16-660

No. _____

In the Supreme Court of the United States

TIFFANY L. AGUAYO, (HAYES), *et al.*,
Petitioners,

v.

S.M.R. JEWELL, Secretary, Department of the Interior; KEVIN K. WASHBURN, Esquire, Assistant Secretary, Department of the Interior - Indian Affairs; AMY DUTSCHKE, Regional Director, Department of the Interior; ROBERT EBEN, Superintendent of the Department of Indian Affairs, Southern California Agency; DOES, 1 through 10,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Tracy L. Emblem
Counsel of Record
P.O. Box 300764
Escondido, CA 92030
(760) 300-5837
tracyemblemlaw@gmail.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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QUESTION PRESENTED

The question presented is whether the Assistant Secretary, Department of Interior, Bureau of Indian Affair's decision to recognize a void tribal ordinance stripping petitioners of their tribal membership—a tribal ordinance enacted by a minority six-member tribal committee pursuant to authority from a tribal Constitution which was never legally ratified by the Band as a whole—violates appellants' due process rights and the Administrative Procedures Act.

PARTIES TO THE PROCEEDING

Petitioners are 63 individual federally recognized members of the Pala Band of Mission Indians:

Tiffany L. Aguayo, (Hayes); Karen Duro, (Renio); Rosa Estrada; Christian Griffith; Justin Griffith; Natasha Griffith; Cameron C. Hayes; Pamela Kennedy; Elizabeth Martinez; Jacqueline Mcwhorter; Dawn Mojado; Priscilla Mojado; Michael Peralta; Johnny Poling; Jessica Renteria; Adam Trujillo; Andrea Trujillo; Annalee H. Trujillo, (Yanez); Bradley L. Trujillo, Jr.; Brandon M. Trujillo, Sr.; Brian A. Trujillo, Ii; Charles Trujillo; Donald Trujillo; Jennifer Trujillo; John A. Trujillo; Jonathan Trujillo; Joshua E. Trujillo; Kristine Trujillo; Laura J. Trujillo; Leslie Trujillo; Marlene Trujillo; Randolph W. Trujillo, Jr.; Shalah M. Trujillo; Tina Trujillo-Poulin; Annette E. Walsh; Brenda J. Walsh; Eric J. Walsh; Patricia A. Walsh; Stephanie S. Walsh; Juanita Luna; Lanise Luna; Shalea Luna; Anthony Lunatrujillo; Brian Trujillo, Sr.; Jacob Trujillo; Miriam Trujillo; Rachel Ellis-Trujillo; Rebekah Trujillo; Richard Trujillo; Michelle Trujillo; Brianna Mendoa; Angel Morales; Destiny Pena; Mari Pena; Rogelio Pena; Geronimo Poling; Krista Poling; Kristopher Poling; Cheyenne Trujillo; Peter Trujillo, Jr.; Brandon Trujillo, Jr.; Feather Trujillo; Mukikmal Trujillo; Tashpa Trujillo; Kawish Trujillo; Susanne Walsh; Joseph Ravago; Kaley Ravago,

Petitioners sued respondents, Department of Interior and the Bureau of Indian Affairs under the Administrative Procedures Act. The Respondents are S.M.R. Jewell, Secretary, Department of the Interior; Kevin K. Washburn, Esquire, Assistant Secretary, Department of the Interior - Indian Affairs; Amy

Dutschke, Regional Director, Department of the Interior; Robert Eben, Superintendent of the Department of Indian Affairs, Southern California Agency; Does, 1 through 10.

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Petitioners, Tiffany Aguayo et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1) is published at ___F.3d___ (2016). The district court's opinion is unpublished. (Pet. App. 32) The Assistant Secretary's June 2013 decision is unpublished. (Pet. App. 80)

JURISDICTION

The Ninth Circuit's judgment was entered on July 8, 2016. (Pet. App. 1) The Ninth Circuit denied petitioners' timely petition for rehearing en banc on August 16, 2016. (Pet. App. 125) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

This case involves Fifth Amendment due process considerations and the government's duties and trust responsibility under 25 U.S.C. § 2, which provides: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."

STATEMENT OF THE CASE[1]

Petitioners are former tribal members of the Pala Band of Mission Indians who as of 2012, along with other tribal members similarly situated, constituted over 18 percent of the Pala Band. For decades all major tribal governance decisions in the Pala Band were decided by a General Council of all adult tribal members under the Pala Band's Articles of Association. (Pet. App. 6) Under the Articles of Association, the General Council delegated to the Secretary of the Department of Interior the authority to make "final and conclusive" membership decisions for the Band. In 1989, the Assistant Secretary Bureau of Indian Affairs confirmed that petitioners qualified as tribal members, based on their ancestor's 'blood quantum' and instructed the Pala Band to include them on the federally recognized membership roll.

But in 2011, a minority six-member Pala Executive Committee claimed it had sole power to reassess tribal membership decisions and voted to revisit the "blood quantum" of petitioners' ancestor, Margarita Britten. Ignoring the prior decision from the Department of Interior, the Executive Committee reversed course and determined that there was "insufficient evidence" to conclude Britten was a full-blooded (rather than half-blooded) Pala Indian. The Executive Committee thus expelled petitioners from the tribe for having only 1/32 (rather than the required 1/16) tribal blood. Many of the petitioners lived on the Pala reservation and spent years participating in tribal life. The Executive

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[1] The Department of Interior and BIA are interchangeably used in this petition.

Committee's decision meant petitioners were no longer members of the tribe, no longer identified as Native Americans under federal law--and gave the Executive Committee and the remaining tribal members each a substantially larger share of the tribe's casino revenues.

Pursuant to the Executive Committee's February 3, 2012, letter addressing petitioners' appeal rights, petitioners sought agency review of the Executive Committee's action. Petitioners challenged the tribal law being applied, the revised 2009 enrollment ordinance passed under the auspices of a 1997 Constitution submitted to the Department for its approval.

This "Constitution" was an entirely new governing document which ostensibly ratified in 1997 at a meeting where only 27 out of several hundred eligible voters were present. No formal election was ever held on that new Constitution, and petitioners did not even receive proper notice of the meeting itself. The new tribal Constitution dramatically shifted power from the General Council to a six-member Executive Committee and stripped the Department of the Interior of its authority over membership decisions.

The Department of Interior, taking a highly deferential stance to the new Executive Committee, accepted the Executive Committee's claim that this Constitution was validly enacted, and concluded it no longer had any trust authority to grant petitioners' request for reinstatement on the tribal rolls.

The Ninth Circuit declined to overturn the Assistant Secretary's decision that found that the 1997

Constitution was validly adopted, despite the fact that for the past eighteen years, the Department of the Interior and the Pala Band, between governments, and publicly, have legally recognized that the Pala Band's Articles of Association is the Band's governing document instead of the unratified tribal Constitution.

While the D.C. Circuit has previously rebuffed a similar attempted power grab by a small group of tribal members in adopting a tribal constitution, the Ninth Circuit in this case felt compelled by precedent to take a "hands off" approach to tribal affairs and affirmed the agency's decision. The Ninth Circuit added, though, that "we recognize with regret that Plaintiffs will suffer severe and significant consequences from losing their membership in the Pala Band," and it is "plausible that Plaintiffs were disenrolled unjustly, or in a manner not in accordance with tribal law." (Pet. App. 31.)

Tribal disenrollments have been dramatically increasing in recent years across a broad number of tribes, as casino revenues fuel incentives for those in positions of power to secure a larger share of the revenues for themselves and their supporters. Most cases brought to challenge these mass disenrollments have been rejected because of jurisdictional or procedural problems, so few cases have presented adequate vehicles for courts to define and explain the Department's trust responsibility to prevent the disenfranchisement and disenrollment of tribal members by a minority faction of the tribe. This case presents an appropriate vehicle for the Court to address this important issue of federal law that impacts the rights of native people across the country.

FACTUAL AND PROCEDURAL BACKGROUND

For decades, the Pala Band of Mission Indians has been governed by its Articles of Association approved by the Secretary of the Interior. (Pet. App. 6; ER 360-368) The Pala Band enacted an enrollment ordinance (the "1961 Ordinance") pursuant to the Articles of Association that gave the Secretary the "ultimate authority" to make final membership decisions. (Pet. App. 6)

Petitioners are descended from Margarita Britten, a Pala Indian born in 1856. (Pet. App. 6) In 1984, the Band's general membership considered the issue of Britten's blood quantum and determined that she was "a full blooded Indian," and thus petitioners (generally her great-great-grandchildren) were eligible for membership in the Band. (Pet. App. 7)

Petitioners' tribal membership and federal recognition was confirmed in a 1989 final and conclusive decision issued by the Assistant Secretary-Indian Affairs finding Britten was a full-blooded Pala Indian, and thus, petitioners were eligible for tribal membership. (Pet. App. 7) Petitioners were federally recognized as Indians for purposes of tribal and federal benefits, and for years, the final agency decision was honored between governments.

In 1994, the Band voted to begin a process of adopting a new yet-to-be-drafted governing document to "supplant the Articles of Association." (Pet. App. 8) The BIA recommended changes to the initial draft submitted to it, and withheld its approval. (*Id.*; ER 387) By November 1997, the Band's Executive Committee had been working on updating its Articles

of Association and also working on drafting a new Constitution.

The draft Constitution provided that it would "become effective immediately after its approval by a majority vote of the voters voting in a duly-called elections [sic] at which this Constitution is approved by the Bureau of Indian Affairs." (Pet. App. 8) At a General Council meeting, a small minority of tribal members, 27 voting members, voted to adopt the new Constitution and submit it to the Bureau for its approval. The Band's adult voting members were not properly given notice of that meeting to discuss submitting the proposed tribal Constitution, and the tribal Constitution was never ratified by an election held for the Band's adult voting tribal members. (Pet. App. 130-132, 135, 138)

The Department recommended several changes to the submitted Constitution. One of the recommendations—which the Ninth Circuit later described as a "prescient warning"—was "that the General Council not delegate the enactment of Ordinances to the Executive Committee," because the agency explained that "when the governing body of the tribe delegates totally the enactment of governing documents to its executive body, problems may occur causing internal disputes." (Pet. App. 9) The Chairman of the Executive Committee responded that it did not want to make any changes. Even though the Department's changes were never made, in July 2000, a low level Regional agency employee, Carmen Facio, acting as "acting Regional Director" retroactively approved the 1997 Constitution. (Pet. App. 9, 130-131.)

That approval and the enactment of the Constitution was never adequately publicized to tribal members. Indeed in the subsequent years—in 2009, 2011, 2012, 2014 and 2015—both the Department of Interior and the Pala Band continued to legally recognize between governments and publicly acknowledge in several public records that the Band was governed by its Articles of Association. (Pet. App. 31,[2] 163)

The six-member Executive Committee began to exercise its broad new powers under the 1997 Constitution, and in 2009, the Committee promulgated a new Ordinance giving themselves sole power to decide all tribal membership issues. (Pet. App. 11-12) Although the Ordinance stated that the Committee did "not intend to alter or change the membership status of individuals whose membership has already been approved and who are currently listed on the membership roll of the Pala Band," in June 2011, the Executive Committee reopened an inquiry into petitioners' ancestor Margarita Britten. (*Id.*) Despite the Department of the Interior's 1989 final decision, the Band's minority six-member Executive Committee arbitrarily reduced Margarita Britten's blood quantum, making petitioners ineligible for tribal enrollment and federal recognition. The Executive Committee then denied petitioners all tribal benefits, and stated that petitioners' only recourse was to appeal the

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[2] The Ninth Circuit denied petitioners' request to take judicial notice of several public records of the Department of Interior and the Pala Band, disseminated to various government agencies that stated the Band was governed by its Articles of Association. (Dkt. 34, 43)

Committee's action to the Regional Bureau of Indian Affairs. (Pet. App. 12, ER 353)

Petitioners did appeal, challenging the validity of the tribal governing documents relied on by the Executive Committee to take action against them. Petitioners contended the Committee was applying the wrong tribal law. (Pet. App. 81.) In response to the challenge, the BIA's Regional Director exercised jurisdiction and recommended that the tribe reverse its decision to expel petitioners from the tribe. (Pet. App. 12.) Despite this recommendation, the tribal Executive Committee refused to follow the BIA's Regional Director's recommendation to re-enroll petitioners. (Pet. App. 12)

Petitioners pursued their appeal to Assistant Secretary for Indian Affairs. (Pet. App. 12) Although the agency found that the Band's six-member Committee had presented "no new evidence" supporting its decision to reverse policy and disenroll petitioners, the Assistant Secretary concluded it no longer had any authority over tribal membership decisions based on the 1997 Constitution and the 2009 Ordinance. The Assistant Secretary rejected petitioners' claim that the 1997 Constitution was *void ab initio* because it had not been properly ratified or approved by a majority of the adult voting members of the tribe. The Assistant Secretary thus concluded that it had no power to force the Executive Committee to re-enroll petitioners or honor the 1989 final decision. (Pet. App. 13)

Before the District Court and Ninth Circuit, were declarations from a BIA employee Elsie Lucero (who was the Department's liaison to the Pala Band), and

the Band's former vice-chairman King Freeman, which stated that the 1997 tribal Constitution was neither adopted nor ratified by a majority of the Band's adult voting tribal members. (Pet. App. 134-142) Petitioners also submitted evidence from the Band's own website as of 2012, publicly stating that it was governed under its Articles of Association at the time the Executive Committee took action in 2012 to disenroll the petitioners. (Pet. App. 163). Yet both the district court and Ninth Circuit Court of Appeals affirmed the Assistant Secretary's decision under an arbitrary and capricious standard, that the 1997 Constitution was validly adopted by the Band.

The Ninth Circuit recognized that "the propriety of the BIA's 'hands-off' approach hinged on whether the Articles of Association and the 1961 Ordinance continue to govern the band," since if they did the BIA would have erred in taking a hands-off approach. (Pet. App. 14) The court held that any direct attempt by petitioners to challenge the agency's 2000 retroactive approval of the Constitution was barred by the statute of limitations (Pet. App. 24), despite the fact that petitioners claimed they did not have notice of that decision, and may not have had any particularized injury to challenge that process until the 2012 disenrollment process. The court also rejected petitioners' argument that the agency had a trust duty to protect tribal members from unjust disenfranchisement or disenrollment. (Pet. App. 28)

REASONS FOR GRANTING THE WRIT

I. There is significant confusion in the law about the government's trust responsibility.

The Ninth Circuit's decision approving federal recognition of a tribal constitution approved by a small minority of tribal members, when the tribal membership had several hundred adult voting members is in significant tension with the D.C. Circuit's decision in *California Valley Miwok Tribe v. United States* (Miwok), 515 F. 3d 1262, 1263 (D.C. Cir. 2008). In the *Miwok* case, the Secretary declined to approve a tribal constitution for a tribe organized under the Indian Reorganization Act (IRA) because that constitution was not ratified by a majority of the tribe's adult voting members.

The *Miwok* case involved approval of a tribal constitution under the safe harbor provision in 25 U.S.C. § 476(h)(1). In rejecting the argument that the Secretary had no role in determining whether a tribe has properly organized itself, the D.C. Circuit reasonably explained:

> Although the sovereign nature of Indian tribes cautions the Secretary not to exercise freestanding authority to interfere with a tribe's internal governance, the Secretary has the power to manage "all Indian affairs and [] all matters arising out of Indian relations." 25 U.S.C. § 2 (emphasis added). We have previously held that this extensive grant of authority gives the Secretary broad power to

> carry out the federal government's unique responsibilities with respect to Indians.

Miwok, *supra*, at p. 1267; *see also Seminole Nation v. Norton*, 223 F. Supp. 2d 122, 137, 138 (D.D.C. 2002) ("The obligation of the BIA to review a tribal constitution is justified under its trust responsibility.").

The *Miwok* court found that although the tribe had a potential membership of 250, only a small group had a hand in adopting the proposed tribal constitution. The court reasoned, "[t]his antimajoritarian gambit deserves no stamp of approval from the Secretary." *Id.* at p. 1267-1268.

Miwok involved a tribe organized under the IRA, while the Pala Band is not an IRA tribe. Yet the Ninth Circuit found the BIA was reviewing petitioners' challenge of the contested 1997 Constitution under its general enforcement powers over Indian affairs provided for in 25 U.S.C. § 2, the same provision that the D.C. Circuit invoked in *Miwok* to shape its understanding of the BIA's responsibility. (*Miwok*, *supra*, at p. 1267; Pet. App. 21) In contrast to the D.C. Circuit's decision, the Ninth Circuit refused to recognized the BIA's trust responsibility under 25 U.S.C. § 2 to protect the individual interests of tribal members, even though petitioners are federally recognized tribal members, and even though their membership was legally resolved in 1989 in a final and conclusive agency decision. (Pet. App. 28)

The Ninth Circuit's decision that the Department has no trust responsibility is in significant tension not only with *Miwok* but also with several other courts that have recognized a trust responsibility. For example, in

Ransom v. Babbitt, 69 F. Supp. 2d 141, 151 (D.D.C. 1999), the district court discussed the Saint Regis Mohawk Tribe's change of government from a three chief government to a constitutional one. In *Ransom*, the tribe certified that 51% of the voters voted for the new constitution. However, the administrative record documents show that 50.935093% –- not 51% of those present and voting supported the adoption of the Constitution. The district court held that the BIA and IBIA "acted arbitrarily and capriciously" in determining that the Saint Regis Mohawk Tribe had validly adopted its Constitution. *Id.* at 151, 155.

The same reasoning applies in petitioners' case, where the agency record clearly establishes that the final version of the Pala Band's 1997 tribal Constitution was not presented to the Band's adult voting tribal members; that there was NO notice provided, and NO election was held to ratify the new tribal Constitution. (Pet. App. 136-140) There were several hundred adult voting members at the time. However, in November 1997, by a minority vote, the proposed tribal Constitution was submitted to the Department for approval. (Pet. App. 134-142)

Petitioners challenged the six-member Executive Committee's action taken under tribal law. The BIA must interpret tribal laws to ensure that tribal action in which the Department has an interest is consistent with tribal law. *Ransom v. Babbitt*, 69 F. Supp. 2d 141, 151. In the proceedings below, the government admits in its brief: "the Regional Director did not then specifically confirm the Pala Band's compliance with ratification procedures in tribal law." (DE 25, p. 47) Despite the Executive Committee's non-compliance

with tribal law in adopting the governing documents, the Ninth Circuit decided to take a hands off approach when it concluded "Bureau review and approval was not required." (Pet. App. 25) In petitioners' case, the federal government's recognition of tribal governing documents not adopted or ratified by a majority of the adult voting tribal members violates the Department's trust responsibility and is a due process violation.

II. The Ninth Circuit's decision involves important public policy–the Department of Interior's duty to recognize only validly enacted tribal governing documents.

About 40 percent of tribal governments are non IRA tribes.[3] This Court's review of the Department of Interior's federal recognition of tribal governing documents adopted by less than a majority of adult tribal members is critically important because the agency action undermines the continued existence of non-IRA tribes. The Department's duty to only recognize a validly ratified tribal constitution does not depend on whether a tribe is an IRA or non-IRA tribe. The Secretary's "duty to protect [petitioners'] rights is the same whether the infringement is by non-members or by members of the tribe." *Seminole Nation v. Norton*, 223 F. Supp. 2d 122, 137-138. In the *Seminole Nation* case, the district court realized:

> The Court respects and understands the Seminole Nation's right to self-government.

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[3] 60 percent of the nation's federal recognized tribes are IRA tribes. See National Congress of American Indians (NCAI) "An Introduction to Indian Nations in the United States" http://www.ncai.org/about-tribes/indians_101.pdf at p. 12.

> However, unlike *Harjo*, *Ransom*, and *Wheeler*, there is an element here of oppressive action on the Nation's part against its own minority members. As another member of this court has recognized: The Secretary of the Interior is charged not only with the duty to protect the rights of the tribe, but also the rights of individuals members.

Id. at p. 137.

Governing documents recognized by the Department of Interior must have consent of the governed. The federal trust responsibility includes a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes. *Seminole Nation v. United States*, 316 U.S. 286, 62 S. Ct. 1049, 86 L. Ed. 1480 (1942).

The Ninth Circuit erred in finding petitioners could not challenge the BIA's 2000 decision to approve the new Constitution despite the Executive Committee's failure to make any of the changes requested by the agency. First, petitioners did not have valid notice of that decision, which tolls the statute of limitations. Second, it is unclear whether they could have brought a general challenge to the BIA's 2000 decision before there had been any specific action taken under the approved constitution that caused them individual harm. Finally, the statute of limitations bar is inapplicable because a tribal constitution not ratified by a majority of the adult voting tribal members is void ab initio and cannot be legally recognized.

III. The Ninth Circuit's decision inflicts a significant injustice by affirming the Assistant Secretary's decision to allow the current minority tribal leadership to strip petitioners of tribal membership by reversing a decades-old final decision on their ancestor's 'blood quantum' that had been honored and enforced between governments for years.

The 2009 enrollment ordinance stated that "the Committee did 'not intend to alter or change the membership status of individuals whose membership has already been approved and who are currently listed on the membership roll of the Pala Band.'" (Pet. App. 11) However, the Ninth Circuit ignored the preclusive effect of the 1989 final decision (Pet. App. 30) and the Department's duty to honor and enforce that final decision. The court's decision has inflicted a significant injustice on petitioners by failing to require the Department of Interior to enforce a final decision between governments. In reaching its conclusion, the Ninth Circuit recognized that it was plausible that petitioners were disenrolled unjustly and not in accordance with tribal law. (Pet. App. 31.) The Ninth Circuit's denial of petitioners' request to take judicial notice of several public records issued between the Department of Interior and the Pala Band that show that both the Band and Department have continued to recognize that the Band is governed by its Articles of Association also inflicted a grave injustice. (Dkt. 34, 43; Pet. App. 30)

CONCLUSION

For petitioners and individual tribal members around the nation who are federally recognized members in non-IRA tribes, full scrutiny of the agency record in this case and the Ninth Circuit's published decision affirming the Assistant Secretary's decision is critically important. The Assistant Secretary's federal recognition of a tribal Constitution that was neither adopted nor ratified by a majority of the adult voting tribal members is no less important than interpreting and enforcing the United States Constitution.

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

Tracy L. Emblem
P.O. Box 300764
Escondido, CA 92030
(760) 300-5837
tracyemblemlaw@gmail.com

Counsel for Petitioners