No. 18-891

In the Supreme Court of the United States

SALLY JIM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether treaties with Indian tribes must be construed consistent with that tribe's present-sense understanding of the treaty.

Whether the Miccosukee Tribe's long-standing method of compensation for use of Tribal member lands and distributing revenue from land to its members can be considered a "mere formalism" to avoid inclusion and taxation as income to the members when the Tribe's chosen method of compensation is soundly in line with federal law and policy.

Whether the Assistant Secretary of the Interior through its designated representative can interpret, waive, modify or exempt payments made to tribal members from inclusion as income.

PARTIES TO THE PROCEEDINGS

Petitioner is Sally Jim, defendant and appellant below. The Miccosukee Tribe of Indians of Florida was also intervenor and appellant below and is filing a separate petition.

Respondent is the United States of America, plaintiff and appellee below.

CORPORATE DISCLOSURE STATEMENT

Sally Jim is an individual.

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JURISDICTION

This petition seeks review of the order of the United States Court of Appeals for the Eleventh Circuit dated June 4, 2018, reported at 891 F.3d 1242. The Circuit denied rehearing on August 9, 2018, reported at 2018 U.S. App. LEXIS 22201 (11th Cir. 2018). Justice Thomas issued an order extending time to file the petition to January 6, 2019. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

INTRODUCTION

Self-government is an essential predicate to tribal sovereignty. Using aggressive tax-collection tactics, the U.S. government seeks to force Sally Jim, a member of the Miccosukee Tribe of Indians of Florida (the "Miccosukee Tribe" or the "Tribe')), to pay hundreds of thousands of dollars in taxes, penalties and interest for income she received 15 years ago. This income, however, is exempt from taxation under several statutes.

The Miccosukee Tribe is solely responsible for the welfare of its members and the preservation of its cultural heritage. To effectuate these twin goals, the Tribe derives revenue from businesses operating on tribal lands, and then, as required by its Tribal Constitution and custom, distributes that revenue equally to its members. This practice began shortly after the Indian Self Determination Act and was formalized by the Tribe in 1984, but dates back centuries and was firmly in place long before the Tribe opened its gaming facility in the early 1990's. The Tribe's method of compensation for use of its members' lands was disclosed and known to all relevant federal agencies. Now that there has been a dramatic increase in the Miccosukee Tribe's revenue derived from tribal businesses, attributable largely to its gaming facility located on tribal lands, the IRS wants its share. For three reasons the funds received as compensation for use of member lands by Ms. Jim—and other tribal members—is not taxable income and as such Ms. Jim has no tax liability.

First, income derived from Miccosukee Tribal lands is exempt from taxation under the Florida Indian Land Claims Settlement Act of 1982, 25 U.S.C. § 1741, *et seq.*, the Miccosukee Settlement Act of 1997, 25 U.S.C. § 1750, *et seq.*, and the Miccosukee Reserved Area Act of 1998, 16 U.S.C. § 410, *et seq*. Working in tandem, these statutes express the clear intent of the federal government to allow the Miccosukee Tribe to self-govern and create income sources on tribal lands free of federal taxation. There is no exception for gaming revenue, as the IRS argues.

Second, the Eleventh Circuit's holding minimizes the Miccosukee Tribe's long-standing practice of distributing revenue derived from business operating on tribal land equally to its members. This practice long predates the creation of the Tribe's gaming facility, as the record evidence proves, yet the Eleventh Circuit called it form over substance meant to sidestep taxation. This holding is erroneous and inapposite to prior Supreme Court rules of construction and interpretation of statutes impacting Indian tribes. More problematic, it invites other courts to ignore well-settled tribal custom if it frustrates subsequently enacted federal statutes. This is at odds with all notions of tribal self-governance.

Third, even putting aside what the government argues that these statutes mean, the only interpretation that matters is that of the Tribe's Chairman who serves as the delegated representative of the Assistant Secretary of the Interior. Under 25 C.F.R. § 1.2, the delegated representative has the right to interpret regulations applicable to the Tribe. The Tribe's Chairman, as the appointed superintendent of

the Tribe, interpreted this statutory scheme, and concluded that tribal members weren't required to pay income tax.

All three of these issues, each going directly to the heart of Tribal self-governance, well settled statutory construction and application of federal statutes to tribal self-governance, present important issues of law essential to resolving the scope of the Miccosukee Tribe's right to self-governance and Ms. Jim's right to exclude income from Tribal lands from any imposed tax.

STATUTES

The Florida Indian Land Claims Settlement Act of 1982, provides in relevant part:

> (a) Acceptance by Secretary
>
> The Secretary is authorized and directed to accept the transfer to the United States, to be held in trust for the use and benefit of the Miccosukee Tribe of Indians of Florida, of the lands authorized to be conveyed to the Miccosukee Tribe by section 285.061, Florida Statutes, and the lands described in Dedication Deed No. 23228 from the Trustees of the Internal Improvement Trust Fund subject to the provisions of section 285.061, Florida Statutes, and of this section.
>
> 25 U.S.C.A. § 1747

The Miccosukee Settlement Act of 1997 provides in relevant part:

> As Trustee for the Miccosukee Tribe, the Secretary shall--
>
> (1)(A) aid and assist in the fulfillment of the Settlement Agreement at all times and in a reasonable manner; and
>
> (B) to accomplish the fulfillment of the Settlement Agreement in accordance with subparagraph (A), cooperate with and assist the Miccosukee Tribe;
>
> (2) upon finding that the Settlement Agreement is legally sufficient and that the State of Florida has the necessary authority to fulfill the Agreement--
>
> (A) sign the Settlement Agreement on behalf of the United States; and
>
> (B) ensure that an individual other than the Secretary who is a representative of the Bureau of Indian Affairs also signs the Settlement Agreement;
>
> (3) upon finding that all necessary conditions precedent to the transfer of Miccosukee land to the Florida Department of Transportation as provided in the Settlement Agreement have been or will be met so that the Agreement has been or will be fulfilled, but for the execution of that land transfer and related land transfers--
>
> (A) transfer ownership of the Miccosukee land to the Florida Department of Transportation in accordance with the Settlement Agreement, including in the transfer solely and exclusively that Miccosukee land identified in the Settlement Agreement for

transfer to the Florida Department of Transportation; and

(B) in conjunction with the land transfer referred to in subparagraph (A), transfer no land other than the land referred to in that subparagraph to the Florida Department of Transportation; and

(4) upon finding that all necessary conditions precedent to the transfer of Florida lands from the State of Florida to the United States have been or will be met so that the Agreement has been or will be fulfilled but for the execution of that land transfer and related land transfers, receive and accept in trust for the use and benefit of the Miccosukee Tribe ownership of all land identified in the Settlement Agreement for transfer to the United States.

25 U.S.C.A. § 1750c

Constitution of the Miccosukee Tribe of Indians of Florida (Dec. 17, 1961), Article VI, Section 1:

All members of the Miccosukee Tribe shall be accorded equal political rights and equal opportunities to participate in the economic resources and activities of the tribe, and no person shall be denied freedom of conscience, speech, association or assembly, or due process of law, or the right to petition for the redress of grievances.

STATEMENT OF THE CASE

I. Factual Background

Petitioner, Sally Jim, is an enrolled member of the Miccosukee Tribe, a federally recognized Indian tribe residing in its ancestral lands located within the Miccosukee Reserve Area of Miami-Dade County. (R. DE 168 at ¶ 3.) In 2001, Ms. Jim, her husband, and their two daughters received welfare payments from the tribal government in the amount of $272,000.00. (*Id.* at ¶¶ 7-8.) Tribal attorneys and advisors led Ms. Jim—who possesses limited understanding of English language and U.S. laws—to believe she need not pay income taxes on these distributions. (R. Tr. Aug. 12, 2016 at 56:7-58:13; 81:16-82:4.) Accordingly, Ms. Jim did not file a tax return in 2001. (R. DE 168 at ¶ 10.)

Many years later, the Internal Revenue Service ("IRS") assessed taxes, penalties, and interest against Ms. Jim totaling $267,237.18. (R. DE 168 at ¶ 1.)

For centuries the Miccosukee Tribe has operated independently. Only after European settlement and forced removal from its ancestral lands did the Miccosukee Tribe move to the uninhabited lands of the Florida Everglades, choosing to live off that land rather than concede defeat to the U.S. government. (R. Defs.' Ex. 8.) Since then, the Miccosukee Tribe and its members lived a self-sufficient existence, relying on the land to provide for its members.

Despite its longstanding heritage of tribal sovereignty, it wasn't until 1962 that Congress formally recognized the Miccosukee Tribe. (*Id.*) Since that initial recognition, the federal government and the

Miccosukee Tribe have entered into other inter-government agreements that define the scope of the relationship between the two sovereigns.

Notably for this Petition, the Miccosukee Tribe entered into three agreements with the federal government. As codified, these agreements are entitled the Florida Indian Land Claims Settlement Act of 1982, 25 U.S.C. § 1741, *et seq.*, the Miccosukee Settlement Act of 1997, 25 U.S.C. § 1750, *et seq.*, and the Miccosukee Reserved Area Act of 1998, 16 U.S.C. § 410, *et seq.* These binding treaty obligations not only formalize the Miccosukee Tribe's longstanding position of independence and self-governance, free from federal intervention, but also reaffirm the scope of the Miccosukee Tribe's independence after it gave up claims to millions of acres of lands taken from the Tribe by the U.S. Central to this understanding is the Miccosukee's belief that, with these three agreements, and in return for release of its claims to millions of acres, the U.S. government could not impose any further restrictions or limitations on Tribal lands and can take nothing more from the Tribe.

All members of the Miccosukee Tribe possess an equal and undivided interest in the usage of Miccosukee lands.[1] This concept has been codified into the Miccosukee Constitution—as recognized in 25 U.S.C. § 5123—providing that "[a]ll members of the Miccosukee Tribe" are "accorded equal political rights

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[1] To illustrate how critical this custom is to Miccosukee culture and governance, the Miccosukee language lacks a word to describe individual ownership, instead construing ownership as a collective concept. (R. Tr. Aug. 12, 2016 at 29:6-10.)

and equal opportunities to participate in the economic resources and activities of the Tribe." (R. Defs.' Ex. 8.)

This case concerns the right of Ms. Jim—and potentially all other members of the Miccosukee Tribe—to use tribal lands to generate revenue for the benefit of tribal members, thus preserving the culture, history and independence of the Miccosukee Tribe. By statute, Miccosukee lands should be exempt from federal, state and local taxation. Conflicting with this principle, as articulated by the U.S. government in this case, is the concept that all revenues from the Tribe's gaming facility—operated by the Miccosukee Tribe on Miccosukee land held by all members in an undivided interest—should be taxable regardless of the source of revenue when provided to members.

II. Procedural History

On July 1, 2014, the government filed a one-count complaint solely against Ms. Jim seeking to reduce its tax assessment for the year 2001 to a judgment. (App. at 3.) In that complaint, the government sought unpaid income tax for the year 2001 in the amount of $267,237.18, plus statutory additions and interest. (*Id.*) In March 2016, the Miccosukee Tribe filed a motion to intervene, which was ultimately granted by the District Court. (*Id.*)

After discovery, the government filed a motion for summary judgment on its claims against Ms. Jim. The Miccosukee Tribe and Ms. Jim opposed the motion, arguing that (i) the income paid to Ms. Jim is non-taxable pursuant to the Tribal General Welfare Exclusion Act; (ii) the IRS incorrectly calculated Ms. Jim's tax liability; (iii) Ms. Jim should not need to pay

penalties; and (iv) distributions derived from the land are non-taxable.

The District Court, in June 2016, granted in part and denied in part the Government's summary judgment motion. In the order, the District Court found Ms. Jim liable for distributions derived from gaming revenue, finding that the Miccosukee treaties were inapplicable to the U.S. Government's case, and the income paid to Ms. Jim was taxable.

Both Ms. Jim and the Miccosukee Tribe appealed to the Eleventh Circuit. After oral argument, the Eleventh Circuit issued an opinion affirming the District Court's order, finding that the treaties and statutes did not overcome the taxability of distributions made to Ms. Jim. On this basis, the Miccosukee Tribe seeks a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Opinion Conflicts with Longstanding Precedent that Tribal Treaties Should be Interpreted Consistent with the Understanding of the Tribal Members

The Eleventh Circuit did away with a long-standing principle of this Court—that treaties with Indian tribes must be interpreted in the manner the tribe understood it. *See United States v. Winans*, 198 U.S. 371, 381 (1905). Like many other Indian tribes, the Miccosukee Tribe operates according to several treaties with the federal government. Relevant here, the Tribe operates according to the Miccosukee Settlement Act of 1982, the Miccosukee Settlement Act of 1997, and the Miccosukee Reserved Area Act of 1998 ("MRAA").

These three acts, all passed by the U.S. Congress, are a portion of the framework within which the Miccosukee Tribe operates. Of particular note, the 1997 Settlement Act—as codified in 25 U.S.C. § 1750c—exempts from taxation any payments derived from the land conveyed to the Miccosukee Tribe. *See* 25 U.S.C. § 1750c(b)(2).

Included within the Miccosukee land recognized by the federal government is the 25 acres "located within one mile of the intersection of...Krome Avenue and the Tamiami Trail." 25 U.S.C. § 2719(b)(2). This land, as Congress acknowledged in 1998, is where the exclusive location within which the Miccosukee Tribe operates its gaming facility.

The interplay of these settlement acts is important, and all but ignored by the Eleventh Circuit. At the time Congress accepted the gaming facility located at Krome Avenue, it has just passed the 1997 Settlement Act, which stated that income derived from Miccosukee land is exempt from taxation. 25 U.S.C. § 1750c(b)(2). That Congress passed the acts contemporaneously naturally means that it was done so that the two statues must operate as if drafted together. *See Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

This factual framework is significant when considering that Tribe, including contemporary leaders, understood that this statutory framework would allow the Tribe to operate free of federal government interference. (R. Tr. Aug. 15, 2016 at 55-58.) The non-taxability of gaming revenues falls squarely within the Miccosukee Tribe's understanding of the settlement agreements they were negotiating, as the revenues

derived from gaming stem from the Tribe's usage of the land. Under the 1997 Settlement Act, this revenue would be plainly not taxable.

The Eleventh Circuit—and the District Court before it—ignored this evidence. Interpreting the treaties any other way conflicts with binding U.S. Supreme Court precedent.

II. The Eleventh Circuit's Opinion Ignores the Tribe's Right to Self Government, Thus Presenting an Important Issue of Law

Quite simply, the Miccosukee Tribe's payments to members are not payments derived from net gaming revenue. This is because these are trust payments made to tribal members, and consists of all revenue derived from all tribal revenue sources, including the gaming facility. The Miccosukee Tribe has operated under this system of compensation for use of its lands pursuant to well-settled principals of Tribal self-government existing long before the gaming facility opened.

The Eleventh Circuit, in a footnote, called the Tribe's method of self-government "form over substance," deciding that its system of taxation could not avoid IGRA's thrust. (App. at 14 n. 17.) Specifically, the Tribe applied a gross receipts tax on all tribal business as a means for compensating the members of the Tribe for the use of their undivided interest in tribal lands and distributed this revenue to all members. This practice predates the creation of the tribal gaming and IGRA. (R. Pl.'s Ex. 75.) Indeed, the Miccosukee Tribe formally adopted the long-standing practice in 1984, years before gaming, applying a uniform tax of 8.75% to all tribal businesses. (*Id.*)

But the Eleventh Circuit's decision belies this fact. Rather than accept record evidence of the Tribe's method of taxation, the Eleventh Circuit decided—without evidence—that the self-government efforts were a formalism to evade taxation under IGRA. By deciding that this long-standing practice was "form over substance" created to avoid taxation, the Eleventh Circuit calls into question the Tribe's efforts at self-governance, a long-recognized tenet of Indian law. *See Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) ("[C]ourts will not lightly assume that Congress in fact intends to undermine Indian self-government.") Moreover, this Court recognizes a "formalism" only when retroactive to an existing method of taxation. *See Comm'r v. Court Holding*, 324 U.S. 331 (1945); *see also Comm'r v. Estate of Sanders*, 834 F.3d 1269 (11th Cir. 2016). On the other hand, in a case like this one, if the method existed before the possibility of tax scrutiny, it is not a formalism but a bona fide tax. *See United States v. Cumberland Pub. Serv. Co.*, 338 U.S. 451, 453-54 (1950).

This also is consistent with IGRA's narrow reach, and IRS guidance which shows that tribal trust funds should not be taxable absent an express imposition of federal income taxation by Congress. *See* IRS Rev. Ruling 67-284.

The Court, therefore, can address one of the most-important aspects of the trust-based relationship existing between Indian tribes and the U.S. government—the right to self-government. The Tribe's long-standing decision to tax tribal and non-tribal businesses, which eliminates the possibility that

distributions made to members is net-gaming revenue, should not be questioned.

III. The Eleventh Circuit's Opinion Presents an Important Issue of Law Concerning The Ability of an Authorized Representative of the Assistant Secretary of Interior to Interpret Statutes and Regulations

The regulatory scheme of the Department of the Interior provides that the Secretary of the Interior or his or her representative may "waive or make exceptions to his regulations." 25 C.F.R. § 1.2. Moreover, the Assistant Secretary of the Interior has the sole and exclusive authority "over all matters arising out of Indian relations." 25 U.S.C. § 2. Trial testimony plainly establishes that the Secretary of the Interior delegated his authority as Superintendent of the Miccosukee Tribe to Chairman Billy Cypress, making him a representative of the Secretary.

In that capacity, Chairman Cypress had the right, subject to the Secretary's review, to interpret the regulations surrounding his authority as superintendent of the Tribe, including 25 U.S.C. §§ 459, 1750, and 2210. Exercising that right, the unrefuted evidence proves that Chairman Cypress approved the Miccosukee Tribe's interpretation that it could use its lands by leasing it to the gaming facility, using that income for fair compensation to members.

The Eleventh Circuit flatly ignored this argument, silently affirming the District Court's conclusion that Chairman Cypress lacked authority delegated to him by statute. This failure to address this important issue creates a matter of law significant enough to impact

the scope of authority of the Assistant Secretary of the Interior and his or her dutifully appointed representatives, like Chairman Cypress.

CONCLUSION

Longstanding notions of tribal self-governance require the U.S. government to abandon its effort to pursue the taxation of Ms. Jim. The Miccosukee Tribe, through the applicable treaties with the U.S. government, controls the use of its land and possesses the right to derive income from those lands, free of taxation. That the Miccosukee Tribe used those lands for a gaming facility cannot override these inter-government agreements. Also, the Assistant Secretary of the Interior authorized Chairman Billy Cypress to interpret the regulatory scheme of taxation, and he interpreted those statutes and regulations to exempt Ms. Jim—and other tribal members—from taxation. Finally, there is no reason for Ms. Jim to pay taxes on a centuries-old Miccosukee Tribe practice of providing income derived from tribal businesses to its members. Erasing this custom, as the Eleventh Circuit has done, eliminates any notion of tribal self-governance. For these reasons, the Court should grant this petition and review the Eleventh Circuit's decision.

Respectfully submitted,

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January 7, 2019