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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

SOUTHCENTRAL FOUNDATION,

Plaintiff,

v.

ALASKA NATIVE TRIBAL HEALTH  
CONSORTIUM,

Defendant.

Case No.: 3:17-cv-00018-TMB

**ALASKA NATIVE TRIBAL HEALTH CONSORTIUM'S REPLY IN SUPPORT  
OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS FOR FAILURE TO  
JOIN PARTIES UNDER FED. R. CIV. P. 19**

*Southcentral Foundation v. ANTHC*  
Case No. 3:17-cv-00018-TMB

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## I. INTRODUCTION

The Ninth Circuit held that because Section 325<sup>1</sup> gave SCF representation on ANTHC's Board, SCF has governance and participation rights in ANTHC.<sup>2</sup> SCF has standing to litigate its interest in exercising those rights, the Ninth Circuit decided, including the scope of its informational rights.<sup>3</sup> But other participants in ANTHC have the same rights as SCF, including Tribes who are unwilling to waive their sovereign immunity. In response to SCF's statements about them in its Opposition, they have filed an *amicus* brief asserting their interest in this lawsuit and supporting ANTHC's motion for judgment on the pleadings (Motion). Because those other ANTHC participants are necessary and indispensable parties, SCF's lawsuit should be dismissed.

## II. RESPONSE TO SCF'S "BACKGROUND" SECTION

SCF makes numerous misleading and divisive statements in the "Background" section to its Opposition. While many of those statements are not relevant to the Motion, ANTHC will partially correct the record as follows.

SCF's Background section begins with a mischaracterization of SCF's own Complaint. SCF tells the Court that its lawsuit only seeks a declaratory judgment regarding Section 325 rights that belong to "SCF and twelve other Regional Health Entities."<sup>4</sup> This

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<sup>1</sup> Pub. L. No. 105-83, § 325, 111 Stat. 1543 (1997) (Section 325).

<sup>2</sup> *Southcentral Found. v. Alaska Native Tribal Health Consortium*, 983 F.3d 411, 419 (9th Cir. 2020).

<sup>3</sup> *Id.* at 420.

<sup>4</sup> SCF's Opposition (Opposition), Dkt. 302, at 3 (emphasis added).

is not accurate. SCF's Complaint plainly seeks a declaratory judgment concerning the Section 325 rights of all Regional Health Entities, Indian Tribes, and Tribal organizations represented on the ANTHC Board of Directors.<sup>5</sup> It refers to them collectively as "Designating Entit[ies]," and ANTHC will use that term in the same way here.<sup>6</sup>

SCF then mischaracterizes ANTHC's motives in filing the present Motion, writing that it is "ANTHC's latest attempt to avoid the merits of SCF's case and to avoid offering the transparency and accountability that Congress mandated."<sup>7</sup> This might be troubling if it were accurate. It is not. As SCF knows, ANTHC responded to the Ninth Circuit's decision by systematically reviewing and revising its governance policies. As but one facet of that work, ANTHC's senior leadership team repeatedly met with SCF's representatives last summer to get SCF's input into that process. The result was a suite of changes to ANTHC's bylaws and governance policies that ANTHC's Board, including SCF's

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<sup>5</sup> SCF's Complaint, Dkt. 2, at 15 ¶ 47 ("SCF contends that the *Regional Health Entities, Indian tribes, and tribal organizations* represented on the ANTHC Board of Directors are participants in the ANTHC consortium under federal law, and thus are entitled to all information provided to the ANTHC Directors who are designated by these entities to represent them on the ANTHC Board. ANTHC disagrees. SCF is entitled to an order so declaring." (emphasis added)); *id.* at 15–16 ¶¶ 48–49 (seeking a declaratory judgment that ANTHC's Directors Code of Conduct and Disclosure Policy violate all Designating Entities' rights, not just the 13 Regional Health Entities' rights).

<sup>6</sup> *Id.* at 6 ¶ 17 (defining "Designating Entity" to include not just the 13 Regional Health Entities, but also each of the "Indian tribes, and sub-regional tribal organizations," which will be referred to in this Reply as the "Unaffiliated Tribes," that are represented on ANTHC's Board by the two Unaffiliated Tribes' Directors).

<sup>7</sup> Opposition at 5.

Designated Director, unanimously supported. Contrary to SCF's statements to this Court, ANTHC (with SCF's input) has diligently implemented the Ninth Circuit's decision by making significant changes to ANTHC's governance.<sup>8</sup>

SCF next tells the Court that ANTHC is wrongfully refusing to share with SCF the results of an independent investigation into ANTHC's former President and Chair.<sup>9</sup> SCF alleges that ANTHC is trying to "bury institutional shortcomings and keep critical governance-related issues from even its core constituencies."<sup>10</sup> These statements are both offensive and misleading. SCF conspicuously omits the reason ANTHC has not shared the investigation results with SCF: the investigation was conducted by counsel and sharing the results with SCF would result in a waiver of the attorney-client privilege. ANTHC's revised governance policies provide that documents and information protected by the attorney-client privilege will not be shared with Designating Entities where doing so will result in a waiver of the privilege. Contrary to SCF's insinuation that ANTHC's new management is acting with corrupt intent, ANTHC is following a procedure that was unanimously approved by ANTHC's Board, including SCF's own Director.

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<sup>8</sup> See, e.g., ANTHC's Brief on Impact of the Ninth Circuit's Order, Dkt. 293, at 2–3 (summarizing amendments already enacted as of August 23, 2021). Ironically, SCF also chastises ANTHC for not filing the Motion sooner. Opposition at 31–32. But ANTHC held off on filing the Motion in the—ultimately vain—hope that it could resolve this lawsuit by negotiation without additional litigation and acrimony.

<sup>9</sup> Opposition at 6.

<sup>10</sup> *Id.* at 7.



SCF does not limit its attacks to ANTHC. It also attacks the status of other Designating Entities, arguing that the Unaffiliated Tribes have second class status. Although Section 325 expressly states that Indian Tribes and sub-regional Tribal organizations that operate health programs not affiliated with a Regional Health Entity are represented on the ANTHC Board, SCF asserts that these Unaffiliated Tribes are somehow lesser participants in ANTHC than is SCF.<sup>11</sup> SCF's attacks are wrong—all Designating Entities have the same rights as SCF.<sup>12</sup>

SCF also asserts that “no purported absent party has ever claimed an interest in this litigation, despite available avenues and ample time in which to do so,” implying that no absent party cares about this case.<sup>13</sup> As is evident from the *amicus* brief lodged by Arctic Slope Native Association, Bristol Bay Area Health Corporation, Copper River Native Association, Kenaitze Indian Tribe, Kodiak Area Native Association, Metlakatla Indian Community, Mt. Sanford Tribal Consortium, Norton Sound Health Corporation, and Southeast Alaska Regional Health Consortium, however, other ANTHC participants do care. They do want a voice, although not at the expense of their sovereign immunity. In short, they are necessary and indispensable parties who cannot be joined and without whom SCF's lawsuit should not proceed.

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<sup>11</sup> *Id.* at 21 n.72, 27–28 n.94.

<sup>12</sup> Motion at 4, 10.

<sup>13</sup> Opposition at 12.

SCF also complains that ANTHC is trying to put it in a “Catch-22” situation to deprive it of a forum for its claims.<sup>14</sup> But being immunized from unwanted adjudication is the essence of sovereign immunity.<sup>15</sup> And as mentioned, SCF already received a full remedy—the extensive changes ANTHC made to its governance policies—from the very forum Congress intended in Section 325: ANTHC’s Board.

Later in its Opposition, SCF asserts that the only issue in this case is a binary question: “either the challenged policies and actions are illegal, as SCF claims, or they are lawful, as ANTHC claims.”<sup>16</sup> But this assertion is belied by SCF’s Prayer for Relief.<sup>17</sup> Its second item seeks an order declaring that “SCF and the other Designating Entities specified in Section 325” are “entitled to all documents and information necessary to participate in the governance of the consortium, including confidential and/or privileged documents and information.”<sup>18</sup> And its third item seeks an order declaring that “SCF’s Designated Directors have an absolute right to documents and information as directors of ANTHC,

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<sup>14</sup> *Id.* at 1.

<sup>15</sup> *Alden v. Maine*, 527 U.S. 706, 716–17 (1999) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind....” (internal quotation marks, emphasis, and citation omitted)); *State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994) (“The Tribe’s retained sovereignty predates federal recognition—indeed, it predates the birth of the Republic—and it may be altered only by an act of Congress.” (citation omitted)); *see also* Motion at 32 & n.112 (citing cases holding that sovereign immunity outweighs lack of alternative forum).

<sup>16</sup> Opposition at 26.

<sup>17</sup> Complaint, Dkt. 2, at 17–18.

<sup>18</sup> *Id.* at 17.

without limitation or reservation, and a right and duty to convey such documents and information to their Designating Entity.”<sup>19</sup> These issues are hardly binary. For example:

- Which documents and information are “necessary” to participate in ANTHC’s governance? All of ANTHC’s documents and information? Just documents and information considered in an ANTHC Board meeting? What if ANTHC is prohibited from sharing information by law, such as HIPAA, the Privacy Act of 1974, or the medical quality assurance program privilege under 25 U.S.C. § 1675? What if information is protected by the attorney-client privilege and sharing it would waive that privilege? And what about confidential information shared in executive session?
- Also, does any corporate Director have an “absolute right” to his or her corporation’s documents? What if he or she has a conflict of interest? Or improper motive or intent? What if it would violate the law for the Director to receive the information or documents?

ANTHC’s Board just spent several months addressing and revising its governance policies to comply with the Ninth Circuit’s decision, which necessarily involved grappling with these decidedly non-binary questions. That process included balancing full transparency, on the one hand, with protecting candid discussions and following legal

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<sup>19</sup> *Id.*

restrictions, on the other. In making these non-binary decisions, the ANTHC Board considered potential changes in the context of all of the other changes it made. Plainly, these issues, which are what remain under SCF's Complaint, are not binary. Instead, they would require the Court to interject itself deeply into ANTHC's Board governance.

### III. ARGUMENT

As ANTHC argued in its Motion, the absent ANTHC participants are necessary and indispensable parties to SCF's claims. Indeed, this conclusion was only underscored by SCF's Opposition. In it, SCF expressly distanced itself from a subset of ANTHC's Designating Entities: the Unaffiliated Tribes and Tribal Organizations. SCF writes that it "does not concede that it is similarly situated to any entity that is not 'expressly identified' in Section 325."<sup>20</sup> SCF also asserts that "Congress wanted to 'draw on the existing expertise of the Alaska Native regional health entities now managing extensive regional health networks in Alaska,' not all of the Tribes in the state."<sup>21</sup> And SCF tells the Court that it need "only decide whether ANTHC's policies have violated SCF's governance and participation rights *as a Regional Health Entity*."<sup>22</sup> Yet SCF simultaneously claims that it can represent the interests of *all* absent participants<sup>23</sup> and that it seeks merely to enhance everyone's rights.<sup>24</sup>

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<sup>20</sup> Opposition at 21 n.72.

<sup>21</sup> *Id.* at 27–28 n.94.

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> *See id.* at 25–27.

<sup>24</sup> *See id.* at 2, 29.

Not surprisingly, ANTHC participants for whom SCF purports to speak disagree. Nine *amici* support ANTHC's request that this Court dismiss SCF's suit. And the *amici* are correct. SCF's suit *should* be dismissed for failure to join necessary and indispensable parties.

**A. The Absent ANTHC Participants Are Necessary Parties.**

SCF argues on various grounds that the absent ANTHC participants are not actually necessary parties under Rule 19(a)(1)(B)(i) or 19(a)(1)(A). For the reasons stated in ANTHC's Motion, in the *amicus* brief, and below, SCF's arguments fail.

**1. The absent ANTHC participants *do* claim their interests.**

The Motion explained that the absent participants have legally protected interests in (1) their governance, participation, and informational rights and (2) preserving their sovereign immunity.<sup>25</sup> SCF concedes that at least Regional Health Entities enjoy these rights.<sup>26</sup> Despite this, SCF nevertheless asserts that the Motion should be denied because “[n]o supposedly absent party has *claimed* an interest in this action.”<sup>27</sup> SCF is wrong.

First, nine absent participants—seven Regional Health Entities, an Unaffiliated Tribe, and an Unaffiliated Tribal health organization—have now expressly claimed an

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<sup>25</sup> Motion at 9.

<sup>26</sup> Opposition at 13.

<sup>27</sup> *Id.* at 11 (emphasis added).

interest and sought leave to file an *amicus* brief. SCF itself invited this demonstration of the absent participants' interests,<sup>28</sup> which conclusively refutes SCF's argument.

Second, SCF elevates form over substance. After the Ninth Circuit's decision, the absent participants invested significant time, through their designated Directors, in revising ANTHC's bylaws, policies, and code of conduct to conform to their rights. That sustained effort unmistakably demonstrates that even those absent participants that have not formally sought *amicus* status "claim[]" through their conduct "an interest relating to the subject of the action."<sup>29</sup> The Court should not disregard the absent participants' work, as SCF would have it do.

In sum, absent ANTHC participants indisputably claim an interest in this action and its subject matter—their own governance, participation, and informational rights.<sup>30</sup>

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<sup>28</sup> *Id.* at 12 ("Similarly, an interested party could seek to file an *amicus* brief expressing its interest, something no absent party has done here.").

<sup>29</sup> Fed. R. Civ. P. 19(a)(1)(B).

<sup>30</sup> To be sure, SCF denies that the Tribes and Tribal health organizations represented on the ANTHC Board by Directors designated by UANTHC possess these rights. Opposition at 21 n.72, 27 n.94. But under Section 325 and the Ninth Circuit's reasoning, those Unaffiliated participants do enjoy these rights. *See* Motion at 9–10. For purposes of this Motion, however, it suffices that the absent participants have a nonfrivolous "*claim* to an interest." *Shermoe v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992).

**2. Proceeding in the ANTHC participants' absence will impair their ability to protect their interests.**

SCF's argument that its lawsuit would not "as a practical matter impair or impede [any absent] person's ability to protect the interest"<sup>31</sup> is without merit.

First, SCF asserts that no party has a "'legally protected' right to violate federal law."<sup>32</sup> But *Shermoen* disposed of this argument 30 years ago:

The appellants' position is not without some logical appeal. The Act is either constitutional or unconstitutional: if the latter, then the absent tribes have no "legally protected interest in the outcome of the action"; if the former, then the appellants will not prevail and thus the disposition of the action will not impair the absent tribes' interests.

The language of Rule 19, however, forecloses such an analysis. Under that rule, the finding that a party is necessary to the action is predicated only on that party having a *claim* to an interest.... Just adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party.<sup>[33]</sup>

Indeed, the Ninth Circuit consistently rejects this argument when plaintiffs raise it.<sup>34</sup>

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<sup>31</sup> Fed. R. Civ. P. 19(a)(1)(B)(i).

<sup>32</sup> Opposition at 14.

<sup>33</sup> *Shermoen*, 982 F.2d at 1317.

<sup>34</sup> *White v. Univ. of Cal.*, 765 F.3d 1010, 1027 (9th Cir. 2014) ("The Scientists argue that the Tribes and the Repatriation Committee do not have a 'legally protected interest' because the La Jolla remains have not been established to be 'Native American' within the meaning of [the Native American Grave Protection and Repatriation Act] and, in fact, are not. However, that argument misses the point of the Rule 19(a) inquiry. The question is whether the Tribes and the Repatriation Committee have a *claim* that is not 'patently frivolous.'" (quoting *Shermoen*, 982 F.2d at 1318)); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002) ("The district court also opined that the tribes could have no legally protected interest in gaming that was not permitted by state

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SCF also relies on characterizing its case as presenting merely a binary question of whether ANTHC's policies violate Section 325.<sup>35</sup> But SCF's characterization is both factually false and legally irrelevant. As explained above,<sup>36</sup> SCF's claims do not as a matter of fact merely present a binary question. Moreover, even binary legal determinations or statutory interpretation issues can give rise to necessary parties.<sup>37</sup> Because the purportedly "binary" issue here would affect the absent ANTHC participants' interests, SCF cannot characterize its way out of the conclusion that they are necessary parties.<sup>38</sup>

SCF's next argument is that it seeks to "enhance" everyone's rights.<sup>39</sup> To begin, SCF's claim rings hollow next to its assertion that the Court need "only decide whether

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law.... We have rejected this kind of circularity in determining whether a party is necessary.").

<sup>35</sup> See, e.g., Opposition at 14 ("ANTHC appears to argue that the absent entities have an interest in enacting barriers to information that violate Section 325.").

<sup>36</sup> See *supra* at 5–7.

<sup>37</sup> See, e.g., *White*, 765 F.3d at 1027 (absent Tribe was necessary party to suit contending that human remains "are not 'Native American' within the meaning of [statute]"); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458 (9th Cir. 1994) (absent Tribe would be necessary party to declaratory judgment claim that statute was facially unconstitutional); *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245, 251 (D. Or. 2017) (absent Tribes would be necessary parties to determination whether statute preempts local regulation).

<sup>38</sup> See *Quileute Indian Tribe*, 18 F.3d at 1458 ("[N]ecessity of the Quinalts ... cannot be avoided by characterizing the issue as constitutionality of the [statute]. If the [statute] were to be found unconstitutional, it would affect the property interests of the Quinalts....' We agree." (first ellipsis in original)); *Union Pac. R.R.*, 320 F.R.D. at 251 ("[A] party cannot avoid a finding of necessity under Rule 19 by its characterization of the issue, especially when the outcome of the litigation would affect tribal interests.").

<sup>39</sup> Opposition at 15; see also *id.* at 2, 18, 29.

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ANTHC's policies have violated SCF's governance and participation rights *as a Regional Health Entity*.”<sup>40</sup> SCF plainly seeks to enhance the rights of only some of ANTHC's participants, including potentially at the expense of Tribes and Tribal Organizations not named in Section 325.

Furthermore, SCF's mantra of “enhancing” rights incorrectly presumes that an expanded informational right will be all upside and no downside for ANTHC participants. Despite SCF's pronouncement on behalf of other participants that their interests “could not possibly be in obtaining *less* information,” ANTHC explained and the *amici* concur that reduced confidentiality protections may inhibit Board discussions, to the detriment of participants' ability to effectively exercise their governance and participation rights.<sup>41</sup> Thus, an “enhanced” informational right could come at some cost to effective exercise of their governance and participation rights.

SCF misconstrues this point, setting up the straw man that ANTHC supposedly argues that a piece of information is itself zero sum.<sup>42</sup> Not so. ANTHC does not disagree that a given datum of information can be shared with all ANTHC participants without diminishing that datum. But an expanded *right to access information* necessarily means a reduction in confidentiality protections and, under circumstances in which certain

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<sup>40</sup> *Id.* at 27–28 n.94 (emphasis added).

<sup>41</sup> Motion at 15, 17.

<sup>42</sup> Opposition at 16.

confidentiality protections improve governance, a reduction in the participants’ ability to effectively exercise their governance and participation rights. It is that inherent tradeoff between the unlimited entitlement to information that SCF seeks and participants’ governance and participation rights that invokes analogous zero-sum precedents, confirming that all ANTHC participants are necessary parties.<sup>43</sup>

SCF next makes the sweeping claim that lawsuits over corporate rights do not make absent directors and shareholders necessary parties.<sup>44</sup> But the three cases on which SCF relies are clearly distinguishable. In *Hulburt Oil & Grease Co. v. Hulburt Oil & Grease Co.*, where a corporate name change was ordered, the court concluded without any analysis that the officers, directors, and shareholders were not indispensable parties.<sup>45</sup> But *Hulburt* involved no governance, participation, or informational rights belonging to the directors or shareholders. Notably, it also relied on a prior precedent indicating that whether the absent officers have a “personal or substantive right which is affected” is the key.<sup>46</sup> Here, of course, the Ninth Circuit’s decision recognizes that Section 325 confers personal rights on ANTHC participants. Next, in *Gibbs Wire & Steel Co. v. Johnson*, the non-party shareholders were held not to be necessary parties because, *inter alia*, “any interests they

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<sup>43</sup> See Motion at 17.

<sup>44</sup> Opposition at 17.

<sup>45</sup> 371 F.2d 251, 256 (7th Cir. 1966).

<sup>46</sup> *Hertz v. Rec. Publ’g Co. of Erie*, 219 F.2d 397, 400 (3d Cir. 1955).

may have are adequately protected by the existing parties.”<sup>47</sup> As explained in the Motion and below, that rationale does not apply here, where neither SCF nor ANTHC can adequately represent the interests of the absent sovereigns. And, finally, *Castner v. First National Bank of Anchorage* is inapposite: the court there merely noted that directors are generally not necessary parties to suits by or on behalf of a corporation.<sup>48</sup> SCF’s claims are neither by nor on behalf of ANTHC. In sum, SCF fails to identify any on-point precedent that supports its “corporate rights” argument.

SCF finally argues that the absent entities do not have an interest in preserving their sovereign immunity.<sup>49</sup> Besides the fact that the *amici* disagree, the Ninth Circuit has held that “absent [T]ribes have an interest in preserving their own sovereign immunity, with its concomitant right not to have their legal duties judicially determined without consent.”<sup>50</sup> SCF cannot credibly contend that Tribes have any less of an interest in not having the scope of their legal *rights* judicially determined without their consent. SCF tries to muddy the water by citing cases in which absent Tribes lack a legally protected interest in suits relating

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<sup>47</sup> 255 F.R.D. 326, 329 (D. Conn. 2009).

<sup>48</sup> 278 F.2d 376, 384 (9th Cir. 1960).

<sup>49</sup> Opposition at 18.

<sup>50</sup> *Shermoen*, 982 F.2d at 1317 (internal quotation marks, brackets, and citation omitted); *see also Pit River Home & Agr. Coop. Ass’n v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994) (holding that the Council was necessary party because it had a legal interest in its designation as a beneficial owner of the ranch and a legal interest “in preserving its sovereign immunity”).

exclusively to the legality of federal agencies' future administrative processes.<sup>51</sup> Those cases are inapposite here, where no federal agency processes are involved. Furthermore, far from supporting SCF, the distinction drawn in those cases between (1) agency actions that "would have 'retroactive effects' on rights already enjoyed by a tribe" and (2) "those 'relating only to the agencies' future administrative process'"<sup>52</sup> merely *confirms* that the absent ANTHC participants are necessary parties here. SCF's claims would have "retroactive effects" on the informational, governance, and participation rights that ANTHC participants already possess under Section 325 and not "'only to [ANTHC]'s future [governance] processes,'"<sup>53</sup> because SCF seeks to declare unlawful past decisions by the ANTHC Board (all of which were made through the participants' representatives, in the exercise of ANTHC participants' governance and participation rights).<sup>54</sup> As such, this caselaw underscores the ANTHC participants' interest in preserving their sovereign immunity against having their Section 325 rights judicially determined without their consent.

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<sup>51</sup> Opposition at 19 (citing *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 997 (9th Cir. 2020)); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990).

<sup>52</sup> *Jamul*, 974 F.3d at 997 (brackets and citation omitted).

<sup>53</sup> *Id.* (emphasis added; citation omitted).

<sup>54</sup> Complaint Prayer ¶¶ 1, 5–6.

**3. Neither SCF nor ANTHC can adequately represent the absent participants' interests.**

SCF argues that “the existing parties can adequately represent the absent entities.”<sup>55</sup> But as the Motion noted, ANTHC is not aware of a single case where a Tribal entity was held to adequately represent the interests of another Tribe.<sup>56</sup> SCF’s Opposition fails to identify any such case either.

Furthermore, despite listing the three factors that guide a court’s determination of whether an existing party can adequately represent an absent party’s interests, SCF does not explain why it satisfies any of these factors, including how it will ensure that it is capable of and will “undoubtedly” make all the absent participants’ arguments.<sup>57</sup> Instead, SCF explicitly distinguishes itself from the absent Unaffiliated Tribes.<sup>58</sup> There should not be any meaningful dispute that SCF cannot represent the interests of these absent participants—some of which have appeared as *amici*—when SCF “does not concede that it is similarly situated” with them.<sup>59</sup>

SCF again seeks to characterize its claims as *merely* a binary question “whether ... the challenged policies and actions are illegal, as SCF claims, or they are lawful, as

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<sup>55</sup> Opposition at 25.

<sup>56</sup> Motion at 22.

<sup>57</sup> See Opposition at 25–27.

<sup>58</sup> See *supra* at 7.

<sup>59</sup> Opposition at 21 n.72; see also *id.* at 27–28 n.94 (“The Court need only decide whether ANTHC’s policies have violated SCF’s governance and participation rights as a Regional Health Entity.”).

ANTHC claims.”<sup>60</sup> This is not merely a binary case, as discussed above. But even if it were, under Ninth Circuit precedent, the existing parties cannot represent an absent party’s interest, when the interests of the absent party and an existing party “would ‘not necessarily remain aligned’” throughout the litigation.<sup>61</sup> For instance, in *White*, the question was whether two skeletons were or were not “Native American” within the meaning of the Native American Grave Protection and Repatriation Act.<sup>62</sup> The Ninth Circuit did not analyze whether this was merely a “binary” legal issue. Instead, it focused pragmatically on the possibility that the interests of the defendant university and the absent Tribe might diverge with regard to the “next course of action” if a court were to initially rule against their assertion that the remains were Native American.<sup>63</sup> As the Motion explains, the same is true here with regard to the potential future divergence between ANTHC’s interests and the interests of individual ANTHC participants.<sup>64</sup> SCF does not even attempt to show otherwise. Nor could it. Neither SCF nor ANTHC has any way of assuring they undoubtedly will make all of the absent participants’ arguments now, much less without divergence from the absent participants’ preferred courses of action as the litigation progresses.

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<sup>60</sup> *Id.* at 26.

<sup>61</sup> *Dine Citizens Against Ruining Our Env’t v. Bureau of Indian Affairs*, 932 F.3d 843, 854 (9th Cir. 2019) (quoting *White*, 765 F.3d at 1027); see Motion at 20–22.

<sup>62</sup> *White*, 765 F.3d at 1023.

<sup>63</sup> *Id.* at 1027.

<sup>64</sup> Motion at 21–22.

**4. The absent ANTHC participants are also necessary parties under Rule 19(a)(1)(A).**

SCF asserts that it can obtain complete relief without joining the absent ANTHC participants.<sup>65</sup> SCF's arguments—including its reliance on a dissent for its statement of law<sup>66</sup>—are unconvincing given that the other absent participants are not part of this case or bound by any judgment on the merits and, perhaps more importantly, given that any judgment would not take their interests into account. That SCF asserts it can obtain complete relief while simultaneously claiming that it has rights that others do not have<sup>67</sup> is telling. The absent participants are necessary for this reason as well.

**B. Joinder of the Absent Tribal Participants Is Not Feasible.**

Even SCF concedes that *amicus* Metlakatla Indian Community is both a Regional Health Entity expressly identified in Section 325—like SCF—and a federally recognized Tribe whose sovereign immunity prevents its joinder.<sup>68</sup> This admission alone defeats

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<sup>65</sup> Opposition at 21–25. ANTHC explained why SCF could not obtain complete relief without the absent participants in its Motion at 23–27. ANTHC relies on and incorporates that argument here by reference.

<sup>66</sup> *Id.* at 21 & n.71 (quoting *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1501 (9th Cir. 1991) (O'Scannlain, J., concurring in part and dissenting in part)).

<sup>67</sup> *Id.* at 27–28 n.94.

<sup>68</sup> *Id.* at 28.

SCF's suggestion that the joinder of the absent Tribal participants in ANTHC is somehow feasible.<sup>69</sup>

SCF's chief feasibility argument is that ANTHC "never defines the universe of absent parties."<sup>70</sup> But ANTHC *did* identify the absent potential parties: "other entities with a Section 325(b) right to be represented on ANTHC's Board," including "the 12 other regional health entities" and "the Tribes and Tribal organizations that are neither affiliated with nor receiving services from a Regional Health Entity."<sup>71</sup> Moreover, seven of those other Regional Health Entities have now confirmed that they claim an interest in this lawsuit. So have an Unaffiliated Tribe (Kenaitze Indian Tribe) and an Unaffiliated Tribal Organization (Mount Sanford Tribal Consortium). None of the nine *amici*, including the two *amici* that are federally recognized Tribes, Metlakatla Indian Community and Kenaitze Indian Tribe, will waive their sovereign immunity.<sup>72</sup> Sovereign immunity accordingly bars joining at least some of the *amici* without their consent. Regardless of SCF's disagreement about exactly how many absent Tribes are ANTHC participants, it is not feasible for the Court to join the *amici* Tribes, nor any of the other absent Tribes either.

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<sup>69</sup> As previously explained (Motion at 4, 10), there are also other Tribes that possess the same governance, participation, and informational rights in ANTHC as SCF does. One of those Tribes—Kenaitze Indian Tribe—is among the *amici*.

<sup>70</sup> Opposition at 27.

<sup>71</sup> Motion at 4.

<sup>72</sup> *Id.* at 11 n.41.



**C. The Absent ANTHC Participants Are Indispensable.**

SCF completely fails to acknowledge the “‘wall of circuit authority’ in favor of dismiss[al] ... ‘regardless of whether an alternate remedy is available, if the absent parties are Indian tribes invested with sovereign immunity.’”<sup>73</sup> Indeed, the “need to protect tribal sovereignty”<sup>74</sup> is even greater where *many* sovereigns are absent, and where one participant seeks to use the courtroom to elevate its voice above the others. But ignoring the wall of authority<sup>75</sup> does not make it go away. Nor do SCF’s arguments surmount it.

First, SCF denies any possibility of prejudice to the absent ANTHC participants, contending that they can only “reap ... benefits” from the lawsuit.<sup>76</sup> The *amici* beg to differ. As ANTHC already explained, proceeding in the absence of the ANTHC participants threatens to impair their interests in a number of ways,<sup>77</sup> and the *amici* concur. SCF has failed to rebut either that prejudice to the absent parties or the distinct prejudice to ANTHC by incomplete relief here.<sup>78</sup>

Second, SCF proposes that prejudice can be averted by litigating only the absent ANTHC participants’ rights and not also the ANTHC Directors’ duties.<sup>79</sup> But the prejudice

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<sup>73</sup> *Dine Citizens*, 932 F.3d at 857 (brackets omitted) (quoting *White*, 765 F.3d at 1028).

<sup>74</sup> *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996).

<sup>75</sup> See Motion at 28–29 (citing cases).

<sup>76</sup> Opposition at 29.

<sup>77</sup> Motion at 12–18.

<sup>78</sup> See *id.* at 23–27, 29–30.

<sup>79</sup> Opposition at 29.

to the absent participants *is* from litigating their rights in their absence, or from forcing them to choose between their sovereign immunity and having a voice in this lawsuit.<sup>80</sup>

Third, SCF claims “there is no question” as to the adequacy of the judgment because it would “resolve the issue of whether ANTHC violated Section 325” and “guide the creation” of new policies.<sup>81</sup> Yet again, SCF ignores the prejudice, which under Ninth Circuit jurisprudence would render the judgment inadequate.<sup>82</sup>

Fourth, SCF criticizes the alternative forum—the ANTHC Boardroom—because in 2016 the majority of ANTHC Directors disagreed with SCF’s views.<sup>83</sup> But the fact that SCF stands on an equal footing in the Boardroom with numerous other Tribal participants with a diversity of voices is a feature of that forum, not a failing. And in any event, SCF does not deny that the Ninth Circuit consistently prioritizes the importance of sovereign immunity over the lack of any alternative forum at all.<sup>84</sup>

Under the circumstances here, the absent ANTHC participants are manifestly indispensable.

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<sup>80</sup> Motion at 12–18

<sup>81</sup> Opposition at 30.

<sup>82</sup> See Motion at 31 & n.109 (collecting cases); *see also id.* at 32 & n.110.

<sup>83</sup> Opposition at 30–31.

<sup>84</sup> Motion at 32 & nn.110, 112.

**D. ANTHC's Motion Is Timely.**

SCF suggestion that ANTHC's Motion is untimely<sup>85</sup> is incorrect. As a matter of law, the absence of necessary parties "can be properly raised at any stage in the proceeding," including "by reviewing courts *sua sponte*."<sup>86</sup> The Ninth Circuit has affirmed dismissal under Rule 19 where, as here, the issue is first raised following a remand to the district court after appellate reversal of an earlier dismissal on other grounds.<sup>87</sup> The timing of ANTHC's Motion here is well within governing precedent.

The authorities SCF cites are not to the contrary.<sup>88</sup> First, *Provident Tradesmens Bank & Trust Co. v. Patterson* involved the Third Circuit's *sua sponte* Rule 19 ruling in an appeal from a jury verdict. Although noting that the defendant never raised the absence of necessary parties prior to the Third Circuit's decision, the U.S. Supreme Court explained that, when necessary, "a court of appeals should, on its own initiative, take steps to protect the absent party."<sup>89</sup> Thus, if anything, *Provident* confirms that a party raising Rule 19 pretrial is not too late. Second, in *Gil Enterprises, Inc. v. Delvy*, it was the *plaintiff* who tried for a second bite at the appeal by raising—after an unfavorable verdict—the plaintiff's

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<sup>85</sup> Opposition at 31–32.

<sup>86</sup> *CP Nat'l Corp. v. Bonneville Power Admin.*, 928 F.2d 905, 911 (9th Cir. 1991); *see also* Fed. R. Civ. P. 12(h)(2)(C) (defense may be raised for first time at trial).

<sup>87</sup> *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1154, 1163 (9th Cir. 2002) (affirming grant of Rule 19 motion filed *four years* after inception of case and after previous appeal).

<sup>88</sup> Opposition at 31 n.107.

<sup>89</sup> 390 U.S. 102, 111 (1968); *see also id.* at 112.

own failure to join the absent party.<sup>90</sup> Here, by contrast, it is ANTHC and the *amici* that invoke the protection of Rule 19, and they are doing so pretrial. Third, the comment that SCF quotes expressly does not apply to a Rule 19 motion to “protect the absent person.”<sup>91</sup>

Furthermore, ANTHC did not in fact unduly delay. Until the Ninth Circuit ruled that SCF has governance, participation, and informational rights, ANTHC disagreed that its participants possessed such rights. ANTHC cannot be faulted for not bringing a motion based on a legal premise it believed was wrong. In May 2021, only seven weeks after expiration of the time to petition the Supreme Court for a writ of certiorari, ANTHC alerted SCF and the Court that the absence of necessary and indispensable parties was fatal to SCF’s suit.<sup>92</sup> Nevertheless, over the succeeding months, ANTHC invested hundreds of hours revising its policies and attempting to negotiate a corresponding settlement with SCF before filing the Motion. Contrary to SCF’s accusation, there has been no “gamesmanship” by ANTHC here, only a patient commitment to a process ANTHC hoped would result in settlement.<sup>93</sup>

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<sup>90</sup> 79 F.3d 241, 247 (2d Cir. 1996).

<sup>91</sup> 7 Mary Kay Kane, *Federal Practice and Procedure* § 1609, Westlaw (3d ed., database updated Apr. 2021) (quoting 1966 advisory committee comment on Rule 19).

<sup>92</sup> Dkt. 287, at 8 & n.12.

<sup>93</sup> Opposition at 32.

#### IV. CONCLUSION

For all of the foregoing reasons, as well as those stated in the Motion and by the *amici*, ANTHC respectfully requests the dismissal of SCF's claims.

DATED: December 22, 2021

STOEL RIVES LLP

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*Attorneys for Defendant Alaska Native Tribal  
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## CERTIFICATE OF COMPLIANCE

I certify pursuant to D.Ak. L.R. 7.4(a) that this motion brought under Federal Rule of Civil Procedure 12(c) complies with the word limitation of D.Ak. L.R. 7.4(a)(1) because it contains 5,699 words, excluding the parts of the motion exempted by D.Ak. L.R. 7.4(a)(4).

DATED: December 22, 2021

STOEL RIVES LLP

s/ James E. Torgerson

JAMES E. TORGERSON

*Southcentral Foundation v. ANTHC*

Case No. 3:17-cv-00018-TMB

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## CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2021, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system. Participants in this Case No. 3:17-cv-00018-TMB who are registered CM/ECF users, and who are listed below, will be served by the CM/ECF system.

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