No. 05-445

IN THE

Supreme Court of the United States

THE LUMMI NATION, *et al.*,

Petitioners,

v.

SAMISH INDIAN TRIBE,

Respondent.

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

REPLY BRIEF

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RULE 29.6 STATEMENT

Petitioner's Rule 29.6 Statement was set forth at page *iv* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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INTRODUCTION

The United States agrees that the decision below conflicts with and undermines prior precedent. However, the United States ignores its corrosive effect on Fed. R. Civ. P. 60(b)(6) jurisprudence and the case load of the judiciary. The United States portrays the Ninth Circuit opinion as narrow in its implications, and concludes that the decision is unworthy of this Court's review.[1] The United States is able to reach that conclusion only by (1) ignoring all of the conflicts the Ninth Circuit has created with sister Circuits, *Petition for Certiorari* at 12-18, and (2) failing to discuss any of the other concerns raised by Petitioners in their Petition.[2] By offering no rebuttal, the United States admits that the decision below is inconsistent with Rule 60(b) cases from this Court[3] and from the sister Circuits.[4]

Samish likewise does not attempt to rebut the argument that the Ninth Circuit's decision is directly contrary to well-established law of this Court and the Circuits. Instead, Samish puts on the cloak of victimhood and asks the Court to relieve it of the consequences of its deliberate, intentional choice in 1975 to proceed with treaty rights litigation without first obtaining federal recognition. In so doing, it raises new issues and refers to "evidence" not contained in the record. Allowing Samish to re-open the 1979 decision, *United States v. Washington*, 476 F. Supp. 1101, (W.D. Wash. 1979) would violate a large body of Rule 60(b) law.

1. The Ninth Circuit Ruling Has National Significance.

The federal district courts have already noticed the Ninth Circuit decision, and relied on it to expand the grounds for relief under Rule 60(b)(6). For example, in one of the myriad

1. The United States iterates its argument no less than four times. The United States doth protest too much. Repetition does not strengthen a weak argument.

2. These concerns include the Ninth Circuit's denial of due process, *Petition for Certiorari* at 9-12 and the Ninth Circuit's expansion of "misconduct" covered by Rule 60(b), *id.* at 19.

3. *See, e.g., Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

4. *See, e.g.,* cases cited at pages 12, 14, 15, & 17 of *Petition for Certiorari.*

parts of the Exxon Valdez case, the Alaska District Court cited the Ninth Circuit decision on review here, and then went on to rule that a claimant would be allowed to reopen his fishing claim because his attorney failed to inform him that the claim had been dismissed. *In re the Exxon Valdez,* __ F. Supp. 2d __, 2005 WL 2340703 at *4 (D. Alaska September 22, 2005). The court allowed a reopening on the basis that the claimant personally did not know that his fishing claims had been dismissed even though his lawyer was aware that of the dismissal. *Id.*

This ruling is inconsistent with well-settled law from other circuits holding that the client's sole remedy in such a case is legal malpractice action against his attorney. *Daniels v. Brennan,* 887 F.2d 783, 788 (7th Cir. 1989), *quoting Pryor v. United States Postal Service,* 769 F.2d 281, 288-89 (5th Cir. 1985) (allowing reopening each time a party alleged "hardships" due to a negligent attorney would cause the "meaningful finality of judgment" to "largely disappear").

Thus, the Ninth Circuit's ruling has already yielded results contrary to settled law of this Court and other circuits. It also creates the potential for reopening prior rulings in the multitude of complex, multiparty cases in which federal courts across the nation retain continuing jurisdiction. *See, e.g., Ayers v. Fordice,* 111 F.3d 1183 (5th Cir. 1997), *cert. denied,* 522 U.S. 1084 (1998) (jurisdiction over remedial decree entered in class action alleging racially dual system of public higher education); *Floyd v. Ortiz,* 300 F.3d 1223 (10th Cir. 2002) (jurisdiction to administer consent decree in action by inmates against Colorado Department of Corrections contesting DOC's handling of prison canteen funds); *Marino v. Pioneer Edsel Sales, Inc.,* 349 F.3d 746 (4th Cir. 2003) (jurisdiction over consent decree entered in class action by auto dealers); *United States v. State of Tennessee,* 143 Fed. Appx. 656 (6th Cir. 2005) (unpublished decision) (jurisdiction over Remedial Order and Community Plan entered in action alleging that State of Tennessee failed to provide humane conditions to mental retarded residents of state-operated care facility); *Jeff D. v. Kempthorne,* 365 F.3d 844 (9th Cir. 2004) (jurisdiction over consent decrees entered in class action by indigent minors

diagnosed with severe emotional and mental disabilities who were being housed in state facilities with adults including sexual predators); *McDowell v. Philadelphia Housing Authority*, 423 F.3d 233 (3rd Cir. 2005) (jurisdiction over administration and enforcement of consent decree entered in class action by public housing tenants because of housing authority's failure to properly factor gas rates into gas allowances).

2. This proceeding does *not* challenge the Department of the Interior's decision to grant federal recognition to Samish.

Samish devotes much of its Brief in Opposition to explaining that federal recognition is a "political question" and that the federal government's decision to grant federal recognition to Samish cannot be challenged in this appeal. *Brief in Opposition to Certiorari* at 14-16. This discussion is interesting, but completely irrelevant, because the Petitioning Tribes are NOT challenging Interior's decision in this proceeding.[5] The Petitioning Tribes are challenging the Ninth Circuit's decision to ignore well-established finality rules and allow Samish to resurrect its attempt to relitigate its entitlement to treaty fishing rights.

Samish attempts to characterize this case as an Indian law case with limited applications in other contexts, but it is not. This is a procedural case aimed at preserving the important role that Federal Rule of Civil Procedure 60(b) plays in furthering the essential interests served by *res judicata* and other finality doctrines. The Ninth Circuit's decision in this matter, particularly its decision finding extraordinary circumstances in *this* case based on alleged misconduct that occurred in a *different* case twenty years earlier, has implications far beyond the relatively small Indian law world.

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5. The only danger to Samish's administrative recognition is if the current Ninth Circuit decision stands. A rationale similar to that which allows Samish the opportunity to reopen its Treaty status case applies with equal force to allow Tulalip and the other interested Tribes to seek to reopen the Samish recognition proceeding.

3. Motions to reopen judgments necessarily implicate finality concerns.

Samish claims that the Ninth Circuit decision does not implicate finality concerns:

> [T]he *Samish Indian Tribe* decision does not dispense with the *res judicata* effect of the Samish judgment in *Washington II*. The Ninth Circuit in *Samish Indian Tribe* decided . . . that the Samish Tribe [should] be allowed to revisit the issue of its treaty status in *United States v. Washington.*

Samish Brief in Opposition at 10. Samish apparently does not understand that being allowed to "revisit" a previously decided issue is exactly what the doctrine of *res judicata* is designed to prevent:

> When a litigant files a lawsuit, the courts have a right to presume that he has done his legal and factual homework. It would undermine the basic policies protected by the doctrine of res judicata to permit the [plaintiffs] to once again avail themselves of judicial time and energy while another litigant, who has yet to be heard even once, waits in line behind them.

Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 596 (7th Cir. 1986). The purpose of *res judicata* is to ensure "that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522 (1931).

4. Protected property interests of Tulalip and the other Petitioning Tribes have been adversely affected by the Ninth Circuit's decision threatening their treaty rights based on a proceeding in which the Petitioner Tribes were not allowed to participate.

Tribal fishing rights secured by Treaty with the United States are a "property right" protected by the Due Process Clause of the Fifth Amendment. *Menominee Indian Tribe v. United States*, 391 U.S. 404, 413 (1968). Thus, a Tribe who shares

the property right would be allowed to intervene in any action where a new group of Indians sought to dilute its share. But Samish persuaded the Ninth Circuit that their recognition would not threaten Tulalip fishing rights, *Greene v. United States*, 966 F.2d 973 (9th Cir. 1993):

> The Tulalip concede that the district court limited the Samish claims to federal recognition. Thus, adjudication of the Samish treaty fishing rights is not an issue in the pending proceeding. Nevertheless, the Tulalip argue that renewed administrative inquiry into the Samish tribal status will raise nearly identical questions. They assert that the BIA will review much of the same factual record that served as the basis for the judicial allocation of fishing rights.
>
> . . .
>
> We recognize that the two inquiries are similar. Yet each determination serves a different legal purpose and has an independent legal effect. Federal recognition is not a threshold condition a tribe must establish to fish under the Treaty of Point Elliott.
>
> . . .
>
> Similarly, the Samish need not assert treaty fishing rights to gain federal recognition. . . . Even if they obtain federal tribal status, the Samish would still have to confront the decisions in Washington I and II before they could claim fishing rights. ***Federal recognition does not self-execute treaty rights claims.***

Greene I, 996 F.2d at 976-77(*emphasis added*).

Having prevailed on that argument, which prevented the Tribes from participating in the recognition proceedings to protect their interests, Samish now claims that its recognition should allow it to do exactly what the Ninth Circuit said it could not, *i.e.*, allow Samish to reopen the Treaty fishing rights decisions. Samish's position directly contradicts the Ninth Circuit's observation that

> [T]he Tulalip assert an interest in defending *Washington II*[6] from collateral attack by way of an administrative hearing. This interest is immaterial because the district court explicitly ruled that the Samish may not use the reopened hearing to attack the *Boldt* decision.

Greene I, 996 F.2d at 977.

Samish also claims that due process was not denied because Tulalip was permitted to participate in the recognition proceedings as *amicus curiae. Samish Opposition Brief* at 16-17. However, as Samish surely knows, an *amicus curiae* is not a party to litigation. *Miller-Wohl Co., Inc. v. Comm'n of Labor and Industry*, 694 F.2d 203 (9th. Cir. 1982), *citing Clark v. Sandusky*, 205 F.2d 915, 917 (7th Cir.1953). *Amici* have

> been consistently precluded from initiating legal proceedings, filing pleadings, or otherwise participating and assuming control of the controversy in a totally adversarial fashion. *Moten v. Bricklayers, Masons and Plasterers Int'l Union of Am.*, 543 F.2d 224, 227 (D.C. Cir. 1976) (per curiam) (amicus may not appeal judgments); *State ex rel. Baxley v. Johnson*, 293 Ala. 69, 300 So.2d 106, 111 (1974) (per curiam) (amicus is not a party and cannot assume the functions of a party nor control litigation); *Silverberg v. Industrial Comm'n*, 24 Wis. 2d 144, 128 N.W.2d 674, 680 (1964) (amicus brief seeking to challenge validity of testimony in the record stricken because attempt to challenge was not a proper function of amicus); 4 Am.Jur.2d, Am.Cur. §§ 3, 6 at 111, 114. *See City of Winter Haven v.* Gillespie, 84 F.2d 285 (5th Cir. 1936), *cert. denied*, 299 U.S. 606, 57 S.Ct. 232, 81 L. Ed. 447 (1936).

United States v. State of Michigan, 940 F.2d 143, 165 (6th Cir. 1991). An *amicus* cannot initiate, create, extend, or enlarge issues. *United States v. Alkaabi*, 223 F. Supp. 2d 583, 593 n.19

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6. *United States v. Washington*, 476 F. Supp. 1101 (W.D.Wash.1979), *aff'd*, 641 F.2d 1368 (9th Cir.1981), *cert. denied*, 454 U.S. 1143 (1982).

(D.N.J. 2002), *citing Waste Mgmt. of Pa., Inc. v. City of York,* 162 F.R.D. 34, 36 (M.D. Pa.1995), and *Wyatt By and Through Rawlins v. Hanan,* 868 F. Supp. 1356, 1358-59 (M.D. Ala. 1994). Only a named party or an intervening real party in interest is entitled to litigate on the merits. *United States v. Michigan,* 940 F.2d at 165-66, *citing Miller-Wohl,* 694 F.2d at 204; *Schneider v. Dumbarton Developers, Inc.,* 767 F.2d 1007, 1017 (D.C. Cir. 1985); and *Gilbert v. Johnson,* 601 F.2d 761, 768 (5th Cir. 1979) (Rubin, J., concurring).

In short, participation as *amicus* was a wholly inadequate way for Tulalip to protect its rights, because Tulalip was not permitted to cross-examine or impeach Samish's witnesses, to offer its own impeaching and other evidence, or to raise new issues. Tulalip and the other Petitioning Tribes including Swinomish, who also tried to intervene in the Samish proceeding, have interests different from and adverse to Samish, in contrast to the BIA.[7] Had intervention been permitted, there may well have been a different outcome in the recognition proceeding. The only way for Tulalip and other tribes to obtain standing to litigate on the same basis as that exercised by the named parties was by intervention. *See United States v. Michigan,* 940 F.2d at 166 (only a named or intervening party is entitled to litigate on the merits).

Samish also claims that the Petitioning Tribes' due process claims significantly undermine federal "exclusive" or "plenary" authority over Indian affairs, because allowing the due process claim would result in re-opening the ***administrative recognition*** proceeding. But the only issue ***here*** is whether Samish is entitled to seek relief from the earlier judgments under Rule 60(b)(6) because of the alleged extraordinary circumstances attendant to its recent federal recognition. Samish cannot have it both ways: either the administrative recognition has no bearing on treaty tribe

7. Another of the Petitioner Tribes, Swinomish, sought to intervene in the administrative proceedings on Samish recognition that resulted from the *Greene* case. The ALJ denied intervention based upon the *Greene* decisions. *See* 61 Fed. Reg. 15825-01, 15827 (1996).

status, as it argued and the Ninth Circuit ruled in the *Greene* cases, *supra,* or Tulalip and other Tribes were denied due process when they were prevented from intervening in the administrative recognition proceedings.

5. Samish created its own problem by choosing to litigate its treaty status before obtaining federal recognition.

In 1975, a number of other tribes, like Samish, had neither federal recognition nor treaty tribe status. The Stillaguamish and Upper Skagit Tribes chose the same path as Samish, *i.e.* to litigate treaty tribe status before achieving federal recognition, and were found to have Treaty fishing rights. *Washington I,* 384 F. Supp. at 378-79. Others, such as the Jamestown S'Klallam, elected to wait to litigate treaty tribe status until ***after*** they had achieved federal recognition. *See United States v. State of Washington,* 626 F. Supp. 1405, 1433 (Findings of Fact 326 & 327) (W.D. Wash. 1985). Samish elected to proceed without first obtaining federal recognition, and fully litigated its treaty tribe status in court. In so doing, Samish forfeited its right to relitigate the treaty tribe status at a later date. Nothing is more basic to the well-settled rules protecting the finality of judgments than the rule that a litigant gets only one bite at the judicial "apple".

6. Samish has not, and cannot, support its claim that the Tribes made "promises" to Samish to induce Samish not to pursue its treaty rights.

Samish claims that in previous proceedings," . . . the United States, the United States District Court, and those tribes opposing Samish treaty status all suggested that future federal recognition would probably warrant reexamination of the Samish Tribe's treaty fishing rights", and characterizes these alleged "suggestions" as "promises". *Samish Brief in Opposition* at page 5. There are at least two problems with this argument.

First, Samish does not, and cannot, point to a single instance in which the Tribes opposing treaty status suggested that future federal recognition would warrant re-examination of Samish's treaty rights. To the contrary, the Petitioning Tribes

have consistently taken the position that federal recognition would ***not*** justify reopening the issue.

Second, no one made any ***promises*** to Samish. Samish claims that the "most explicit" of the so-called "promises" occurred when the United States included the following statement in its Opposition to Samish's original Petition for Certiorari in the 1979 case:

> "[S]hould [the Samish] succeed in obtaining 'acknowledgement' of their current status as an 'Indian tribe []' in the pending administrative proceedings, this ***might*** justify an application to re-open the present judgment against them.

Samish Brief in Opposition at p. 5, note 8 (emphasis added). As the Court can see, it is a misnomer to call this statement a "promise". Certainly it is not the kind of affirmative statement required for promissory estoppel:

> The first essential element of promissory estoppel is that the promisor has made a binding offer in the form of a promise. . . . This promise must be definite and certain so that the promisor should reasonably foresee that it will induce reliance by the promisee or a third party. . . . A mere expression of future intention, however, does not constitute a sufficiently definite promise to justify reasonable reliance thereon.

Santoni v. Federal Deposit Ins. Corp., 677 F.2d 174, 179 (1st Cir. 1982).

7. Samish's Brief in Opposition includes unsupported factual statements and citations to evidence not in the record.

Federal Rule of Appellate Procedure 10 prohibits Samish form offering new "evidence" to the Court except by motion. Nevertheless, Samish violates this rule twice. First, Samish cites a tribal council resolution in support of its argument. *See Samish Opposition Brief* at 2, n.5. But that document is not in the administrative record. Second, Samish claims that "[t]he Department of Interior and the Department of Justice took three years to deny the Samish Tribe's request for recognition"

with no citation to the record below. *See id.* These references and averments should be stricken.

8. The Decision below destroys needed finality and repose for adjudicated cases.

In *Tahoe Sierra Preservation Council, Inc. v. Tahoe,* 322 F.3d 1064, 1077 (9th Cir.2003), the Ninth Circuit eloquently explained why finality and repose are central to our jurisprudence. Holding that final judgments should "rest in peace", the Court underscored the "merits of finality."

> The doctrine of *res judicata* provides that 'a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.' The application of this doctrine is 'central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction.' Moreover, a rule precluding parties from the contestation of matters already fully and fairly litigated 'conserves judicial resources' and 'fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.'

Id.

The Ninth Circuit's ruling in the case at bar is at total odds with these views. Here, the lower court's decision wastes judicial resources, increases the likelihood of inconsistent decisions, rejects well-established law interpreting Rule 60(b), and subjects the Petitioning Tribes to the threat of having to engage in costly re-litigation of an issue that was resolved and sustained on appeal many years ago. The expansion of this ill-conceived decision to other situations and cases has already begun.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted on behalf of the Petitioning Tribes this 20th day of December, 2005.

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