assets. App. pp. 26a – 27a, and 44a. These payments to the Petitioners' political opponents are also alleged to have diluted the Petitioners' vote, and thereby denied them a majority in all tribal elections. App. pp. 27a – 28a, and 44a.

These payments are alleged to be in violation of 18 U.S.C. 597, and 25 U.S.C. 2711(e)(2) and 2710(d)(2)(B)(ii), in an attempt to unduly influence those voting in federal tribal elections to adopt a Class III gaming ordinance, at some undetermined time in the future. App. pp. 28a and 44a – 45a.

The Respondents were also alleged to have made these unlawful payments to members of the political faction opposing Petitioners' election, who had verbally threatened the Petitioners and their children with physical harm, used racially derogatory and ancestral slurs against the Petitioners to harass and intimidate them, thrown rocks at the windows of the Petitioners' homes and vehicles, burned one of the

" Since the District Court dismissed the Petitioners' action pursuant to F.R.C.P. Rule 12(b)(6), the Court must accept Petitioners' allegations as true. *Hinshon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Petitioners' trailers, and set a truck on fire adjacent to another Petitioner's house. App. pp. 27a and 44a-45a.

This Court identified in *Griffin* that the "rights of national citizenship which Congress has the power to protect by appropriate legislation," "included interference with voting rights in National elections." 403 U.S. at 106. Congress has specifically prohibited the Respondents' paying for votes, and thereby diluting the Petitioners vote in federal elections at the Village, by prohibiting the making, or soliciting, an expenditure in consideration of a vote, or the withholding of a vote, in any federal election. 18 U.S.C. 597.

Congress has also prohibited a prospective management contractor from unduly interfering and influencing, or attempting to unduly interfere or influence, for its gain or advantage, any decision or process of tribal government, relating to Class III gaming activities, in the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. 2711(e)(2) and 2710(d)(2)(B)(ii).

Pursuant to Congress' adoption of IGRA, the Tribal-State Compact offered by California Governor Gray Davis to Jamul also prohibits the contribution of more than $25,000 in any given year, prior to the licensing of any "Gaming Resource Supplier," or "Financing Source." Compact, Sec. 6.4.5 and 6.4.6; excerpted at App. pp. 19a – 20a. See also, 65 F.R. 31189. Section 6.1 of the Tribal-State Compact provides that none of the Respondent corporations can be so licensed, in the absence of a lawfully adopted Class III gaming ordinance approved by the Chairman of the NIGC. App. p. 19a. The Federal Register further confirms that there has been no Class III gaming ordinance approved by the NIGC.

This Court holds that: "the right to vote is protected in more than the initial allocation of the franchise...'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush v. Gore*, 531 U.S. 98, 104-105 (2000), citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

For example, in *Moore v. Ogilvie*, 394 U.S. 814 (1969), this Court invalidated a county based procedure that diluted the influence of citizens in larger counties in the nominating process; "the idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.*, at 819.

Following this reasoning, the Eighth Circuit held in *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976), that the 1985(3) protection of the right to undiluted federal elections extends to those held at Indian Villages: "It is thus apparent that the right to vote in federal elections is a right of national citizenship protected from conspiratorial interference by 42 U.S.C. 1985(3)." *Id.*, at 838.

Here, the Ninth Circuit Court of Appeals and the District Court for the So. Dist. of Cal. chose to ignore the reasoning of the Eighth Circuit in *Means*, and the Sixth Circuit in *Cameron v. Brock*, 473 F.2d 608, 610 (6th Cir. 1973), which was relied upon in *Means*. Here, the District Court dismissed the Petitioner's entire cause of action under 42 U.S.C. 1985(3), with no more than a footnote, "The Court is not bound or persuaded by *Means* and declines to follow its reasoning here," App. pp. 8a, 14a, fn3; which dismissal the Court of Appeals affirmed, "for the reasons stated by the district court." App. p. 2a.

In *Means*, the Eighth Circuit held that the right to vote is fundamental to representative government. As a right of national citizenship, it is a source of constitutional power, and Congress has used its power to guarantee that right by statute. *Id.*, at 838, citing *Griffin*, at 106. Where Indian tribes have adopted Anglo-Saxon democratic processes for selection of tribal representatives, equal protection concepts applicable to the tribes require adherence to the one person one vote principle as a necessary concomitant of the election process. Therefore, the Eighth Circuit concluded in *Means*: "42 U.S.C. 1985(3) protects the right to vote in tribal elections against interference from private conspiracies as well."

> Since the right to vote in a system of representative government is one of the essential trappings of citizenship protected by the Constitution, we hold that Congress has necessarily granted it to the plaintiffs, and in a proper case, interference with the right to vote in a tribal election may be vindicated under 42 U.S.C. 1985(3), as a deprivation of equal protection of the laws or equal privileges and immunities under the law. *Id.*, at 839.

In *Means* the Eighth Circuit further found that allegations "that Respondents conspired and did overt acts in furtherance of a conspiracy to deprive the plaintiffs of their right to vote because they were supporters of plaintiff Means and members of the American Indian Movement," were sufficient to state a cause of action under Section 1985(3).

In determining that the plaintiffs were members of a sufficiently recognized "class" to be protected from class-based invidious discrimination, the *Means* court held:

> There need not necessarily be an organizational structure of adherents, but there must exist an identifiable body with which the particular plaintiff associated himself by some affirmative act. It need not be an oath of fealty; it need not be an initiation rite; but at least it must have an intellectual nexus which has somehow been communicated to, among and by the members of the group." *Id.*, at 839-40.
>
> The group of plaintiffs in this case, by their affirmative acts of supporting plaintiff Means and the American Indian Movement and attempting to oust Wilson as their Council President, were a class against whom, according to the allegations of their complaint, the Respondents discriminated because of their class membership. This brings their complaint within the ambit of 42 U.S.C. 1985(3)." *Id.*, at 839.

Despite the Ninth Circuit's refusal to follow the reasoning in *Means* in this case, the Ninth Circuit relied upon

Means and *Cameron v. Brock* (6th Cir. 1973) 473 F.2d 608, in *Life Ins. Co. v. Reichardt* (9th Cir. 1979) 591 F.2d 499, 505. In *Cameron*, the Sixth Circuit found that 42 U.S.C. 1985 protected "clearly defined classes, such as supporters of a political candidate," without "transform[ing] the statute into the "general federal tort law" feared by the *Griffin* court, and [gave] full effect to the Congressional purpose in enacting the statute." *Id.*, at 610.

Despite having acknowledged that "many federal courts have unhesitatingly expanded the protections of sec. 1985(3) well beyond the racial context," *Canlis*, at 719, fn. 15, the Ninth Circuit's memorandum opinion in this case also conflicts with the Second Circuit's finding in *Keating v. Carey*, 706 F.2d 377 (2nd Cir. 1983), that a member of the Republican party was protected under 1985(3) from being fired because he was Republican. "In our view, Congress did not seek to protect only Republicans, but to prohibit political discrimination in general...Congress sought, among other things... to prohibit acts of political recrimination that deprived their victims of equal privileges and immunities or the equal protection of the laws." *Id.*, at 387-88.

The court of appeals decision here also conflicts with another Sixth Circuit decision in *Glasson v. City of Louisville* (6th Cir. 1975) 518 F.2d 899, *cert. den.* 423 U.S. 930 (1975), wherein a demonstrator protesting against President Nixon was found within the political class protected by 42 U.S.C. 1985(3). "A more invidious classification than that between persons who support government officials and their policies and those who are critical of them is difficult to imagine." *Glasson*, 518 F.2d 899, 912.

Thompson v. New York (N.D.N.Y. 1979) 487 F. Supp. 212, also conflicts with the court of appeals decision in this case. There, the alleged conspiracy to deny plaintiffs police and fire protection because they were "Indians, relatives of Indians, and residents of Indian reservations," "sufficiently support[ed] the required animus... because of their race...[to] "have thus stated a claim for relief under Section 1985(3)." *Id.*, at 228.

While not every group of individuals suffering discrimination is a "protected class" under *Griffin*,[7] a very thoughtful opinion in *Stevens v. Rifkin*, 608 F. Supp. 710 (N.D. Cal. 1984), citing *Means*, *Glasson*, and *Keating*, sets forth the compelling reasons why a dissident political group is a "class" protected by Sec. 1985(3). The *Stevens* court was particularly persuaded by the legislative history of 42 U.S.C. 1985(3), in which members of Congress specifically stated their intent that political factions be protected from discrimination under Sec. 1985(3).

> Statements from members of both houses evidence this purpose of the Act to protect lawful political activity from the conspiratorial acts of others. Senator John Sherman stated in support of the legislation: 'Here is a political organization; with political ends, political aims; it shows that the object and intent of that political organization is to prevent large masses of the people of the southern states from enjoying a right which has been guaranteed to them by the Constitution of our country.' Cong. Globe, 42d Cong., 1st Sess. 153 (1871). *Id.*, at 723.

Senator Edmunds is often quoted by the courts of appeals in conflict with the Ninth Circuit here, that if a conspiracy were formed against a man "because he was Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, ...then this section could reach it." Cong. Globe, 42 Cong., 1st Sess. 567 (1871).

> Even the Ninth Circuit conceded in *Reichardt*:
>
> Section 1985's drafters clearly intended to protect groups other than oppressed southern blacks. The Congressional debates evinced

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[7] *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) women seeking abortion insufficient class, *United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825 (1983) non-union members insufficient class.

> concern for all groups subject to the organized lawlessness of the Ku Klux Klan, including all Unionist, Republicans and certain religious groups. Courts construing Sec. 1985(3) have not limited its protection to racial or otherwise suspect classifications. 591 F.2d at 505.

Judge Aguilar concluded in *Stevens*: "This Court must agree with the conclusions of these courts that the Ku Klux Klan Act was motivated in large part as a desire to inhibit one political group from attempting to violate the civil rights of another political group. This is the best interpretation of the Act."*Id.*,608 F.Supp. at 723. As Justice Stevens concluded in the dissent in *Bray*: "The text of the statute provides no basis for excluding from its coverage any cognizable class of persons who are entitled to the equal protection of the laws." 506 U.S. at 319.

Protecting the Petitioners from invidious discrimination because they are Indians and members of the recognized political faction opposed to building a casino on the site of their homes, will also not raise the risk of turning Sec. 1985(3) into a "general federal tort law," because the Petitioners were already members of the political faction that opposes building a casino and supports ROSALES' election, before the Respondents' began their invidious discrimination against the Petitioners. Hence, the Petitioners did not become members of a protected class, merely because the Respondents chose to make them victims of the combination of their racial and political animus. As noted by Judge Aguilar in *Stevens*:

> As plaintiffs' Complaint alleges that plaintiffs are members of a political group, and as plaintiffs allege further that that group is the subject of a class-based invidiously discriminatory animus and a conspiracy to deprive plaintiffs of their civil rights, and as plaintiffs' "class" as alleged exists independently of the Respondents' alleged actions and is not defined simply as the group of victims of the Respondents' actions,

> plaintiffs have stated a claim for relief under Section 1985(3). *Id.*, at 726.

Similarly, here, the Petitioners have alleged that the Respondents conspired to deprive them of the undiluted right to vote in tribal elections, because they are Indians and because they are members of the political faction that is opposed to building a casino and that supports Petitioner ROSALES' election as Chairman of the Village. App. pp. 26a – 28a, and 44a – 45a. Moreover, just as in *Stevens*, the Petitioners' "class" is not defined simply as the group of victims of the Respondents' actions, but as the opposing political faction of the Village, who was elected to the leadership of the Village in 1995, long before the Respondents began their invidious discrimination. App. pp. 26a – 28a and 44a.

The *Stevens* court further concluded that without a civil action under Section 1985(3), political minorities may well be without any protection whatsoever from private conspiracies, contrary to our nation's long history of protecting the political minority's rights:

> It is clear that the purpose behind the Ku Klux Klan Act was to federally protect the rights of persons from deprivation on account of their lawful political beliefs, activities, and associations. ... Permitting minority political groups to exercise their rights has been historically treasured in America, and is often thought of as the device for accomplishing political change. To leave minority, or less popular, political groups without Section 1985(3) protection could render them without protection at all. Otherwise, the majority, and the law enforcement authorities responsible to that majority, can unlawfully infringe upon the rights of the minority simply because they are part of the majority. 608 F.Supp. 710, 725.

Justices Blackmun and O'Connor joined in explaining the compelling need for a federal civil rights remedy for private conspiracies like that of the Respondent gaming

corporations in this case, where the conspiracy wields such power and influence over the local government, that it becomes powerless to protect the Petitioners from invidious discrimination:

> Congress intended to provide a remedy to *any* class of persons, whose beliefs or associations placed them in danger of not receiving equal protection of the laws from local authorities. While certain class traits, such as race, religion, sex, and national origin, *per se* meet this requirement, other traits also may implicate the functional concerns in particular situations. Dissent in *Scott*, 463 U.S. at 853 (emphasis added); see also, O'Connor's dissent in *Bray*, 506 U.S. at 354.

Here, there is no question based upon the face of the Petitioners' Second Amended Complaint, that they have already failed to receive equal protection of the laws from the local authorities at the Jamul Indian Village, due to the overwhelming effect that the invidiously discriminatory payments of $100,000 per month have had on the tiny tribal electorate. The Petitioners and their supporters have been denied a majority in all subsequent tribal elections. Petitioners' vote has been diluted by the undue and corrupting influence such unlawful contributions have produced.

If the Petitioners are not to be protected by Section 1985(3), against the Respondents' racial and political discrimination in this case, non-Indian gaming corporations across the country will be given a wholesale license to invade other racially and politically discreet Indian villages, and spend their billions for whatever invidiously discriminatory actions it takes to remove indigenous Americans from their homes and their land, in the headlong rush to put a casino on every corner in Indian country.[8] Post hoc justifications for

[8] The May 8, 2002, Hartford Courant reports that Indian gaming generates $13 billion in revenue, with an economic impact of $32 billion, from 340 Indian gaming facilities in 29 states, and that Merrill Lynch forecasts Indian gaming will grow 10% in 2002.

such clearly racially and politically motivated discrimination against those whose usufructuary rights stem directly from their race as Indians, is not what Congress intended, nor what this Court should permit.

No matter how the Respondents seek to torture the Indian Gaming Regulatory Act in an attempt to defend the indefensible racially and politically motivated invidious discrimination, Congress and this Court have never allowed such a conspiracy to dilute a class of Americans' voting rights in violation of Sec. 1985(3), for any reason; let alone for the sake of casino construction in the overwhelming and unbridled expansion of gambling in America.

Just as in *Griffin*, *Means*, *Hampton*, *Cameron*, *Glasson*, *Keating*, *Thompson*, and *Stevens*, in which similar racial and political classes were found to be protected from class-based animus, under 42 U.S.C. 1985(3), the Indian Petitioners, by their affirmative acts of supporting Petitioner ROSALES as Chairperson, and opposing the building of a casino, are a protected class against whom the non-Indian Respondent gaming corporations unlawfully discriminated because of Petitioners' class membership.

Therefore, the Petitioners' Second Amended Complaint properly states a cause of action under 42 U.S.C. 1985(3), and the trial court's dismissal of the Sixth Claim for Relief should be reversed, and at a minimum, the Petitioners should be granted leave to amend their complaint under 42 U.S.C. 1985(3).[9]

[9] Leave to amend should be freely given, where as here, there has been no showing of prejudice to the Defendants; *Foman v. Davis*, 371 U.S. 178, 182 (1962); leave to amend should be granted with great liberality, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); facts alleged in the complaint must be accepted as true, and viewed in the light most favorable to the plaintiff, *Hinshon v. King & Spalding*, 467 U.S. 69, 73 (1984); and leave to amend need only have been requested in the opposition papers, as here. *Edwards v. Occidental Chem. Corp.*, 892 F.2d 1442, 1445-46, fn.2 (9th Cir. 1990).

CONCLUSION

The decision of the Ninth Circuit Court of Appeals conflicts with the majority of other circuit courts of appeals and district courts to have considered the question in this case. In most circuits, a private conspiracy remains actionable under 42 U.S.C. 1985(3), where it deprives the Petitioners of the right to vote in federal tribal elections because of a combination of "racial and otherwise class-based invidiously discriminatory animus."

Similarly here, the private conspiracy by the non-Indian Respondent gaming corporations should be held liable for depriving the Petitioners of the right to vote because the Petitioners are Indians and members of the political faction opposed to building a casino on the site of their homes.

For all of the foregoing reasons, the writ of certiorari to the Ninth Circuit Court of Appeals should be granted.

Respectfully submitted,

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(Any footnotes trail the end of each document.)

No. 01-55745

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER ROSALES; MARIE TOGGERY;
KAREN TOGGERY,
Plaintiffs - Appellants,

v.

KEAN ARGOVITZ RESORTS, INC., a limited liability company; LAKES GAMING, INC., a publicly traded company; KEAN-ARGOVITZ RESORT-JAMUL, LLC, a Nevada limited liability company; LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, a Delaware limited liability company,
Defendants - Appellees.

May 10, 2002 **, Submitted, Pasadena, California

May 21, 2002, Filed

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