No. 00-886

In the Supreme Court of the United States

JENNY MANYBEADS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

JOHN CRUDEN
Acting Assistant Attorney General

JOHN A. BRYSON
KATHERINE W. HAZARD
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

This case was brought in 1988 by certain members of the Navajo Nation who refused to relocate from lands partitioned in favor of the Hopi Tribe pursuant to the Navajo-Hopi Land Settlement Act of 1974, Pub. L. No. 93-531, 88 Stat. 1712. The district court dismissed the action for failure to state a claim. Pursuant to mediation ordered by the court of appeals, many of the initial plaintiffs elected to participate in a settlement and accommodation plan approved by Congress, Navajo-Hopi Land Dispute Settlement Act of 1996, Pub. L. No. 104-301, 110 Stat. 3649, and signed an agreement allowing them to remain on the land under a 75-year lease term. The court of appeals subsequently affirmed the dismissal of the action. The question presented is as follows:

Whether the court of appeals properly upheld the dismissal of this litigation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 00-886

JENNY MANYBEADS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 209 F.3d 1164. The opinion of the district court (Pet. App. 5a-15a) is reported at 730 F. Supp. 1515.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2000. A petition for rehearing was denied on July 31, 2000 (Pet. App. 16a). On October 20, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 28, 2000, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For more than a century, the Hopi Tribe and Navajo Nation have laid competing claims to the ownership and use of approximately 1.9 million acres of land in northern Arizona. In 1958, Congress authorized litigation between the Tribes to quiet title to that land. Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403. Pursuant to that litigation, a federal district court determined that 650,000 acres of the disputed area belonged exclusively to the Hopi Tribe, and that the two Tribes shared joint and undivided interests in the remaining 1.8 million acres. The latter area is known as the "Joint Use Area." See *Clinton* v. *Babbitt*, 180 F.3d 1081, 1083-1084 (9th Cir. 1999).

In 1974, Congress passed the Navajo-Hopi Land Settlement Act, Pub. L. No. 93-531, 88 Stat. 1712 (1974 Settlement Act), which directed the courts to partition the Joint Use Area. 25 U.S.C. 640d. Under the 1974 Settlement Act, any lands partitioned to either Tribe pursuant to the Act shall be held in trust by the United States exclusively for the Tribe (*i.e.*, Navajo Nation or Hopi Tribe) to which the lands are partitioned. 25 U.S.C. 640d-9(a) and (b). The Act requires each of the Tribe's members to relocate from land partitioned to the other Tribe. 25 U.S.C. 640d-13, 640d-14. The Act also provides that "reasonable provision shall be made for the use of and right of access to identified religious shrines * * * where such use and access are for religious purposes." 25 U.S.C. 640d-5(c); see 25 U.S.C. 640d-20 (directing Secretary of Interior to make same provision for religious shrines).

The 1974 Settlement Act abrogates the sovereign immunity of the Tribes with respect to specified actions instituted by one Tribe against the other Tribe, 25 U.S.C. 640d-17(a), as well as such further actions "as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of the tribes by the tribes and the members thereof, and to fully accomplish all objects and purposes of [the 1974 Settlement Act]," 25 U.S.C. 640d-17(c). There is no comparable abrogation of sovereign immunity for suits by members of one Tribe against the other Tribe.

2. Petitioners are members of the Navajo Nation who have refused to relocate from Hopi partitioned lands pursuant to the terms of the 1974 Settlement Act. In 1988, they filed suit against the United States, the Secretary of the Department of the Interior, the Assistant Secretary of the Department of the Interior, the United States Bureau of Indian Affairs, the Navajo and Hopi Indian Relocation Commission (a small federal agency, now named the Office of Navajo and Hopi Indian Relocation, 25 U.S.C. 640d-11), and the Chairman of the Commission. Petitioners contend, *inter alia*, that, because they use the land for religious practices, the relocation provisions of the 1974 Settlement Act violate their free exercise rights under the First Amendment. They also claim that they have been denied equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment, because in other instances Congress has allowed "white settlers" to remain on land. Pet. App. 10a. They seek declaratory and injunctive relief. *Id.* at 5a-6a.

3. The United States moved to dismiss the action. In addition to arguing that petitioners failed to state a claim upon which relief could be granted, the United States argued that petitioners are not proper parties to

assert the claims (because the claims belonged to the Navajo Nation); that the claims were barred by the doctrines of res judicata, collateral estoppel, and laches, and by the statute of limitations; and that the Hopi Tribe and Navajo Nation are indispensable parties and may not be joined because of their sovereign immunity. See U.S. Mem. in Support of Mot. to Dismiss 39-43. The United States did not address whether it could adequately represent the interests of the Hopi Tribe, but noted that "the United States' interests and the interests of the Hopi Tribe are not necessarily coextensive." *Id.* at 39.[1]

The district court agreed with the United States that petitioners had failed to state a claim, and granted the motion to dismiss. Pet. App. 7a-15a. The court held that petitioners' free exercise claim lacked merit under the framework established by *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). As the court explained, "[n]either the [1974 Settlement Act] nor court cases construing the Act prohibit the free exercise of religion by any of the plaintiffs," and, indeed, the Act called for religious uses

---

[1] The United States argued that, under the 1974 Settlement Act, "the Navajo Tribal Chairman is the only proper party who can assert the claims that plaintiffs assert here." U.S. Mem. in Support of Mot. to Dismiss 42 (relying on 25 U.S.C. 640d-17(c)); see *Sekaquaptewa* v. *MacDonald*, 591 F.2d 1289, 1292 (9th Cir. 1979) ("Finally, § 640d-17(c) provides that individual interests may be litigated in a suit between the two tribes only when those interests are represented by the tribal chairmen."). Subsequent filings by petitioners, and by the Navajo Nation as amicus curiae, made clear, however, that petitioners were asserting only constitutional arguments concerning their *individual* rights, and that petitioners were not seeking to relitigate already-decided issues concerning ownership of the Hopi partitioned lands.

to be taken into account in dividing the Joint Use Area. Pet. App. 8a-9a (citing 25 U.S.C. 640d-5(c) and 640d-20). The court also rejected petitioners' equal protection claim, finding the argument to be "disingenuous here where the joint property owners were two Indian Tribes." *Id.* at 10a. Because the court dismissed for failure to state a claim, it did not reach the issue whether the Hopi Tribe is an indispensable party under Rule 19 of the Federal Rules of Civil Procedure.

4. After briefing and oral argument, the court of appeals concluded that "the best interests of the parties would be served if the case were settled." Pet. App. 17a. As a result, the court deferred resolution of the appeal and ordered the parties to participate in settlement negotiations under the direction of a magistrate judge. The court also "invited and urged" the Navajo Nation and Hopi Tribe—which are not parties in this case but which had filed amicus briefs—to participate in the settlement proceedings. *Id.* at 18a. The mediation eventually resulted in two agreements: an "Accommodation Agreement" between the Hopi Tribe and individual members of the Navajo Nation residing on lands partitioned for the Hopi Tribe; and a "Settlement Agreement" between the Hopi Tribe and the United States.

The Accommodation Agreement allows certain Navajo residents of the Hopi partitioned lands (HPL)—the lands at issue in this case—to enter into a 75-year lease with the Hopi Tribe. Pursuant to the Accommodation Agreement, eligible HPL Navajos are assured a three-acre homesite, up to ten acres of farmland, and the right to continue traditional uses (includeing religious uses) they were then making of the HPL. An overwhelming majority of HPL Navajos, including

many of the plaintiffs in this action, signed an Accommodation Agreement.

Under the Settlement Agreement, the Hopi Tribe agreed to dismiss several claims against the United States and to abide by the terms of the Accommodation Agreement. The United States, in turn, agreed to provide $50.2 million to the Tribe, and to take into trust for the Tribe up to 500,000 acres of land acquired by the Tribe. The Settlement Agreement further provided that by February 1, 2000, the Office of Navajo and Hopi Indian Relocation would complete implementation of its regulations relating to relocation for any Navajo family eligible for an Accommodation Agreement who did not enter into an Accommodation Agreement. The Settlement Agreement further provided that if the United States failed to discharge that obligation, the Hopi Tribe preserved any action regarding quiet possession against the United States arising out of the use of the HPL after February 1, 2000, by any Navajo family eligible for but not a party to an Accommodation Agreement.

Congress ratified both the Accommodation Agreement and the Settlement Agreement in the Navajo-Hopi Land Dispute Settlement Act of 1996, Pub. L. No. 104-301, 110 Stat. 3649, amended in part, Act of Oct. 14, 1998, Pub. L. No. 105-256, § 3, 112 Stat. 1897 (1996 Settlement Act). See S. Rep. No. 363, 104th Cong., 2d Sess. 1 (1996). Neither the Accommodation Agreement nor the Settlement Agreement required petitioners to dismiss their appeal in this case.

5. Following the 1996 Settlement Act, the appeal in this case proceeded. The court of appeals requested supplemental briefing on whether the Hopi Tribe—which declined to waive its tribal sovereign immunity from suit and participate in this litigation as a party—is

a necessary and indispensable party in this case pursuant to Rule 19 of the Federal Rules of Civil Procedure, such that the case must be dismissed due to the Tribe's absence.

The United States argued that the Hopi Tribe is not a necessary party under Rule 19(a), because the United States is capable of adequately representing the Tribe's interests, and that the court did not have to consider whether the Tribe is an indispensable party under Rule 19(b). Gov't Supp. C.A. Br. on Indispensable Party Issue 5, 16.[2] The United States further argued that, even though the Tribe's absence did not require a dismissal pursuant to Rule 19, the case should be dismissed for failure to state a claim. *Id.* at 5. See also Gov't Supp. C.A. Br. on Merits. The court of appeals held that the Hopi Tribe is a necessary and indispensable party pursuant to Rule 19, and affirmed the dismissal on that ground. Pet. App. 2a-4a.

The court first concluded that the Hopi Tribe is a necessary party under Rule 19(a)(1), reasoning that petitioners "cannot be afforded complete relief without undoing the Accommodation Agreement * * * and without undoing the Settlement Agreement by which the Hopi Tribe is entitled to compensation for what is conceded to the Navajos." Pet. App. 2a. Likewise, the court concluded that the Tribe is a necessary party under Rule 19(a)(2), because the Tribe "'claims an interest relating to the subject of the action and is so

---

[2] As the United States pointed out in its supplemental brief on the indispensable party issue (at 3 n.1), in the district court the United States had taken the position that, due to the Hopi Tribe's interest as the beneficial owner of the land at issue in this case, the Tribe was an indispensable party. "The [United States's] memorandum in the district court did not discuss the ability of the United States to adequately represent the Hopi Tribe." *Ibid.*

situated that the disposition of the action may * * * as a practical matter impair or impede' its ability to protect that interest." *Id.* at 3a (quoting Rule 19(a)(2)(i)).

The court rejected the position of the United States and petitioners that the United States could adequately represent the interests of the Hopi Tribe. According to the court, the United States is not capable of adequately representing the interests of the Hopi Tribe because, under 25 U.S.C. 640d-9(c) and (d), the United States owes a trust responsibility to the individual Navajos subject to relocation. Pet. App. 3a. If the government "undertook to act for the Hopi Tribe," the court believed, the United States "would stand on both sides of the question." *Ibid.*

The court further concluded that the Hopi Tribe is an indispensable party under Rule 19(b). As the court explained, a judgment in favor of petitioners "would upset two agreements, long and carefully worked out, * * * to the substantial prejudice of the Hopi Tribe." Pet. App. 3a. While the court acknowledged that dismissing the case under Rule 19 would allow petitioner's First Amendment claim to go unaddressed, it concluded that this fact did not, in itself, compel a contrary result. *Ibid.*

6. The court of appeals denied petitioners' petition for rehearing and suggestion for rehearing en banc. Pet. App. 16a.

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals, and the "unique facts of this case" (Pet. 23) make it a poor candidate for certiorari. Furthermore, dismissal of the case is in any event proper because petitioners' claim on the merits fails under *Lyng* v.

Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988). Further review is not warranted.

1. The only question presented by the petition that was actually decided by the court of appeals below is whether "the United States is capable of representing the absent Hopi Tribe in this case." Pet. 23; see Pet. i (question two). That issue does not merit this Court's review.

As discussed above, in the court of appeals, the United States argued that it is capable of adequately representing the interests of the Hopi Tribe in this litigation, and that the Tribe therefore is not a necessary party within Rule 19(a). While the court of appeals disagreed with that argument, we do not believe its decision merits review. The decision does not conflict with any decision of this Court or of any other court of appeals. In addition, while we disagree with the court's conclusion, the court sought to tailor its ruling to this case. First, the court stated that the government's contention that it could adequately represent the interests of the Hopi Tribe was "weak because it is the reverse of what the government contended in the district court." Pet. App. 3a. Second, the court stated that the government's contention was "contradicted" by the fact that, "[b]y the explicit terms of [the 1974 Settlement Act], the government must protect the property and personal rights of the individual Navajos subject to relocation." *Ibid.* Third, the court stated that it did not mean to "suggest that it is the United States' trust responsibility to the Navajo Nation that creates a conflict of interest preventing the United States from adequately representing the Hopi Tribe," but rather the court found that the conflict stemmed from the responsibility that the government

owes to "the very plaintiffs in this case," under the specific terms of the legislation at issue. *Id.* at 3a-4a.[3]

Petitioners erroneously suggest (Pet. 19-20) that the court of appeals' ruling conflicts with *Nevada* v. *United States*, 463 U.S. 110 (1983), and *Arizona* v. *California*, 460 U.S. 605 (1983). Those cases involved efforts to reopen certain water-rights litigation. In the course of holding that such efforts were foreclosed by prior litigation, this Court recognized that, "[a]s a fiduciary," the United States has the authority to bring certain water rights claims "for the Indians and [to] bind them in the litigation." *Arizona*, 460 U.S. at 626-627; see *Nevada*, 463 U.S. at 135. In *Arizona*, the Court further rejected the argument that the United States' representation of Tribes in the prior proceedings was inadequate, stating that there was "no demonstration" of any "actual conflict of interest" in that case, and that "[t]he United States often represents varied interests in litigation involving water rights, particularly given the large extent and variety of federal land holdings in the West." 460 U.S. at 627. Even if *Nevada* and *Arizona* could be extended beyond the specific water-rights context in which they arose, they do not conflict with the decision below. Neither *Nevada* nor *Arizona* considered whether, or under what circumstances, an Indian Tribe may be a necessary party for purposes of Rule 19(a).

---

[3] As this Court has recognized, the decision whether to dismiss pursuant to Rule 19 is inherently case specific. See *Provident Bank* v. *Patterson*, 390 U.S. 102, 118-119 (1968) ("The decision whether to dismiss (*i.e.*, the decision whether the person missing is 'indispensable') must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests.").

Petitioners also argue that the decision below conflicts with the decisions of other Ninth Circuit panels. See Pet. 21-22 (citing *Southwest Ctr. for Biological Diversity* v. *Babbitt*, 150 F.3d 1152 (1998), and *Washington* v. *Daley*, 173 F.3d 1158 (1999)). We agree that there is some tension among those decisions. See Gov't C.A. Supp. Br. on Indispensable Party Issue 14-16. The court below, however, apparently believed that this case was distinguishable in view of the specific obligations owed by the United States to the individual plaintiffs under the 1974 Settlement Act and the other factors discussed above. See Pet. App. 3a-4a. In any event, any inconsistency that might exist among those decisions is for the Ninth Circuit, and not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

2. Petitioners ask (Pet. 11) this Court to decide "whether an Indian Tribe's sovereign immunity necessarily extends to actions which only seek prospective equitable relief." That issue, however, was not raised in or decided by the court of appeals below. And that fact provides a sufficient reason to deny certiorari on this issue. See *Powell* v. *Nevada*, 511 U.S. 79, 85 n.* (1994) ("Because the issue was not raised, argued, or decided below, we should not settle it here."); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").[4]

---

[4] Petitioners argue (Pet. 11) that the circuits are divided on the question whether tribal sovereign immunity extends to such actions. As the Hopi Tribe has explained in its amicus brief urging that the petition be denied, the asserted conflict does not merit this Court's review. Hopi Br. 5-9. And, in any event, in view of the

Petitioners contend (Pet. 11-12) that, insofar as this case does present the question whether the Hopi Tribe is entitled to sovereign immunity, the case implicates the question presented in *C&L Enterprises, Inc.* v. *Citizen Potawatomi Nation*, cert. granted, No. 00-292 (Oct. 30, 2000). That contention is erroneous. *C&L Enterprises* presents the question whether, or under what circumstances, an Indian Tribe's agreement to arbitrate disputes arising out of a standard-form commercial contract, and to judicial enforcement of arbitration awards entered pursuant to such contract, waives the Tribe's sovereign immunity from suit in state court. See 00-292 Pet. at i. This case, however, does not involve the enforcement of any arbitration agreement or arbitration award. There is accordingly no reason for the Court to hold this case for the disposition in *C&L Enterprises*.

3. Petitioners contend (Pet. 23) that, in light of the "unique facts of this case," the Hopi Tribe should be deemed to have waived its sovereign immunity from suit. In particular, although petitioners acknowledge (Pet. 24) that a Tribe does not waive its sovereign immunity by "appearing in a lawsuit as amicus," they argue that the Hopi Tribe has gone "far beyond" the role of an amicus insofar as the Tribe "actively involved itself as a full participant in both the litigation and mediation process." That fact-bound contention lacks merit. As this Court has held, "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58-59 (1978) (internal quotation marks and citation omitted). The Tribe in this case has not unequivocally

---

"unique facts of this case" (Pet. 23), this case would be an ill-suited vehicle to resolve any conflict.

waived its sovereign immunity from suit, by its words or actions. Cf. *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676-686 (1999) (rejecting constructive waiver argument). In any event, petitioners' constructive waiver argument was not raised or decided below and, therefore, does not warrant review.

Petitioners similarly assert (Pet. 25-26) that the Tribe should not be permitted to invoke its sovereign immunity from suit when doing so would leave petitioners with "no alternative forum to bring their constitutional claim." This Court, however, has not recognized such an exception to sovereign immunity. Moreover, the court of appeals specifically weighed that factor in deciding whether dismissal was warranted under Rule 19. Pet. App. 3a. In any event, the factual premise for petitioners' argument appears to be incorrect. It appears that any of the individual petitioners who are in fact subject to relocation pursuant to the 1974 Settlement Act may be able to assert their constitutional claims as a defense in any federal court proceeding seeking to evict them pursuant to the provisions of the Act. Cf. *Banner* v. *United States*, 44 Fed. Cl. 568, 575 (1999).[5]

4. As the district court concluded, dismissal is also warranted in this case on the merits. See Pet. App. 7a-9a. Petitioners' free exercise claim is that, because they use the Hopi partitioned land to practice their religion,

---

[5] Petitioners who have signed an Accommodation Agreement are no longer required to relocate under the terms of the 1974 Settlement Act and may continue to live at their homesite on Hopi land for 75 years. As a result, they should not be permitted to press their claims in this action that the relocation requirement is unconstitutional.

they have the "right to remain in perpetuity on [the land]." *Id.* at 7a. As the district court held, that claim fails under *Lyng* v. *Northwest Indian Cemetery Protective Association*, *supra.* See Pet. App. 7a-9a. The claim also fails under *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). The 1974 Settlement Act is a neutral and generally applicable law to which the *Smith* standard applies, and petitioners' free exercise claim fails under that standard. See Gov't C.A. Supp. Br. on Merits 11-15. Moreover, as discussed above, petitioners' First Amendment claim is seriously undercut by the fact that the 1974 Act specifically directs that religious uses be taken into account to the extent practicable in dividing the land. The 1996 Settlement Act goes even further by giving petitioners a reasonable option to remain on the land. As the district court explained, petitioners' equal protection claim is similarly unavailing. Pet. App. 9a-10a.

Congress and the courts have long struggled to resolve the land dispute between the Navajo Nation and Hopi Tribe underlying this litigation. The 1974 Settlement Act, in conjunction with the 1996 Settlement Act, is a fair and practical solution to a century-old dispute for which there is no resolution that will please everyone. The settlement and accommodation plan growing out of and ratified by those Acts, including the relocation requirement that now applies only to the few Navajo members who have elected not to enter into an Accommodation Agreement that would allow them to remain on the land, is the least burdensome means of addressing the interests of both Tribes (and their individual members) who have laid claims to the land. Petitioners' challenge to that plan lacks merit, and this decades-old litigation should come to an end.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

JOHN CRUDEN
Acting Assistant Attorney General

JOHN A. BRYSON
KATHERINE W. HAZARD
Attorneys

MARCH 2001