No. 11-

IN THE

Supreme Court of the United States

GILA RIVER INDIAN COMMUNITY,
Petitioner,

v.

G. GRANT LYON

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, under Federal Rule of Civil Procedure 19(b), courts may adjudicate and compromise legal rights in land to which the United States holds title without the United States' participation in the litigation.

II. Whether, in light of this Court's recent decision in *United States v. Jicarilla Apache Nation*, No. 10-382 (June 13, 2011), the Ninth Circuit properly held, as a matter of law, that litigation compromising the United States' title in land can proceed in the United States' absence as long as an Indian tribe is a party to the litigation.

PARTIES TO THE PROCEEDING

All parties to this case are reflected in the caption. In addition, Michael Keith Schugg, d/b/a Schuburg Holsteins, and Debra Schugg were the debtors in the underlying bankruptcy and were noted as such in the case caption in the district court and court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Gila River Indian Community, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 626 F.3d 1059 (9th Cir. 2010). The district court's findings of fact and conclusions of law (App., *infra*, 34a-75a) are reported at 384 B.R. 263 (D. Ariz. 2008). The district court's decisions at the motion to dismiss stage (App., *infra*, 96a-103a) and the summary judgment stage (App., *infra*, 76a-95a) are not reported.

JURISDICTION

The court of appeals entered its judgment on November 24, 2010. App., *infra*, 1a. The Community's petition for rehearing and rehearing en banc was denied on February 15, 2011. App., *infra*, 104a. On May 6, 2011, Justice Kennedy extended the time for filing a petition for writ of certiorari to and including June 15, 2011, and, on June 2, 2011, Justice Kennedy further extended the time for filing the petition to and including July 15, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT FEDERAL RULES PROVISIONS

The relevant provision of the federal rules, Federal Rule of Civil Procedure 19, is reproduced in full in the Appendix to the Petition (App., *infra*, 106a-108a).

STATEMENT OF THE CASE

1. Federal Rule of Civil Procedure 19(a) identifies those persons that must be joined in litigation if feasible. Under Rule 19(a), a party is "required" if, "in that person's absence, the court cannot accord complete relief among existing parties," or if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest" or "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a).

If the court finds that a party is required, the court then applies Rule 19(b)'s prescribed factors to determine whether the party is indispensable such that the litigation must be dismissed unless the party can be joined. Those factors are: (i) the prejudice to any party or to the absent party; (ii) whether relief can be shaped to lessen prejudice; (iii) whether a judgment rendered in the person's absence would be adequate; and (iv) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder, *i.e.*, whether there exists an alternative forum. Fed. R. Civ. P. 19(b).

2. This case arises from the bankruptcy trustee's attempt to obtain a judicially implied easement providing access to a 657-acre parcel of land in south-central Arizona known as "Section 16." App., *infra*, 2a. Section 16 is fully encircled by individually held lands and petitioner's lands. *Id.* at 3a. The United States holds title to all of the land across which the purported easement runs, holding that title in trust for the individual allottee landowners and for petitioner, the Gila River Indian Community, a federally recognized Indian tribe. *Id.* at 9a, 62a.

Section 16 was originally reserved as school lands for the Territories of New Mexico and Arizona, and then the State of Arizona. *See* Act of July 22, 1854, ch. 103, § 5, 10 Stat. 308, 309; R. S. § 1946 (1873); Act of June 20, 1910, ch. 310, § 24, 36 Stat. 557, 572. In 1929, however, Arizona sold Section 16 to a private owner, and since that time the land has been used exclusively for agricultural and animal husbandry purposes. App., *infra*, at 3a.

3. In 2004, Section 16's owners, Michael and Debra Schugg, declared Chapter 11 bankruptcy and listed Section 16 as their largest asset. App., *infra*, 4a. G. Grant Lyon is the bankruptcy trustee for the Schugg bankruptcy estate. *Id.*

On January 20, 2005, the trustee attempted to provide Wells Fargo a priority lien in the land by collateralizing Section 16 in the bankruptcy proceedings. *In re Michael Schugg*, No. 04-bk-13326-GBN, dkt. #150 (Bankr. D. Ariz. Jan. 20, 2005). Petitioner objected and asserted title to Section 16. *In re Michael Schugg*, No. 04-bk-13326-GBN, dkt. #221 (Bankr. D. Ariz. Apr. 29, 2005). The trustee

then asserted, for the first time in the bankruptcy proceedings, a right of access in the form of an easement across petitioner's and the individual allottees' surrounding lands. *In re Michael Schugg*, No. 04-bk-13326-GBN, dkt. #224 (Bankr. D. Ariz. May 5, 2005). Obtaining a right of access across petitioner's and the individual allottees' lands was an indispensable part of the trustee's high-density residential development plans for Section 16, which the trustee had begun marketing to developers. *Lyon v. Gila River Indian Cmty.*, No. 05-ap-384-GBN, dkt. #1, at 9 ¶ 42 (Bankr. D. Ariz. May 25, 2005); *see also* App., *infra*, 52a; Pet. C.A. App. 352-353. In accordance with bankruptcy law, Fed. R. Bankr. P. 3003; 11 U.S.C. § 501, petitioner then filed a proof of claim to protect its beneficiary interests in the lands. App., *infra*, 12a-13a.

The trustee subsequently initiated an adversary proceeding in the bankruptcy court against the Community. App., *infra*, 12a. In that action, the trustee sought not only to quiet title to Section 16, but also to obtain a judicial ruling that it had a full right of access across the lands held by the United States in trust for petitioner and the individual landowners. *Id.* at 4a. The trustee sought an easement for the purpose of opening the rural land up to residential development, with an estimated 2,250 new homes and 850 cars traveling the road during peak periods, *id.* at 52a, 56a.

Petitioner filed counterclaims seeking a declaration that no easement existed and asserting aboriginal title and control over Section 16. App., *infra*, at 5a. Petitioner also moved to dismiss the trustee's action on the ground that the United States,

as title holder of all the lands over which the alleged easement would run, was an indispensable party to the litigation under Federal Rule of Civil Procedure 19(b). The district court initially denied the Rule 19 motion without prejudice to its renewal. *Id.*

Following a bench trial, the district court entered final judgment partially in favor of the trustee. App., *infra*, at 34a-75a. As relevant here, the district court ruled that the United States was a "required" party under Rule 19(a). *Id.* at 59a. The court also held that, because the Quiet Title Act had specifically preserved the United States' sovereign immunity for suits over Indian lands held in trust by the United States, the United States could not be joined. App., *infra*, 60a; *see* Quiet Title Act, 28 U.S.C. § 2409a.

However, instead of dismissing the case under Rule 19(b), the district court reasoned that the case could proceed without the United States (and the individual landowners) because petitioner was a party to the action. App., *infra*, 59a (citing *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983)). The court also stated that neither the United States nor the individual allottees would technically be bound by its judgment implying an easement across their lands. App., *infra,* at 61a, 62a n.3.

4. The United States Court of Appeals for the Ninth Circuit affirmed. App., *infra*, 1a-33a. As relevant here, the court agreed that, as title-holder for the land across which the easement was being implied, the United States was a required party under Rule 19(a), whose joinder was impossible because the United States had not waived sovereign

immunity. App., *infra*, at 9a. The court also agreed that "judicial recognition of an easement would impair the government's right[s]." *Id.*

In addition, the court acknowledged that this Court had previously held that the United States is an indispensable party, whose absence requires dismissal, in litigation designed to determine a "right of way" over Indian land held in trust, and "'to any suit to establish or acquire an interest in the lands'" to which the United States "'is confessedly the owner of the fee.'" App., *infra*, 10a-11a (quoting *Minnesota v. United States*, 305 U.S. 382, 386 (1939)).

The Ninth Circuit nevertheless held that this suit to determine a right of way over reservation and individual allottee lands to which the United States holds title could proceed because petitioner was a party to the litigation. App., *infra,* 14a. In holding that this Court's decision in *Minnesota* did not govern, the Ninth Circuit applied what it admitted was its "somewhat incongruous" rule, *id.* at 12a, that the United States' interest in lands to which it holds title can be litigated in its absence if an Indian tribe as plaintiff files suit "to protect its own interest," *id.* at 11a (citing *Puyallup, supra*). The court then extended the *Puyallup* rule to cases where the tribe is a defendant in litigation and the United States' title is being compromised, reasoning that, by filing a proof of claim in bankruptcy, petitioner "had to know" that the trustee would initiate an adversary action to establish its claim to the land. *Id.* at 12a-13a.

The Ninth Circuit further found inapplicable *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008), in which this Court held that a foreign

sovereign government is a necessary party to litigation over rights to property in which it holds an interest, and that, under Federal Rule of Civil Procedure 19(b), its absence due to sovereign immunity bars the suit from going forward, *id.* at 867. The court of appeals ruled that *Pimentel*'s holding about the nature of a sovereign's interest in litigation implicating its property interests only "narrowly" applied to the interests of a "foreign sovereign that had invoked sovereign immunity." App., *infra*, 14a.

The court then held that the easement was properly implied because it arose in 1877 when Section 16 was reserved as school lands and all of the surrounding lands were public lands held by the United States. App., *infra*, 19a-20a.

In so holding, the Ninth Circuit found it immaterial, App., *infra*, 15a-16a, that Congress has prescribed an alternative administrative process for obtaining access to and easements across land held by the United States. *See* 25 U.S.C. § 323 (Secretary of the Interior may "grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, * * * or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes."); *see also* 25 C.F.R. § 169.1 *et seq.*[1]

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[1] The Ninth Circuit also held that the district court erred in concluding that the access roads were publicly open Indian Reservation Roads, App., *infra*, 23a, and that the trustee failed

5. The court of appeals subsequently denied petitioner's timely request for rehearing and rehearing en banc. App., *infra*, at 104a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's holding is extraordinary. Notwithstanding this Court's on-point and directly binding decisions in, *inter alia*, *Minnesota v. United States*, 305 U.S. 382 (1939), and *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008), the Ninth Circuit held that courts remain free to compromise the United States' title both to public lands held exclusively by the United States and to lands held by the United States in its sovereign role as trustee, without the United States' participation in the litigation and despite the Quiet Title Act's undisputed preservation of the United States' sovereign immunity from precisely such claims, 28 U.S.C. § 2409a(a). The court, moreover, made that ruling while openly acknowledging that "judicial recognition of an easement would impair the government's right[s]" in its absence. App. *infra*, 9a.

That holding flies in the face of this Court's decision in *Pimentel*, which ruled that, in applying Rule 19(b)'s indispensable party criteria, courts must

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to show that the access roads were public highways under R.S. 2477, App., *infra*, 30a. In addition, the held that petitioner's aboriginal title to Section 16 was extinguished. *Id.* at 31a-32a. Finally, the panel held that the issue whether petitioner had zoning authority over Section 16 was not ripe for decision. *Id.* at 32a-33a. None of those issues are presented to this Court for review.

"give full effect to sovereign immunity," 553 U.S. at 865, and a court cannot evade that rule by reasoning that the sovereign "would not be bound by the judgment in an action where they were not parties," *id.* at 871.

The Ninth Circuit's decision is also flatly irreconcilable with this Court's directly on-point holding in *Minnesota* that the United States is an indispensable party in whose absence the litigation cannot proceed when a party seeks to adjudicate a claimed right of way over Indian lands to which the United States holds fee title in trust. That is this case.

Invocation of "somewhat incongruous" circuit precedent, App., *infra*, 12a, that treats Indian tribes as proxies for the United States—a rule that no other court of appeals applies—is no excuse for ignoring binding precedent from this Court.

The gap between Ninth Circuit law and the law of this Court has only gotten worse with this Court's recent issuance of its decision in *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011). That case discussed at length the unique and distinct sovereign interests of the federal government that are implicated when the United States holds property in trust for Indian tribes, *id.* at 2323-2327. Plaintiffs cannot keep the United States' sovereign interests sidelined in a lawsuit while compromising the United States' title by the mere expedience of suing an Indian tribe.

Finally and unsurprisingly, the Ninth Circuit's stark departure from binding precedent conflicts with the decisions of other courts of appeals on issues of

fundamental and recurring importance—the consistent application of Rule 19(b) in cases implicating sovereign immunity. Given the Ninth Circuit's refusal to reconsider its "somewhat incongruous" law en banc, only this Court can correct the Ninth Circuit's expansive inroad on sovereign immunity and disregard of settled Rule 19 precedent.

I. THE NINTH CIRCUIT'S DECISION ALLOWING LEGAL CLAIMS TO THE UNITED STATES' PUBLIC AND TRUST LANDS TO BE ADJUDICATED IN THE UNITED STATES' ABSENCE DEFIES PRECEDENT FROM THIS COURT AND OTHER CIRCUITS

The Ninth Circuit fully agreed that (i) the United States is a required party to this litigation, for purposes of Federal Rule of Civil Procedure 19(a), because it has a substantial legal interest in a claimed easement across lands to which it holds title, (ii) "judicial recognition of an easement would impair the government's right[s]," and (iii) the United States' joinder is barred by sovereign immunity. App., *infra*, at 9a. The only question is whether, under Rule 19(b), the litigation must be dismissed because the United States cannot be joined or whether, instead, the litigation can proceed and the United States' title can be compromised in its absence.

While ordinarily "[t]he decision whether to dismiss * * * must be based on factors varying with the different cases," some factors are "compelling by themselves." *Provident Tradesmen Bank & Trust Co.*

v. Patterson, 390 U.S. 102, 118-119 (1968). In *Pimentel*, this Court held that a "claim of sovereign immunity" is just such a compelling factor, 533 U.S. at 869, and that lower courts err when they "fail[] to give full effect to sovereign immunity" in the Rule 19(b) calculus, 533 U.S. at 865. Likewise, in *Minnesota*, this Court held specifically that the United States is an indispensable party, in whose absence the litigation cannot proceed, when a right of way is sought over Indian lands held by the United States. 305 U.S. at 386-387 & n.1. The decision below casts that precedent and the law of other circuits aside in favor of a "somewhat incongruous" exception to sovereign immunity devised by the Ninth Circuit, App., *infra*, 12a.

A. The Ninth Circuit's Decision Flatly Defies This Court's On-Point Precedent.

Because, as the Ninth Circuit admitted, "judicial recognition of an easement would impair the government's right[s]," App., *infra*, 9a, binding precedent of this Court mandated dismissal of this action because the judgment granting the easement "necessarily affect[ed] adversely and immediately the [interests of the] United States." *See Texas v. New Mexico*, Report of the Special Master, No. 9 Orig., p. 41 (March 15, 1954) (recommending the dismissal of the complaint for failure to join the United States as an indispensable party); *see also Texas v. New Mexico*, 352 U.S. 991 (1957) (per curiam) (dismissing the bill of complaint "because of the absence of the United States as an indispensable party").

In *Republic of the Philippines v. Pimentel*, this

Court held quite straightforwardly that a sovereign immunity barrier to joinder requires dismissal under Rule 19(b) because "[a] case may not proceed when a required-entity sovereign is not amenable to suit." 553 U.S. at 867. That is this case. Here, as in *Pimentel*, the United States was a "required-party" with a substantial interest in the case under Federal Rule of Civil Procedure 19(a); the United States' interest in the land is "not frivolous"; and the court of appeals agreed that "there is a potential for injury to the interests of the absent sovereign." *Id.*; *see* App., *infra*, 9a. Accordingly, "[t]he court's consideration of the merits was itself an infringement on * * * sovereign immunity." *Pimentel*, 553 U.S. at 864. The cases cannot fairly be distinguished.

The Ninth Circuit reasoned that the litigation could proceed because the United States would not be bound by the judgment as it was not a party to the litigation. App., *infra,* 14a. This Court rejected that very same rationale when the Ninth Circuit used it in *Pimentel*, holding that permitting litigation to proceed in the absence of a required sovereign does "not further the public interest in settling the dispute as a whole." 553 U.S. at 870-871. The Ninth Circuit's rationale also defies *Arizona v. California*, 298 U.S. 558 (1936), which specifically held that the fact that a particular decision will not "bind or affect the United States" is "not an inducement for this Court to decide the rights of the [parties] which are before it by a decree which, because of the absence of the United States, could have no finality," *id.* at 572.

That already twice-rejected rationale works no better here. Once a court adjudicates rights in property, material consequences follow as conduct is

undertaken in reliance on that judgment. As a result, the rights and interests of non-parties in land can become, for all practical purposes, irretrievably lost. In this case, for example, an easement was sought to allow development of a high-density subdivision in the middle of a rural, agrarian area. Once such a right is recognized by a court, the only way the sovereign can protect its legal interests is to come to court to challenge the order—and thus to surrender the very sovereign immunity from litigation over title that Congress statutorily preserved in the Quiet Title Act. In addition, adjudicating property interests in the absence of the title holder confounds the "public stake in settling disputes by wholes" and in "the avoidance of multiple litigation." *Pimentel*, 553 U.S. at 870-871.

But the Ninth Circuit now leaves the United States no choice except either (i) to acquiesce in the court's grant of an easement across its land, or (ii) to multiply the litigation, surrender its immunity, and go to court to try to defend its legal interests within the straitened framework already set by the Ninth Circuit's precedential legal rulings and the district court's fact findings. That unravels all of *Pimentel*'s protections. The sovereign immunity "privilege is much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection." 553 U.S. at 868-869.[2]

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[2] Because no court notified the United States about the litigation or invited its views on the trustee's claim to its land,

The Ninth Circuit's only other distinction of *Pimentel* was to declare it a "narrow[]" ruling limited to "foreign sovereign[s]." App., *infra*, 14a. That makes no sense at all. Nothing in *Pimentel* or Rule 19(b) creates a hierarchical stacking of sovereigns' immunities or relegates the United States' immunity to a lower, more judicially dispensable class than that of foreign nations.

In any event, other decisions of this Court, which the Ninth Circuit also disregarded, compel equal treatment for the United States' and foreign governments' sovereign immunity in Rule 19 decisions. Most specifically, in *Minnesota v. United States*, this Court slammed the door shut on the Ninth Circuit's reasoning. *Minnesota* held that the United States' sovereign interest in Indian lands to which it holds title requires dismissal if sovereign immunity bars joinder of the federal government. In *Minnesota*, the State brought suit to establish a right of way by condemning the land of Indian allottees to which the United States held fee title. 305 U.S. at 383. The district court dismissed the United States as a defendant, but allowed the suit to proceed, reasoning that "the United States is not a necessary

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the United States did not appear in this litigation and itself assert sovereign immunity. But sovereign immunity principles cannot be dodged that easily. Congress, in the Quiet Title Act, has already asserted that immunity, 28 U.S.C. § 2409a. Because the Executive Branch cannot waive sovereign immunity that Congress has preserved, *see Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 423-434 (1990); *United States v. Shaw*, 309 U.S. 495, 502 (1940), its formal assertion or not of immunity in a particular case cannot alter the weight of the sovereign immunity interest in the Rule 19(b) analysis.

party." *Id.* at 384.

This Court disagreed and held that the suit must be dismissed in its entirety because it was a "proceeding against property in which the United States has an interest," and the United States had not consented to suit. 305 U.S. at 386, 388-389. Because the United States "is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees," this Court held that "the right of way cannot be condemned without making it a party." *Id.* at 386.

Indeed, in sharp contrast to the Ninth Circuit's decision here, this Court emphasized that "no effective relief can be given in a proceeding to which the United States is not a party and that the United States is therefore an indispensable party to any suit to establish or acquire an interest in the lands." *Minnesota*, 305 U.S. at 387 n.1. The Ninth Circuit's holding that "an interest in the lands," including specifically a "right of way," could be established over Indian trust lands without the United States' participation is completely irreconcilable with *Minnesota*.

Nor was *Minnesota*'s protection of sovereign immunity an isolated event. The Ninth Circuit's decision equally runs afoul of *Texas v. New Mexico*, 352 U.S. 991 (1957), where this Court dismissed an original-action complaint because the United States had an interest in the water rights at issue as trustee but could not be joined due to sovereign immunity. Texas filed suit claiming that New Mexico had violated the Rio Grande Compact. However, this Court agreed with the report of the Special Master,

that the United States was indispensable in its role as trustee for various Indians because, even though the United States would not be bound by a determination made in its absence, a decree in that case would have "necessarily affect[ed] adversely and immediately the United States" in its fiduciary capacity. *See Texas v. New Mexico*, Report of the Special Master, No. 9 Orig., p. 41 (March 15, 1954); *see also Texas v. New Mexico*, 352 U.S. 991 (1957) (*per curiam*) (dismissing the bill of complaint "because of the absence of the United States as an indispensable party").

The list of this Court's precedent that the Ninth Circuit's decision transgresses does not stop there. *See Arizona v. California*, 298 U.S. 558 (1936) (denying motion to file bill of complaint seeking division of unapportioned water in the Colorado River because the relief requested would affect the United States' interests in the river and the United States' joinder was barred by sovereign immunity); *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 375 (1945) (where "the suit is essentially one designed to reach [assets] which the government owns," the "government is an indispensable party").

The departure from precedent here is doubly stark because, although the case involves lands now held in trust by the United States, the Ninth Circuit ruled that the easement actually arose in 1877, at a time when all of the lands at issue were *public* lands owned directly and exclusively by the United States. App., *infra*, 20a. There is no dispute that, had the trustee sued the United States directly to have that same easement across public lands declared, the lawsuit would have been barred by the Quiet Title

Act. *See* 28 U.S.C. § 2409a(a). Suing an Indian tribe does nothing to change the United States' *exclusive* legal interest in and title to those lands at the time of the easement's purported creation.[3]

Further compounding the harm of the decision is that it licenses plaintiffs not only to circumvent direct limitations on the United States' waiver of sovereign immunity, but also to avoid the very administrative processes that Congress and the Executive Branch have provided for obtaining easements over public and trust lands. *See* 25 U.S.C. § 323, *et seq.*; *see also* 25 C.F.R. § 169.1 *et seq.* The Ninth Circuit's contortion of precedent thus was entirely unnecessary to provide the trustee an avenue for relief on its claim. *See* Fed. R. Civ. P. 19(b) (existence of alternative sources of relief weighs in favor of dismissal).

Put simply, the Ninth Circuit has turned its back on binding law from this Court and charted in this precedential decision a path that is diametrically opposed to the principles of sovereign immunity and their role in joinder analysis that this Court laid down in, *inter alia, Pimentel, Minnesota,* and *Texas v. New Mexico.* Indeed, given the extent and on-point clarity of this Court's precedent on this important question of law, summary reversal may be warranted.

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[3] Petitioner's reservation fully encompassing the relevant lands did not come into existence until 36 years after the Ninth Circuit said the easement arose.

B. The Ninth Circuit's Decision Contradicts The Law Of Other Circuits And The Position Of The United States.

While the Ninth Circuit has held that *Pimentel* is a "narrow[]" ruling limited to cases involving "foreign sovereign[s]," App., *infra*, 14a, the Federal Circuit has applied *Pimentel* to domestic governments' assertions of sovereign immunity. In *A123 Sys., Inc. v. Hydro-Quebec*, 626 F.3d 1213 (Fed. Cir. 2010), the Federal Circuit held that *Pimentel* applies to sovereign States and dismissed the litigation under Rule 19(b) when sovereign immunity barred the State's joinder, *id.* at 1221. *See also School Dist. of the City of Pontiac v. Secretary of the United States Dep't of Educ.*, 584 F.3d 253, 305 (6th Cir. 2009) (en banc) (McKeague, J. concurring) (citing *Pimentel* for the proposition that, within Rule 19(b) analysis, State sovereign immunity "'may be viewed as one of those interests compelling by themselves'") (citation omitted).

Likewise, the Ninth Circuit's cramped view of *Pimentel* has been rejected by the United States itself. Although the lower courts here did not seek the views of the United States while compromising its title to land, the United States, like the Federal Circuit, reads *Pimentel* as extending to the federal government's sovereign immunity. *See* Brief of Amicus Curiae United States of America at 28-31, *BGA LLC v. Ulster County*, (2d Cir. 2008) (No. 08-0596-cv) (arguing that *Pimentel* applies to federal sovereign immunity).

Notably, the conflict among the courts of appeals

regarding the importance of sovereign immunity interests in the Rule 19(b) analysis is longstanding. *Compare Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991) (emphasizing the "paramount importance accorded the doctrine of sovereign immunity under Rule 19"); *Enterprise Mgmt. Consultants, Inc. v. United States,* 883 F.2d 890, 894 (10th Cir. 1989) ("When, as here, a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves.") (internal quotation marks omitted); *and Wichita & Affiliated Tribes v. Hodel,* 788 F.2d 765, 777 n.13 (D.C. Cir. 1986) (same), *with Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 276 F.3d 1150, 1162 (9th Cir. 2002) (applying traditional balancing of the Rule 19(b) factors and declining to treat sovereign immunity as a singularly compelling factor).

Thus this Court's review is needed to ensure that Rule 19(b) is enforced consistently across circuit boundaries and that the federal government's and States' activities within the Ninth Circuit receive the same sovereign immunity protections accorded by other circuits.

II. THE NINTH CIRCUIT'S APPLICATION OF ITS "SOMEWHAT INCONGRUOUS" EXCEPTION TO THE UNITED STATES' SOVEREIGN IMMUNITY CONFLICTS WITH *UNITED STATES V. JICARILLA APACHE NATION*

The Ninth Circuit attempted to justify its stark departure from this Court's binding and directly on-point precedent by relying on what it described as that Circuit's "somewhat incongruous" decision (App., *infra*, 12a) in *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983). In *Puyallup*, the Ninth Circuit adopted the novel, seemingly categorical rule that the United States is not an indispensable party to "a suit by an Indian tribe" as a plaintiff "to protect its interest in tribal lands." App., *infra*, at 11a. The panel in this case extended *Puyallup* to cases where the Indian tribe is a defendant, hauled into court involuntarily and forced to litigate to protect its and the United States' existing interests in land. *Id.* at 12a.[4]

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[4] The Ninth Circuit here reasoned that petitioner, although a named defendant in the trustee's suit, was akin to a plaintiff because petitioner had filed a proof of claim in response to the bankruptcy trustee's assertion of adverse claims to petitioner's property. App., *infra*, 12a. Once again, that rationale is squarely foreclosed by *Pimentel*. *See* 553 U.S. at 871 (formal party status controls in Rule 19(b) analysis regardless of whether "other parties press claims in the manner of a plaintiff."); *cf. Central Va. Cmty. College v. Katz*, 546 U.S. 356, 378-379 (2006) (unless validly abrogated, Eleventh Amendment immunity applies to States that file proofs of claim in bankruptcy proceedings).

Whatever *Puyallup*'s validity when an Indian tribe appears as a plaintiff seeking to assert new rights to land, Ninth Circuit law has now taken that concept far afield and extended it to situations when, as here, "the court quite literally cannot give the plaintiff the interest that it seeks without simultaneously taking that interest away from the absent non-party." *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1502 (9th Cir. 1991) (O'Scannlain, J., concurring in part and dissenting in part). That is wrong. The circuit courts have no license to mint "somewhat incongruous" exceptions to sovereign immunity, App., *infra*, 12a, that are directly proscribed by this Court's precedent and that allow plaintiffs to take "interest[s] away from [an] absent non-party" sovereign. *Chehalis*, 928 F.2d at 1502. Indeed, *Minnesota* and *Texas v. New Mexico* both squarely addressed the joinder analysis when a plaintiff sought to take assets and interests away from a United States-held trust, and both held that the action must be dismissed in the United States' absence. *Minnesota*, 305 U.S. at 386, 388-389; *Texas v. New Mexico*, 352 U.S. 991 (1957). The presence in the litigation of Indians as defendants in *Minnesota* did nothing to salvage the litigation. *Minnesota*, 305 U.S. at 383-384.

Nor did the Ninth Circuit ever explain how the United States' legal interests could be sufficiently impacted by the litigation to trigger the Quiet Title Act's bar against suing the United States directly, but not sufficiently implicated to warrant giving those sovereign interests meaningful protection in litigation.

Indeed, the Ninth Circuit's decision that the tribe is a sufficient defensive proxy for the United States' legal interests is particularly "incongruous" because the court held that the easement arose more than three decades before the reservation encompassing the relevant lands was created by the federal government, and thus at a time when the lands over which the easement was applied were *public lands* directly and exclusively held by the United States. Plaintiffs cannot escape a direct sovereign immunity bar on lawsuits seeking easements over federal public lands by the simple expedience of suing an Indian tribe that *later* acquired reservation lands covering a *portion* of the easement.

Tellingly, no other circuit has adopted the Ninth Circuit's *Puyallup* rule. *See Sokaogon Chippewa Community v. Wisconsin*, 879 F.2d 300, 304 (7th Cir. 1989) ("The nature of the Rule 19(b) inquiry—a weighing of intangibles—limits the force of precedent and casts doubt on generalizations such as [the *Puyallup* Rule]").

Finally, the Ninth Circuit's foundational assumption that "the government's interests are shared and adequately represented by" an Indian tribe defendant in the litigation, App., *infra*, at 14a, runs headlong into this Court's recent decision in *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011). In *Jicarilla*, this Court rejected the assumption that the United States' legal interests as trustee of Indian lands and the interests of a tribe are coterminous. The Court noted that the administration of laws concerning tribal trust property is a distinctly sovereign function and the sovereign "has often structured the trust relationship

to pursue its own policy goals," *id.* at 2324; *see also id.* at 2327 n.8 (the control over Indian tribes exercised by the government pursuant to the trust relationship and in restraining alienation "does not correspond to the fiduciary duties of a common law trustee"). Of most relevance here, this Court stated that, when the United States holds land in trust for Indian tribes, "the United States continue[s] as trustee to have an active interest" of its own "in the disposition of Indian assets because the terms of the trust relationship embody policy goals of the United States." *Id.* at 2326. That "active interest" in avoiding an easement across United States-held lands was nowhere represented in this litigation.

The Ninth Circuit's unexplained equation of petitioner's and the United States' legal interests in the case thus paid no heed to the distinct and independent sovereign interests that the United States has in its role as trustee and titleholder of the land. Nor does the decision respect the sovereign immunity rules set forth in *Pimentel* and *Minnesota* that preclude compromising those interests in the United States' absence. *Jicarilla Nation*, however, compels attentiveness to the United States' distinct legal interests in the Rule 19(b) analysis. *See also United States v. Hellard*, 322 U.S. 363, 366-369 (1944) (United States indispensable in action to partition tribal land among tribe members because United States had its own "important governmental interests" that the tribe members could not represent).

Accordingly, if the Court does not grant the petition for a writ of certiorari for plenary review or summary reversal, it should grant, vacate and

remand for further consideration in light of *Jicarilla.*

III. THE QUESTIONS ARE IMPORTANT AND RECURRING

Resolution of the legal questions raised by the Ninth Circuit's decision here and the harmonization of inter-circuit law is critical. Issues involving the rights of sovereigns generally, and judicial solicitude for absent sovereigns in litigation directly implicating their property interests, are matters of great public significance, as this Court's decisions in *Pimentel* and *Minnesota* reflect. And this Court's recent decision in *Jicarilla* underscored the importance of respecting the United States' distinct sovereign interests in the trust relationships that exist between the United States and Indian tribes and individual allottee landowners.

The Ninth Circuit's disregard here of the United States' sovereign interests, moreover, has far-reaching implications for tribes and the United States, given that there are approximately 421 recognized tribal entities located within the Ninth Circuit. *See* 75 Fed. Reg. 60810, 60810-60814 (Oct. 1, 2010).

Finally, the impact of the Ninth Circuit's sharp departure from precedent going forward is profound. That Circuit encompasses a disproportionately large share of trust and restricted lands. Phone Interview with Q. Michael Jones, Acting Chief, Division of Land Titles and Records, Bureau of Indian Affairs (July 13, 2011) (as of March 30, 2009, approximately 38 million of the roughly 67 million acres of trust and restricted land in the United States sits within the

Ninth Circuit). As to all of those lands, the Ninth Circuit has now rolled back the rights of interested sovereigns to participate in litigation compromising their legal title. Given the frequency with which disputes arise involving trust and restricted lands, the questions presented here are bound to recur. This Court's correction of the Ninth Circuit's precedent-spurning course thus is critical.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case set for plenary review. Alternatively, the Ninth Circuit's judgment should either be summarily reversed or vacated and remanded for further consideration in light of *United States v. Jicarilla Apache Nation*, No. 10-382.

Respectfully submitted.

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