No. 11-460

IN THE
Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,
v.
NATURAL RESOURCES DEFENSE COUNCIL, ET AL.,
Respondents.

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

BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether there can be a "discharge" from an "outfall" under the Clean Water Act, when water flows from one portion of a river that is a navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, and into a lower portion of the same river, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians* that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Andrew Brookes, *Channelized Rivers: Perspectives for Environmental Management* 9 (1988) 9

City Water Fails; 45 Dead, 350 Hurt,\ Pittsburgh Sun-Telegraph, March 20, 1936. *Available at* http://www.clpgh.org/exhibit/neighborhoods/downtown/down_n41.html (last visited September 12, 2012)..... 11

Flood Damage Reduction,\ U.S. Army Corps of Engineers Pittsburgh District, http://www.lrp.usace.army.mil/ org/who.htm#flood (last updated Dec. 2, 2011)..... 10, 11

Keith Rogers, *Flood Control a Success*, Las Vegas Review-Journal (last updated Dec. 29, 2010, 11:24

INTEREST OF THE *AMICUS CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 3500 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

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[1] No counsel of a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and no person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Both parties have provided written consent, on file with the clerk, to the filing of briefs in support of either, or neither, party.

IMLA has a record of filing *amicus* briefs in this Court when issues arise that are important to cities, communities, and individuals they represent. Members of this Court have recognized the strength and importance of those briefs by favorably citing them on core issues involving federalism and state power. *See Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133, 1135 n.3, 1136 (2009) (citing and quoting the brief of the IMLA); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 781 n.9 (2005) (Stevens, J. dissenting) (citing the brief of the IMLA).

IMLA respectfully submits this brief to highlight the importance of the Ninth Circuit's ruling to local governments. Increasingly frequent severe weather and rapid urbanization has forced local governments to protect their citizens by expanding their flood control systems. Beyond the legal and political challenges typically encountered in these projects, the current economic climate has made these vital services increasingly difficult to fund. The effects of the Ninth Circuit's decision will exacerbate these problems and prevent state and local governments from protecting their citizens.

IMLA is uniquely situated to address issues of state land use. The Association represents community leaders from politically, economically and geographically diverse municipalities around the country. The communities that these organizations represent all share an interest in properly utilizing land and water resources to develop land for use and for the protection of their populace.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's redefinition of "point source" and "discharge" conflicts with the definitions this Court established in *Miccosukee*. The Ninth Circuit's rule effectively makes MS4 operators with improved waterways strictly liable for any "inter-body" discharge, even if the discharge occurred upstream and outside of the operator's control. If upheld, this would be a major change in the law that would significantly affect municipalities' ability to plan and build flood control systems within MS4s. Municipalities rely on clear and consistent rules and liability when constructing flood control systems. These systems are expensive public works projects requiring extensive planning and development over long periods of time with cooperation from – and the

political will of – federal, state and local governments. Compounding these challenges is the ever increasing need for flood control as weather patterns change and urban populations grow. In addition to making new flood control systems more difficult to construct, the Ninth Circuit's decision will result in increased liability for existing flood control systems. This liability could not have been predicted at the time the systems were built. More and more municipalities will be forced to make the difficult choice between avoiding disastrous flooding and incurring potentially ruinous liability from the future discharge of others. The Supreme Court should reverse the Ninth Circuit's decision and reaffirm *Miccosukee*, so that municipalities will not be liable for pollution merely because they made flood control improvements within existing bodies of water.

ARGUMENT

I. The Ninth Circuit's Decision is Inconsistent with this Court's Decision in *Miccosukee*, Which Governs the Question Presented in This Case.

The Ninth Circuit's treatment of the improved portion of a waterway as a "point source" that "discharges" into the unimproved portion, *see Natural Res. Def. Council v. L.A. Cnty.*, 673 F.3d 880, 900 (9th Cir. 2011), conflicts with this Court's prior treatment of improved waterways. Finding a "discharge of any pollutant" under the Clean Water Act requires an initial determination that a pollutant was added to a "navigable water" from a "point source." 33 U.S.C. § 1362(12). Only then do National Pollutant Elimination Discharge System ("NPDES") permitting requirements apply. 33 U.S.C. § 1311(a); 33 U.S.C. § 1342. Where water is transferred from one portion of an artificially-divided body to another portion of that same body, this Court has demanded a demonstration of "meaningful[] distinct[ion]" between these portions before a "discharge" could be found. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004).

Manmade improvements that convey water between two portions of a single body of water do not constitute a "discharge of a pollutant" when the different portions of the body of water are not distinct. *See id.* at 105, 109-110. In *Miccosukee*, this Court was asked to determine whether a channelized flow of water in the Everglades was a discharge from a point source subject to NPDES permitting requirements. *See id.* at 99, 104. Historically, much of the land of South Florida consisted of wetlands whose ground and surface waters flowed across the land in an unchanneled and uniform sheet. *Id.* at 99. In 1948, Congress authorized the construction of a comprehensive flood control system for South Florida. *Id.* at 100.

Miccosukee concerned the outfall of a pumping station that pumped water across a levee in order to drain canals on one side of the levee and impound the water on the other side. *See id.* at 100-101. The pump in question drained water from a canal system abutting an urban, agricultural, and residential area of more than 100,000 people. *Id.* at 100. When rain fell, contaminated surface runoff from this area flowed into a canal network where it was pumped into a wetland that served as an impoundment. *Id.* at 100-101. This Court considered

whether a discharge of a pollutant occurred when contaminated water was pumped from the canal system into the wetland. *Id.* at 102. This Court determined that when the source and receiving waters are ". . . simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants." *Id.* at 109. "[I]f one takes a ladle from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001) (internal quotation marks omitted). Where water is simply transferred within a single water body, there is no "addition" of a pollutant and subsequently no "discharge" under the Clean Water Act. *Compare id. with* 33 U.S.C. § 1362(12). Thus, the existence of a "discharge of a pollutant" hinged on a factual determination of whether the source and receiving waters were one body of water or "meaningfully distinct water bodies." *Miccosukee*, 541 U.S. at 112.

Compared to the flood control improvements discussed in *Miccosukee*, there is not even an "artificial division" in the rivers at issue here, much less a meaningful distinction between the MS4

waterway portions and those portions upstream from the MS4. The drainage canals in *Miccosukee* acted much like municipal MS4s by channeling stormwater running off of urban, agricultural, and residential land. *See id.* at 101. But unlike the waters in *Miccosukee*, the Los Angeles River has not been diverted or altered. The Los Angeles River was merely channelized for flood control. U.S. Envtl. Prot. Agency, Region 9, *Special Case Evaluation Regarding Status of the Los Angeles River, California, as a Traditional Navigable Water* 8 (July 1, 2010), *available at* http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf. This Court's "meaningful distinction" requirement should therefore apply with even more force. Nonetheless, the Ninth Circuit ignored the holding of *Miccosukee*, and applied a different rule that has vastly different consequences for L.A. County Flood Control District and other MS4s across the country.

II. The Ninth Circuit's Rule Unfairly Subjects Municipalities to Unpredictable and Increasing Liability, Making It Difficult to Plan, Finance, and Manage Flood Control Systems.

A. *Flood Control Systems Are Increasingly Common and Necessary to Protect Life and Property.*

Rivers in Southern California are not the only rivers that could be impacted if all flood control improvements were susceptible to liability under NPDES permitting requirements. America has a long history of improving waterways: between the beginning of the 19th century and the mid-20th century, nearly 320,000 kilometers, or 200,000 miles, of waterways were modified. *See* Andrew Brookes, *Channelized Rivers: Perspectives for Environmental Management* 9 (1988). Flood control methods can take a number of forms, including resectioning, realignment, embankments, flood walls, and culverts. *Id.*; *see also* Brookes at 25.

The city of Pittsburgh stands as an example of the importance of developing robust flood control systems. Pittsburgh's flood control system consists of a network of 16 reservoirs built by the U.S. Army Corps of Engineers. *See* "Flood Damage Reduction," U.S. Army Corps of Engineers Pittsburgh District, http://www.lrp.usace.army.mil/org/who.htm#flood (last updated Dec. 2, 2011). These reservoirs were authorized by the Omnibus Flood Control Act of 1936, 33 U.S.C. § 701 et. seq. (2012). The United States Army Corps of Engineers estimates that these reservoirs, combined with 42 other control systems, have prevented more than $12.6 billion dollars in property damage since their construction. *See* U.S. Army Corps of Engineers Pittsburgh District, *supra*.

Unfortunately for Pittsburgh's residents in March 1936, authorization for these flood control systems was still under debate when floodwaters crested to 46 feet in the city's business district. Len Barcousky, *The Historic St. Patrick's Day Flood of 1936: two eyewitness accounts*, Pittsburgh Post-Gazette, Mar. 17, 2011, available at http://www.post-gazette.com/stories/local/region/the-historic-st-patricks-day-flood-of-1936-two-eyewitness-accounts-287411/?p=3 (last visited Mar.

29, 2012). Public transit and electrical services shut down, and the city suffered an estimated $412,000,000 in property damage in 2012 dollars. [2] *See* "City Water Fails; 45 Dead, 350 Hurt," Pittsburgh Sun-Telegraph, March 20, 1936. *Available at* http://www.clpgh.org/exhibit/neighborhoods/downtown/down_n41.html (last visited September 12, 2012). Since construction of the Corps of Engineers system, Pittsburgh has not suffered from flooding on the scale seen in 1936: in 1996, floodwaters were an estimated 9.7 feet lower than they would have been without the system, and in 2004 flooding was 7.7 feet lower. *See* U.S. Army Corps of Engineers Pittsburgh District, *supra*.

Though far less dramatic than the 1936 flood in Pittsburgh, unusually intense rainfall and inadequate storm sewer capacity combined to flood Washington, D.C.'s Federal Triangle in June 2006. See Report on Flooding and Stormwater in Washington, D.C., Nat'l Capital Planning Comm'n, Report on Flooding and Stormwater in Washington, D.C. at 4-5, (Jan. 2008), available at

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[2] The Sun-Telegraph estimated $25,000,000 in 1936 dollars. The above figure is adjusted for inflation using the Consumer Price Index. *See* CPI Inflation Calculator, Bureau of Labor Statistics, http://www.bls.gov/data/inflation_calculator.htm.

http://www.ncpc.gov/DocumentDepot/Publications/FloodReport2008.pdf. The "extensive flooding shut down operations at four key federal office buildings—IRS Headquarters, the Commerce Department, the Justice Department, and the National Archives." *Id.* at 4. As a result of this flooding, the District of Columbia embarked on an extensive project to update the District's inadequate sewer, drainage, and levee systems. *See id.* Construction of these improvements is critical not only to protecting private and government property but also the nation's heritage, as "many priceless monuments, museums, and national structures are located in areas likely to flood." *Id.* at 9. Planning for these improvements only considered the impact of NPDES requirements on the construction process, however. *Id.* at 10-11. New District liabilities for pollution discharged through stormwater could place these planned improvements on hold as the National Capital Planning Commission takes the additional costs into account.

B. *Flood Control Systems Are Major Public Works Projects that Cannot Be Easily Modified to Adjust to Changing Legal Rules.*

Flood control does not take place in a vacuum. Like any policy set by municipal governments, it can be both politically and legally fraught. Each waterway is unique, and the selection of the most practical and economical flood control methods is an in-depth process. It requires local knowledge and local experts working in collaboration with federal and state authorities, a lengthy political process, and extensive public funding.

For example, despite the dire need for effective flood control in New Orleans, it took the Army Corps of Engineers thirty-eight years just to begin construction on flood walls, and an additional six to complete them. *See* J.D. Rogers, *Development of the New Orleans Flood Protection System Prior to Hurricane Katrina*, 134 J. Geotechnical and Geoenvironment Engineering 602, 614-15 (May 1, 2008). The federal government became involved with flood control in New Orleans in 1955, and five years later, the Army Corps of Engineers proposed constructing tidal gates and pumps on Lake Pontchartrain. *See id.* This proposal was

successfully opposed by citizen groups concerned about how the Corps would coordinate with the local Water & Sewer Board. *Id.* at 615.

In 1961, the Army Corps proposed a system of earthen dikes and tidal gates instead. *Id.* The proposal was too expensive to attract political support, and funding was never approved. *Id.* The Corps then proposed building tidal gates alone, but it was enjoined from doing so in 1977 because it did not consider the environmental impact of alternative flood-control schemes. *Id.* Finally, construction of flood walls began in 1993. *Id.* It was finished six years later, but due to incorrect elevation measurements, the walls were too short to stop Hurricane Katrina from devastatingly flooding much of the city. *Id.*

Flood control is a process that evolves over many years, and thus requires flexibility. In Alameda County, California, flood-control policy has continually responded to shifting political, economic, and environmental needs for the past sixty years. Flood control began in 1949, when the Alameda County Flood Control and Water Conservation District was formed. Zone 7 Water Agency, *supra*. In 1966, the District adopted its first Master Plan for flood control; it built a major reservoir, Lake Del

Valle, two years later. *Id.* The many arroyos running across the county continued to prove problematic, so the District supplemented its early flood control with an Arroyo Management Plan in 1985. *Id.* Major flooding struck in 1998, and the District overhauled its Master Plan a year later. *Id.* In 2001, the District began "stakeholder and regulatory coordination," seeking greater input into its flood-control policies from community and environmental groups. *Id.* That spirit of dialogue around environmental needs found new life in 2007, when the District established StreamWISE, a program to keep adapting flood control in the years to come. *Id.*

Whether it is Pittsburgh, Washington, New Orleans, Alameda County, or any other urban locality in America, it takes a long time and plenty of adaptability to changing politics to control flooding. MS4 and other flood-control systems represent the investment of decades of political effort and planning. The Ninth Circuit's ruling, by changing the applicable rules and expanding the potential for liability for pollution flowing through improved areas, has rendered the potential long-term cost of flood control for the municipality uncertain at best, and vastly more expensive at worst.

C. *The Ninth Circuit's Ruling Creates Difficulty and Uncertainty in the Funding Process for MS4 and Flood-Control Programs, While Increasing Municipal Liability.*

The Ninth Circuit's ruling introduces further uncertainty and complications into the political process, resulting in difficulty obtaining funding by increasing municipal liability. "Municipalities are clearly authorized to perform the regulatory oversight functions required by the MS4 program," but this authority comes with great restrictions and much liability. *See* New York State Dep't of Envtl. Conservation, Div. of Water, Draft, *Municipal Separate Storm Sewer System (MS4) Funding Document 5* (June 2007), *available at*: http://www.dec.ny.gov/docs/water_pdf/funddocdraft1.pdf. Municipalities are both authorized *and obligated* to oversee MS4 programs. They must pay "to oversee the actions taken by third parties that provide input into the municipal stormwater system," and they are liable when they do not meet federal standards in doing so. *Id.* at 8.

But while municipalities bear the burden of supporting MS4 flood control systems, the Ninth

Circuit's ruling undermines the debt funding procedures that most municipalities use to fund this vital infrastructure. Debt-funding mechanisms used by municipalities include bonds, federal grants, and inter-governmental loans. Nat'l Ass'n of Flood and Stormwater Mgmt. Agencies, Guidance for Municipal Stormwater Funding ES-1, ES-2 (Jan. 2006), *available at*: http://www.nafsma.org/pdf/Guidance%20Manual%20Version%202X.pdf. Public debt allows municipalities to undertake extensive, expensive programs in a shorter time period than would be possible if the municipality used a "pay as you go" method of funding. *See id.* at 2-2. However, to be effective, debt funding requires the municipality to present a detailed plan that describes the costs, benefits, needs, and measures it is undertaking years in advance. *See id.* at 2-3, 4-14. The Ninth Circuit's ruling would create uncertainty about costs, thereby reducing municipalities' access to bonds, because those backing the bond would have to be concerned about unpredictably rising levels of pollutants.

By increasing uncertainty, the Ninth Circuit makes debt funding more difficult. Without recourse to debt funding, municipalities would be forced to rely on the money they can scrape together from

other sources. New York shows just some of the difficulties that a municipality can face when trying to meet the costs of funding a flood-control program. In that state, "the only source for the payment of these costs is the general fund of the municipality." New York State Dep't of Envtl. Conservation, Div. of Water, *Municipal Separate Storm Sewer System (MS4) Funding Document*, 6 (June 2007), (last visited Sept. 12, 2009), http://www.dec.ny.gov/docs/water_pdf/funddocdraft1.pdf. In New York, "the only source for the payment of these costs is the general fund of the municipality." *See id.* Municipalities have tried to find alternative schemes for financing MS4 and other flood-control programs, but "[i]n several cases, even where the law is silent, courts have found that the financing scheme in other statutes was intended . . . to be exclusive . . . ." *Id.* at 19. In other cases, the courts have held "that some of the alternative financing schemes have amounted to a tax. According to the state constitution, a tax needs explicit state legislative authorization . . . ." *Id.* States already place many limits on the ability of municipalities to fund their liabilities; the Ninth Circuit's holding will only exacerbate this problem, especially for poorer areas which do not "have the

resources on [their] own to support the costs." *See id.* at 23.

The MS4s at issue in this case are part of a flood control system; as in other cities across the country, the channelized improvements operated by Los Angeles County are necessary to prevent catastrophic losses in the event of a natural disaster. The Ninth Circuit's ruling in this case places cities in the unenviable position of either having to assume liability for pollutants flowing through the MS4s they maintain, regardless of whether the pollution originated in the municipality, or to forego developing flood control systems that protect lives and property and facilitate growth and expansion.

In the end, the MS4 permit holder is the only entity liable for point source discharges within its system. So, even where there is adequate financial assistance for construction on the front end, when, 20 years after construction, increasing contamination of a continuous body of water leads – under the Ninth Circuit's view – to liability, the last municipality within the improved area is the only entity responsible for paying the fine, and it is often the least likely to have the financial flexibility to pay such an unpredicted cost.

D. *Increasing Urbanization, and Extreme Weather Events, Make Flood Control More Important for Municipalities Than Ever Before.*

The past century has seen marked demographic shifts, with the urban population of the United States jumping from 45.6% of the population in 1910 to 80.7% of the population as of 2010. *Compare* United States Census Bureau, *Population: 1790 to 1990*, *available at* http://www.census.gov/population/www/censusdata/files/table-4.pdf (showing historical population trends from 1790 through 1990), *with* United States Census Bureau, *2010 Census Urban and Rural Classification and Urban Area Criteria*, *available at* http://www.census.gov/geo/www/ua/2010urbanruralclass.html (showing the percentage of the American population living in urban areas as of 2010). As the population of the United States continues to move from rural to urban areas, municipalities must make greater investments in their flood control systems.

For example, Las Vegas is protected by a $1.6. billion system of "83 detention basins and 550 miles of channels and underground storm drains built

since the mid-1980s." Keith Rogers, *Flood Control a Success*, Las Vegas Review-Journal (last updated Dec. 29, 2010, 11:24 PM), http://www.lvrj.com/news/flood-control-a-success-112541109.html. Despite these extensive controls, Las Vegas' Clark County Flood Control District has proposed numerous additional flood control conveyances, and has several projects under construction. Regional Flood Control District, *Flood View Advanced Map* (last viewed Sept. 12, 2012, 6:05 PM), http://acequia.ccrfcd.org/fvadvanced/fvadvanced.aspx. http://www.ccrfcd.org/aboutus.htm (follow "FloodView Advanced" hyperlink; then follow "FloodView Advanced" icon). These projects have coincided with dramatic increases Las Vegas' population, which has grown by twenty-two percent from 2000 to 2010. Press Release, United States Census Bureau, U.S. Census Bureau Delivers 2010 Census Population Totals (Feb. 24, 2011), *available at* http://2010.census.gov/news/releases/operations/cb11-cn51.html.

In addition to pressure from larger urban populations, municipalities must handle greater volumes of water due to increasingly common extreme weather events .*See* U.S. Global Change Research Program, *Global Climate Change Impacts*

in the United States 27 (2009) *available at* http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf; *see also* Letter from American Water Works Ass'n et al. to U.S. Congress, *Water Resource Impacts of Climate Change* (May 20, 2008) *available at*: http://www.nafsma.org/pdf/ClimateChangeStatement.pdf. Overall precipitation has increased five percent over the last fifty years and heavy precipitation is more common even in places where the total amount of annual rainfall has decreased. *See* U.S. Global Climate Change Research Program, *supra* at 18. When it rains, it pours: heavy downpours accounted for the majority of the observed increase in precipitation nationwide over the past 50 years. *See id.* at 32. Storms that previously occurred once every two decades are predicted to occur as often as every four years by the end of this century. *Id.* Heavy storms will also become heavier. Once-in-two-decade storms are predicted to be ten to twenty-five percent heavier by the end of the century than similarly frequent storms are now. *Id.*

The effects of this trend can already be seen. "The amount of rain falling in the heaviest downpours has increased approximately twenty

percent on average in the last century." *Id.* at 27. For example, as described in Part II.A above, a storm inundated significant portions of Washington, D.C. in 2006, flooding I.R.S. Headquarters, the Commerce Department, the Justice Department, and the National Archives. *See* Nat'l Capital Planning Comm'n, *Report on Flooding and Stormwater in Washington, DC* 4 (2008), *available at* http://www.ncpc.gov/DocumentDepot/Publications/FloodReport2008.pdf. Beyond increased precipitation, sea level rise will challenge municipalities located near the ocean. By the end of the century, the U.S. Geological Survey forecasts that Chesapeake Bay sea levels will rise one foot, leaving the Washington in danger of storm surges that would "make the Jefferson Memorial an island and flood the National Mall up to the Reflecting Pool." *Id.* at 3.

More people living in urban areas combined with an increase in rainfall overall and an increase in heavy rains in particular can only mean one thing: more people will need flood control systems like the one upon which Los Angeles County relies. These systems, in turn, are going to be more taxed to deal with the weather that comes their way. *See* Letter from American Water Works Ass'n, *supra*.

In sum, this is not just a ruling affecting a single idiosyncratic municipal flood control system. Flood control through channelization and other improvements is common, and likely to be increasingly necessary. It is expensive, and a significant part of a municipality's operations.

The Ninth Circuit's expansion of what is considered a point source discharge is a change in the law that potentially subjects municipalities to *per se* liability for pollutants discovered in a flood control system, a ruling that has tremendous implications for municipal decisions regarding lengthy and costly public works projects. This ruling will only affect more and more municipalities in the future. Accordingly, this Court should reverse the Ninth Circuit's decision and reaffirm its ruling in *Miccosukee*.

CONCLUSION

The decision of the court of Ninth Circuit should be reversed.

Respectfully submitted,

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