15-667



No. 15-___

IN THE

# Supreme Court of the United States

TIMOTHY WHITE, ROBERT L. BETTINGER and MARGARET SCHOENINGER,

*Petitioners,*

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

*Respondents.*

**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

The Native American Graves Protection and Repatriation Act (NAGPRA), which governs repatriation of human remains to Native American tribes, contains an enforcement provision that states, "The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter." 25 U.S.C. § 3013. Over a strong dissent, a divided Ninth Circuit panel held that a party can prevent judicial review of controversial repatriation decisions by claiming a tribe is a "required party" under Rule 19 of the Federal Rules of Civil Procedure, if the tribe invokes tribal immunity. The questions presented are:

1. Whether Rule 19 of the Federal Rules of Civil Procedure mandates that a district court dismiss any case in which a Native American tribe with immunity is deemed to be a "required party."

2. Whether tribal immunity extends to cases where Rule 19 is the only basis for adding a tribe, no relief against the tribe is sought, and no other forum can issue a binding order on the dispute; and if so, whether Congress abrogated tribal immunity as a defense to claims arising under NAGPRA.

## PARTIES TO THE PROCEEDINGS

Petitioners Timothy White, Robert Bettinger, and Margaret Schoeninger, professors at the University of California, were appellants in the court of appeals and plaintiffs in the district court.

Respondents, the Regents of the University of California ("Regents"), Mark Yudof (former President of the University of California), Marye Anne Fox (former Chancellor of the University of California, San Diego), Pradeep Khosla (current Chancellor of the University of California, San Diego), and Gary Matthews (Vice-Chancellor of the University of California, San Diego), were appellees in the court of appeals and defendants in the district court. Respondent Janet Napolitano (current President of the University of California) was an appellee in the court of appeals. Collectively, these Respondents are referred to as the "University."

Respondent Kumeyaay Cultural Repatriation Committee ("KCRC"), a consortium representing twelve federally recognized Kumeyaay Indian tribes, was an appellee in the court of appeals and a defendant in the district court.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Timothy White, Robert L. Bettinger, and Margaret Schoeninger respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a-44a) is published at 765 F.3d 1010 (9th Cir. 2014). The opinion of the United States District Court for the Northern District of California (App. 45a-79a) is unreported, but is available at 2012 WL 12335354.

## JURISDICTION

The judgment of the court of appeals was entered on August 27, 2014. App. 1a. A timely petition for rehearing en banc was denied on August 21, 2015. App. 80a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

This case involves the interpretation and application of Rule 19 of the Federal Rules of Civil Procedure, reproduced at App. 104a-116a. The case also involves the interpretation and application of the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. §§ 3001-3013, reproduced at App. 81a-103a.

## INTRODUCTION

Petitioners filed this case because the University, relying on NAGPRA, decided to transfer prehistoric human remains, aged from 8,977 to 9,603 years old

and found in a rare double burial in La Jolla, California (the "La Jolla remains"), to an 18-member Native American tribe that plans to bury them. App. 5a, 17a-18a & n.5. Repatriation would irrevocably destroy the research potential of the remains, which are essential to understanding the population of the Americas during the last era of the Stone Age. Ninth Circuit ECF 74-3, ¶¶ 3-5; United States District Court (USDC) ECF 12, ¶¶ 13-14; & ECF 19 at 2:1-11. Petitioners, who are scientists at the University of California, want to study the La Jolla remains to enhance humanity's understanding of the earliest human inhabitants in North America. App. 18a; USDC ECF 12, ¶¶ 33-35. Under the University's Human Remains Policy, Petitioners likely woud be able to study the remains. App. 22a; USDC ECF 12, Exh. A. p. 7, VIII.B.

Genetic analysis of the remains, which the University has not allowed, would contribute significantly to our understanding about the entrance of humans into the Americas. Ninth Circuit ECF 74-3, ¶¶ 4-10; USDC ECF 12, ¶¶ 11-13. If the Ninth Circuit's decision is not reversed, the source of this knowledge will be lost forever. Ninth Circuit ECF 74-3, ¶ 3; USDC ECF 12, ¶¶ 13-14.

NAGPRA grants jurisdiction to United States district courts "over any action brought by any person alleging a violation," and authorizes courts "to issue such orders as may be necessary" to enforce it. 25 U.S.C. § 3013. The district court here ruled it could *not* review the University's NAGPRA decision because Ninth Circuit precedent requires dismissal when a "necessary party" under Rule 19(a) asserts tribal immunity. App. 72a-75a. The court "reluctantly" granted Respondents' motions to dismiss, stating the

case "raises troubling questions about the availability of judicial review under NAGPRA." App. 47a, 76a-78a.

The Ninth Circuit's 2-1 majority opinion, after superficially reviewing the Rule 19(b) factors, held that a "wall of circuit authority" mandated dismissal because the tribes and KCRC were immune, and "when the necessary party is immune ... there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" App. 32a-33a (quoting *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1465, 1460 (9th Cir. 1994) and *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991)).

This Court previously rejected this type of formulaic approach to Rule 19 in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968) ("*Provident*"), finding mandatory dismissal conflicts with the equitable purpose of Rule 19. Nevertheless, lower federal courts now routinely ignore *Provident*, choosing instead to follow Ninth Circuit Rule 19 decisions and to expand this Court's more recent holding in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), to require dismissal whenever an absent tribe has immunity. The Ninth Circuit's decision further undermines Rule 19 and *Provident* by providing a template to cut off access to the courts not only in NAGPRA cases, but many other cases.

The Ninth Circuit's decision also contravenes Congress' intent in enacting NAGPRA – to provide a forum to adjudicate competing interests created by NAGPRA's repatriation provisions. The majority's decision warps this function by allowing tribes to use NAGPRA as both a sword (to challenge a repatriation decision) and a shield (to prevent anyone else from

challenging a repatriation decision). If tribal immunity applies in this manner, as the Ninth Circuit held, museums and tribes could easily evade NAGPRA's enforcement provision, contrary to Congress' express intent. *See* 25 U.S.C. § 3013.

## STATEMENT OF THE CASE

### A. Statutory Framework.

#### 1. Rule 19 of Federal Rules of Civil Procedure.

Rule 19 outlines the requirements for mandatory joinder. A party is "required" if (1) the court cannot provide complete relief in the party's absence, or (2) the party claims an interest relating to the subject of the action and disposing of the action in the party's absence (i) would impair the party's ability to protect its interest as a practical matter, or (ii) subject an existing party to a substantial risk incurring double, multiple, or otherwise inconsistent obligations. Fed. R. Civ. P. 19(a).

Rule 19(b) outlines four nonexclusive factors courts may consider to determine whether, "in equity and good conscience," an action should proceed when a required party cannot be joined. Fed. R. Civ. P. 19(b).

#### 2. Native American Graves Protection and Repatriation Act.

Congress enacted NAGPRA "in response to widespread debate surrounding the rights of tribes to protect the remains and funerary objects of their ancestors and the rights of museums, educational institutions, and scientists to preserve and enhance the scientific value of their collections." App. 6a-7a (citing *Bonnichsen v. United States,* 367 F.3d 864, 874

n.14 (9th Cir. 2004); S. Rep. No. 101-473, at 3 (1990)). NAGPRA provides a framework for establishing ownership and control of "Native American" remains held by museums, which include federally funded educational institutions. *See, e.g.*, 25 U.S.C. §§ 3001(8), 3002, 3005. "[T]he statute unambiguously requires that human remains bear some relationship to a *presently existing* tribe, people, or culture to be considered Native American." *Bonnichsen,* 367 F.3d at 875 (emphasis in original).

A decision to classify human remains as "Native American" under NAGPRA is arbitrary or capricious if it lacks adequate factual support. *Id.* at 879. There must be evidence to connect the remains to an existing tribe or people. *See id.* at 880-82. If that evidence does not exist, the remains are not "Native American," and NAGPRA does not apply. *See id.* at 882. As described below, whether the University erred by labeling the La Jolla remains "Native American" under NAGPRA is a matter of serious debate, and became the basis for the underlying lawsuit. USDC ECF 25, ¶¶ 19-22, 40-50, 52-58.

### B. Factual Background.

In 1976, during an excavation of the Chancellor's residence at UC San Diego, an archaeological team discovered a burial site containing the remains of two individuals. App. 5a. The La Jolla remains are among the earliest known human remains ever found in North or South America. App. 5a.

After their excavation, the La Jolla remains were stored in different locations, including UCLA, the National Museum of Natural History, and the Smithsonian Institution. App. 6a. In a letter supporting

repatriation, Vice-Chancellor Matthews admitted they were not returned to UC San Diego until 2008, which "[i]n some respects . . . represents UC San Diego's first receipt of the collection." USDC ECF 45, Exh. 1 to Exh. C, p. 3.

Pursuant to NAGPRA, the University filed a "Notice of Inventory Completion" with the Department of the Interior ("DOI") in 2008 ("2008 Notice"), and listed the La Jolla remains as "not culturally identifiable" with any tribe. USDC ECF 12, ¶ 6. The 2008 Notice was silent on whether the La Jolla remains qualified as "Native American" under NAGPRA.[1] USDC ECF 12, ¶ 6.

Pursuant to a written policy, the University makes human remains accessible for research by qualified scientists. USDC ECF 25, ¶ 36 & Exh. A to ECF 25, VIII.B. Petitioner Schoeninger, who studies subsistence strategies of early humans, asked to study the La Jolla remains in 2009, but was denied. USDC ECF 12, ¶¶ 2, 11-12. Petitioner Bettinger, whose research focuses on hunter-gatherers, sought permission to study the remains in 2010, but never received a reply. Ninth Circuit ECF 74-3, ¶¶ 2, 4. Petitioner White, renowned for his study of ancient human remains, sought the University's permission to study the remains

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[1] "The legislative history [of NAGPRA] is virtually devoid of references to material older than A.D. 1492." Ryan Seidemann, *Altered Meanings: the Department of the Interior's Rewriting of the Native American Graves Protection and Repatriation Act to Regulate Culturally Unidentifiable Human Remains*, 28 Temple Journal of Science, Technology, & Environmental Law 1, 9 n.48 (2009). During Senate hearings in 1988, Senator Daniel Inouye stated, "We are also fully in concurrence with the importance of knowing how we lived a thousand years ago or a million years ago, whatever it may be." *Id.* at n.49.

from 2009 to 2011, but never received a response. USDC ECF 25, ¶¶ 2, 34. The Ninth Circuit held Petitioners have Article III standing because the University agrees they will suffer a concrete injury, traceable to the challenged action, if the La Jolla remains are repatriated. App. 20a-21a. The Ninth Circuit found that a favorable decision likely would redress that injury because Petitioners could study the remains if they are not "Native American," and therefore not subject to NAGPRA. *Id.* at 21a-22a.

In May 2010, the DOI published new regulations requiring museums and federal agencies to transfer "culturally unidentifiable" remains to Native American tribes unless the museum or agency could prove a "right of possession." *See* 43 C.F.R. § 10.11(c). In June 2010, KCRC asked the University to transfer the La Jolla remains to KCRC under the new regulations, claiming the remains were "Native American" because the University listed them on the 2008 Notice. App. 15a.

In 2011, the University's Advisory Group on Cultural Repatriation and Human Remains and Cultural Items issued a report acknowledging "concerns expressed by experts about the scientific uncertainty that the remains are 'Native American[.]'" App. 16a.

In December 2011, the University issued its final Notice of Inventory Completion (App. 17a-18a), which stated the remains were Native American despite the Advisory Group acknowledging scientific and legal concerns about that claim. The 2011 Notice stated the remains would be transferred to the 18-member La Posta Band of Diegueno Mission Indians ("La Posta Band"). App. 18a n.5.

While studying the La Jolla remains "could reveal knowledge of great benefit to humankind generally" (Ninth Circuit ECF 74-3, ¶ 4), repatriation would cut off further research, even as technology advances. Scientists can now produce sequence data from nearly all of the 3.2 billion nucleotides of the human genome, thereby creating a new field of study, dubbed "Paleo-genomics," which studies genome sequences from ancient human remains. Ninth Circuit ECF 74-3, ¶¶ 6-9. These new studies could be critical, especially in light of mounting evidence that the previously agreed upon model of humanity's arrival in the Americas was incorrect. *See* Andrew Curry, Opinion, *Finding the First Americans*, N.Y. Times, May 20, 2012, at SR12; Heather Pringle, *The First Americans*, Scientific American, Nov. 2011, pp. 36-45at 36. Petitioners filed suit to preserve this irreplaceable source of knowledge.

### C. Procedural History.

#### 1. After Their Case is Removed, Petitioners File a Petition for Writ of Mandamus and First Amended Complaint.

Petitioners originally filed their lawsuit in Alameda County Superior Court. The University removed it to the Northern District of California. Because the parties could not agree on how to preserve the La Jolla remains, Petitioners sought and obtained a Temporary Restraining Order ("TRO"). USDC ECF 19. The court found Petitioners had shown "the requisite likelihood of irreparable harm, as well as serious questions going to the merits of their claim." USDC ECF 19, 2:1-11. After the TRO issued, the parties stipulated to a Preliminary Injunction to preserve the remains during the legal proceedings. USDC ECF 23.

In May 2012, Petitioners filed a Petition for Writ of Mandamus and First Amended Complaint for Declaratory and Injunctive Relief, naming the Regents, University officials, and KCRC as defendants. USDC ECF 25. The Petition for Writ of Mandamus ("Writ Petition"), which named only the University defendants, alleged the University violated NAGPRA by failing to make an adequate finding that the La Jolla remains qualified as "Native American" under NAGPRA. *Id.* at ¶¶ 39-50. The Petition requested a peremptory writ directing the University to (1) set aside the 2008 and 2011 Notices; (2) make a formal determination whether the remains are "Native American" under NAGPRA; and (3) cease and desist from any actions taken to transfer the La Jolla remains to the La Posta Band. USDC ECF 25, p. 22.

The First Amended Complaint alleged causes of action for (1) violation of NAGPRA, (2) breach of the public trust, and (3) violation of Petitioners' First Amendment rights. USDC ECF 25, ¶¶ 51-76. KCRC was named as a defendant only on the first cause of action. USDC ECF 25, p. 17.

### 2. The District Court Reluctantly Grants Respondents' Motions to Dismiss, Characterizing the Result as "Troubling."

The University moved to dismiss under Rule 12(b)(7) and Rule 19, on the ground that KCRC and the Kumeyaay tribes were necessary and indispensable parties that could not be joined because of tribal immunity. USDC ECF 37, pp. 5-17. KCRC moved to dismiss on the ground that it was immune as an "arm of the tribe." USDC ECF 41. The district court granted the motions. App. 79a.

In its order, the district court observed this case "raises troubling questions about the availability of judicial review under NAGPRA." App. 47a. The court recognized that although Petitioners "and the public interest are threatened with profound harm in this case, the statutory scheme and controlling case law leaves this Court with no alternative." App. 47a. Although bound by Ninth Circuit precedent, the court cited conflicting Tenth Circuit authority, *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977) (holding a "necessary" tribe was not "indispensable" under Rule 19), and stated the same result could apply here if the court had discretion to balance the Rule 19(b) factors. App. 74a-75a. After describing the dismissal as "unsatisfactory," the court "reluctantly" granted the motions. App. 77a-78a. It suggested, however, that Petitioners "appeal this order and invite the Ninth Circuit to consider whether the logic of *Manygoats* ought to be adopted in present circumstances." App. 75a, n.16.

### 3. By a 2-1 Majority, the Ninth Circuit Upholds Tribal Immunity and Dismissal Under Rule 19.

The Ninth Circuit's majority opinion did not address *Manygoats*, nor did it discuss whether the Writ Petition could survive on its own. It affirmed dismissal under Rule 19 because, in the majority's view, a "wall of circuit authority" required dismissal, "regardless of whether a remedy is available, if the absent parties are Indian tribes invested with sovereign immunity." App. 32a-33a. Citing Ninth Circuit precedent, the court held:

> Although Rule 19(b) contemplates balancing the factors, "when the necessary party is immune from suit, there may be very little

> need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor."

App. 32a (internal quotations omitted).

The majority and the dissent agreed the tribes and KCRC were immune, and rejected Petitioners' argument that Congress abrogated tribal immunity in enacting NAGPRA. App. 23a-27a, 35a, 40a & n.3.

The dissent considered the Writ Petition separately, and found KCRC and the tribes were neither necessary nor indispensable because the primary issue was whether NAGPRA even applied. App. 35a-43a. It distinguished the "wall of circuit authority" on the ground that, in each case cited by the majority, "the absent tribe was a party or signatory to a contract sought to be enforced." App. 43a. For these reasons, and because it concluded the Rule 19(b) factors generally disfavored dismissal, the dissent would have reversed the lower court's judgment and remanded the case for further proceedings without KCRC. App. 42a-44a.

**4. Current Status of the La Jolla Remains.**

The La Jolla remains are in the physical custody of the San Diego Archaeological Center. App. 6a. By stipulation and order, the University is enjoined from changing their location. USDC ECF 23. The Ninth Circuit granted Petitioners' motion to stay issuance of mandate in this matter for 90 days (until November 29, 2015) pending the filing of this petition. Ninth Circuit ECF 75.

## REASONS FOR GRANTING THE WRIT

The petition should be granted to resolve lower federal courts' misapplication of Rule 19 in cases involving Native American tribes. The Ninth Circuit majority opinion, as well as the "wall of circuit authority," automatically results in dismissal when a tribe with immunity is determined to be a "required party" under Rule 19(a). Applying Rule 19 in this manner conflicts with this Court's decision in *Provident* and the plain language of Rule 19(b) because the finding that a required party cannot be joined should start the analysis of whether a party is "indispensable," not end it.

The district court wanted to perform an equitable Rule 19(b) analysis, but Ninth Circuit precedent precluded it. App. 72a-75a. Several state supreme courts, as well as legal commentators, have rejected this short-circuiting of Rule 19(b) in cases involving tribal immunity, further necessitating review.

In upholding tribal immunity and rejecting Petitioners' congressional abrogation argument, the Ninth Circuit also disregarded Congress' clearly expressed intent that district courts serve as forums to adjudicate ownership and repatriation disputes under NAGPRA. If this Court does not address these issues of national importance, the Ninth Circuit decision will be used to prevent judicial review of NAGPRA disputes. It also has far reaching implications for access to the courts in any case where tribal immunity is asserted.

## I. LOWER FEDERAL COURTS' APPLICATION OF RULE 19 TO DISPUTES INVOLVING TRIBAL IMMUNITY UNDERMINES THE PLAIN LANGUAGE OF RULE 19 AND CONFLICTS WITH THIS COURT'S RULING IN *PROVIDENT*.

Rule 19(b) requires courts to determine whether, "in equity and good conscience," an action should proceed when a required party cannot be joined. It outlines four nonexclusive factors to balance in deciding whether an action should proceed or be dismissed. The Ninth Circuit majority opinion undermines this equitable process by automatically dismissing when the party that cannot be joined has tribal immunity.

### A. Ninth Circuit Precedent Mandates Dismissal if the Required Party Has Tribal Immunity Regardless of the Equities Specific to the Case.

#### 1. Rule 19 and *Provident* Give Courts Discretion to Proceed in the Absence of "Required" Parties.

Courts employ a three-step inquiry under Rule 19, asking: (1) "whether a nonparty should be joined under Rule 19(a)"; (2) "whether it is feasible to order that the absentee be joined"; and (3) "whether the case can proceed without the absentee." *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779-80 (9th Cir. 2005).

Rule 19(b)'s equitable factors were added in 1966.[2] At the time, courts were moving away from equitable considerations and toward a formulaic approach to joinder. *See Schutten v. Shell Oil Co.*, 421 F.2d 869, 871-74 (5th Cir. 1970) (discussing history of Rule 19 and 1966 amendment); *see also* App. 108a, Advisory Committee Notes, Rule 19, Defects in the Original Rule, Textual Defects (3), 1966 (noting original Rule 19 focused on technical rights and obligations, not pragmatic considerations).

In *Shields v. Barrow*, 58 U.S. 130 (1854), this Court characterized "indispensable" parties as those without whom a court "could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affecting the rights of [the absentee.]" *Shields,* 58 U.S. at 139-42. In applying the concept of "complete and final justice," lower courts often held that a person whose interest "may be affected" by a judgment was indispensable, and therefore had a substantive right to be joined; if they could not be joined, the action must be dismissed. *See Provident*, 390 U.S. at 123-25. This resulted in courts invariably finding the absent party was "indispensable," regardless of factual equities. *Schutten*, 421 F.2d at 871-72; *Automotive United Trades Org. v. Washington*, 285 P.3d 52, 58 (Wash. 2012) ("*Automotive*") ("[Pre-1966], a determination that a party was 'necessary' often led to a rubber-stamping of the party as 'indispensable.'"); *see also* John W. Reed,

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[2] In 2007, the word "required" replaced "necessary" and the word "indispensable" was removed. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 855-57 (2008) (2007 changes to Rule 19 are stylistic and not substantive).

*Compulsory Joinder of Parties in Civil Actions*, 55 Mich. L. Rev. 327, 340-46 (1957).

Shortly after the 1966 amendments, this Court interpreted the revised Rule 19 in *Provident*. That case involved a declaratory judgment action by the estate of an individual killed in an automobile accident against the estate of the driver and the liability insurer of the vehicle owner. *Provident*, 390 U.S. at 104-06. Although the case had gone to trial, the Third Circuit held it should have been dismissed for failure to join the vehicle owner as an indispensable party, reasoning that a judgment against the insurer could diminish the owner's funds for future lawsuits. *Id.* at 106-07. The Third Circuit ruled there was no need to analyze Rule 19(b) because the potential adverse effect on the owner's interest mandated dismissal. *Id.*

This Court reversed, concluding the "inflexible approach adopted by the Court of Appeals in this case exemplifies the kind of reasoning that the Rule was designed to avoid[.]" *Id.* at 107. The Court held the Third Circuit erred in not applying Rule 19(b)'s equitable factors, and if it had, "it could hardly have reached the conclusion it did." *Id.* at 112, 116-25. The Court rejected the notion that the inability to join a party whose interest may be adversely affected by a judgment always requires dismissal. *Id.* at 118-20. Rather, Rule 19(b) starts with the premise that a "necessary party" cannot be joined, and directs courts to then determine whether that party is "indispensable" in the context of the particular litigation. *Id.*

### 2. Federal Courts Consistently Dismiss Cases Involving Tribal Immunity Without Adequately Considering Rule 19(b).

Notwithstanding *Provident*'s admonition against dismissing cases solely for prejudice to an absent party, federal courts now apply Rule 19 to automatically dismiss cases involving tribal immunity. Relying upon Ninth Circuit precedent, federal courts dismiss these actions on the ground that "when the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor."[3] App. 32a (internal quotations omitted); *Enterprise Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890, 892-94 (10th Cir. 1988); *see also Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) ("[W]e have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs."); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161-63 (9th Cir. 2002); *Manybeads v. United States*, 209 F.3d 1164, 1166 (9th Cir. 2000); *Clinton v. Babbitt*, 180 F.3d 1081, 1090-91 (9th Cir. 1999) (tribe's interest in immunity outweighed plaintiffs' interest in litigating their claim); *Kescoli v. Babbitt*, 101 F.3d 1304, 1310-11 (9th Cir. 1996) (although two of four Rule 19(b) factors favored plaintiffs, tribal immunity was decisive); *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 478-80 (7th

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[3] As noted by the district court, only one federal appellate court has found that a tribe is "necessary," but not "indispensable." App. 74a (finding *Manygoats* the "sole exception" to dismissal where a tribe is a necessary party.) *Manygoats* is discussed at Section I.C.1, *infra*.

Cir. 1996) ("A plaintiff's inability to seek relief, however, does not automatically preclude dismissal, particularly where that inability results from a tribe's exercise of its right to sovereign immunity."); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460-61 (9th Cir. 1994); *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341, 1345, 1347-48 (6th Cir. 1993); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547-48 (2d Cir. 1991); *Confederated Tribes*, 928 F.2d at 1500.

### 3. The District Court Lacked Discretion to Balance the Equities of This Case Under Ninth Circuit Precedent.

Both the district court and the Ninth Circuit cited the "wall of circuit authority" as the primary reason to dismiss this case. App. 32a-33a; 73a-74a. In doing so, the district court stated the fourth Rule 19(b) factor, Petitioners' lack of an alternative forum, "strongly disfavors dismissal," but found it lacked discretion to fully consider this factor given Ninth Circuit precedent:

> While [the phrase "in equity and good conscience"] would appear to afford the Court some discretion in determining whether or not to dismiss under Rule 19, . . . virtually all cases to consider the question appear to dismiss under Rule 19, regardless of whether a remedy is available, if the absent parties are Indian tribes invested with sovereign immunity.

App. 73a.

"[T]his Circuit has consistently dismissed actions under Rule 19 where it concludes an Indian tribe is 'necessary' yet not capable of joinder due to sovereign immunity, and therefore, this Court does not have the discretion to decide otherwise." App. 75a.

Giving decisive weight to a tribe's immunity contradicts the equitable purpose of Rule 19(b). Because Ninth Circuit precedent prevented the district court from exercising discretion, this case is an appropriate vehicle to correct the ongoing misapplication of Rule 19, and to mandate compliance with *Provident*.

### B. This Court Should Clarify Whether Its Statement in *Pimentel* – That Dismissal "Must Be Ordered" When a Foreign Sovereign Cannot Be Joined – Extends to Tribal Immunity Cases.

In *Pimentel*, this Court interpreted Rule 19(b) in the context of foreign sovereign immunity, finding that when a foreign sovereign is a "required" party and cannot be joined, dismissal "must be ordered" if the interests of the absent sovereign could be injured. *Pimentel*, 553 U.S. at 867. Lower federal courts have extended this reasoning to dismiss cases involving tribal immunity.

*Pimentel* was an interpleader action concerning ownership of property allegedly stolen by Ferdinand Marcos. The Court held the action could not proceed without the Republic and a Philippine commission, which were required parties, but immune under the Foreign Sovereign Immunity Act. *Id.* at 863-64. Reversing the Ninth Circuit, the Court held that in balancing the Rule 19(b) factors, insufficient weight was given to the foreign sovereigns' immunity. *Id.* at 864-69. The majority stated, "[W]here sovereign

immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Id.* at 867.

The Court then analyzed the remaining Rule 19(b) factors and found the other parties would not be prejudiced by dismissal. Specifically, the fourth factor – whether plaintiff would be left without an adequate remedy – did not weigh in favor of proceeding. The "plaintiff" was an interpleader, and the Court found that dismissal served the purpose of the interpleader: "to prevent a stakeholder from having to pay two or more parties for one claim." *Id.* at 872. Additionally, a separate action was pending in a Philippine court that could resolve the ownership issue. *Id.* at 858, 872-73.

The majority acknowledged that "the balance of equities may change in due course." *Id.* at 873. This language suggests the *Pimentel* majority did not intend its holding – that foreign immunity be given dispositive weight under Rule 19(b) when there is a potential for injury and the sovereign's claims are not frivolous – to operate as a bright line rule mandating dismissal in all immunity cases.

Lower courts now apply *Pimentel* in this manner, and have expanded it to tribal immunity cases. *See, e.g., Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1283-84 (10th Cir. 2012) (citing *Pimentel* to support holding that an action should be dismissed where a tribe could not be joined because of immunity); *Klamath Tribe Claims Comm. v. United States*, 106 Fed. Cl. 87, 95-96 (Fed. Cl. 2012), *aff'd*, 541 Fed. Appx. 974, 980 (Fed. Cir. 2013) (citing *Pimentel* for proposition that if a required party has immunity, "the entire case must be dismissed" if the interests of the

sovereign could be injured, even when no alternative forum exists); *Vann v. Salazar*, 883 F. Supp. 2d 44, 48-50 (D.D.C. 2011), *rev'd on other grounds, Vann v. United States Dep't of Interior*, 701 F.3d 927 (D.C. Cir. 2012) (citing *Pimentel* as mandating dismissal in tribal immunity cases); *Brewer v. Hoppa*, 2010 WL 3120105 *2-3 (W.D. Wash. Aug. 9, 2010).

One district court rejected a tribe's argument that tribal immunity "must be given cardinal weight in the indispensability calculus of 19(b)" under *Pimentel*. *Diné Citizens v. U.S. Office of Surface Mining*, 2013 WL 68701, *3-6 (D. Colo. Jan. 4, 2013). The *Diné* court declined to apply *Pimentel*, distinguishing it on several grounds, including that (1) the *Diné* plaintiffs challenged alleged non-compliance with federal law, whereas the *Pimentel* plaintiffs sought to resolve property ownership; (2) unlike *Pimentel*, the *Diné* plaintiffs lacked an alternative forum, which "weighs crushingly against dismissal"; and (3) "most vitally," *Pimentel* addressed foreign sovereign immunity, which raises equitable considerations that may not exist in the same measure for tribal immunity. *Id.* at *3-6. Instead, the court found *Manygoats* to be persuasive and applied its reasoning to hold that although the tribe was "necessary," it was not indispensable, and the case could proceed without it. *Id.* at *6.

With few exceptions, federal courts apply *Pimentel* as a bright line rule for dismissal in cases involving tribal immunity. Because this application is at odds with Rule 19's requirement for a fact specific balancing of the equities, and because, as noted by the *Diné* court, *Pimentel* is distinguishable from tribal immunity cases, the Court should grant certiorari to clarify whether *Pimentel* requires dismissal of cases in which a tribe asserts immunity.

### C. Courts That Undertake a Complete Rule 19(b) Analysis Allow Cases to Proceed Even Though a Required Party Has Tribal Immunity.

Courts that are not bound by the Ninth Circuit's mandate to dismiss when an absent tribe asserts tribal immunity have permitted cases to proceed after properly balancing the Rule 19(b) factors.

#### 1. *Manygoats* Applied Rule 19(b) to Hold an Administrative Challenge Should Proceed Even Though a Tribe Was Both Necessary and Immune.

As noted, *Manygoats* did not mandate dismissal when a necessary party asserted tribal immunity. *Manygoats,* 558 F.2d at 558-59. In *Manygoats*, members of the Navajo Tribe sought to enjoin a uranium mining agreement, arguing that an Environmental Impact Statement ("EIS") was inadequate. *Manygoats,* 558 F.2d at 557. The Tribe was held a "necessary" party under Rule 19(a) because it would receive financial benefits under the agreement. *Id.* at 558.

Under Rule 19(b), the Tenth Circuit held the relief sought, a ruling on the adequacy of the EIS, would not prejudice the Tribe because it "does not call for any action by or against the Tribe." *Id.* at 558-59. On the other hand, dismissal for nonjoinder would produce an "anomalous result," because no one, except the Tribe, could seek review of an EIS for development on Indian lands. *Id.* at 559. This result would be inconsistent with NEPA's policy. *Id.* Therefore, "[i]n equity and good conscience," the Tenth Circuit ruled the case "should and can proceed without the presence of the Tribe as a party." *Id.*

The district court below demonstrated frustration with its lack of discretion by observing, "as in *Manygoats*, dismissal appears to conflict with certain aspects of NAGPRA, including its enforcement provision, which creates a private right of action." App. 76a. It described the practical effect of tribal immunity on NAGPRA cases:

> [I]nvoking sovereign immunity selectively permits the tribes to claim the benefits of NAGPRA, without subjecting themselves to its attendant limitations.

App. 78a.

Had the district court been able to exercise discretion under Rule 19(b), as in *Manygoats*, it could have reached a similar result: allowing the case to proceed because a judgment would not require action by or against the tribes, and because the lack of an alternative forum creates an "anomalous result" that allows tribes to prevent judicial review of questionable NAGPRA decisions.

### 2. State Courts of Last Resort Reject Federal Courts' Inflexible Application of Rule 19 and Allow Actions to Proceed Even if a "Required Party" has Tribal Immunity.

All state high courts to address the issue have ruled that the public interest in adjudicating the legality of government actions and the plaintiff's lack of an alternative forum can outweigh tribal immunity under state joinder rules based on Rule 19.

In *Automotive*, the Washington Supreme Court held that absent tribes were necessary, but not indispensable, parties to a lawsuit challenging the

constitutionality of disbursements made to tribes by the State of Washington. *Automotive*, 285 P.3d at 61. Plaintiff, an automotive trade organization, sought a declaration that disbursements under the compacts were unconstitutional, and a writ of prohibition against future disbursements. *Id.* at 54.

The state moved to dismiss on the ground that the tribes were necessary and indispensable, but could not be joined due to tribal immunity. *Id.* Under CR 19(a), Washington's analog to Rule 19(a),[4] the court found the tribes were necessary parties because they had a financial interest, but could not be joined because they were immune. *Id.* at 55-57.

The Washington court reviewed the history of Rule 19 and *Provident*, noting that both the federal and state joinder rules were amended in 1966 to eliminate the application of rigid standards. *Id.* at 57-58. After addressing each CR 19(b) factor, the *Automotive* court held the case could proceed. *Id.* at 58-61.

The court emphasized that its ruling did not undermine the principles of tribal immunity, "but rather recognizes that dismissal would have the effect of immunizing *the State*, not the tribes, from judicial review." *Id.* at 60 (emphasis in original). Similarly, the dismissal here immunizes *the University* from judicial review.

In *Panzer v. Doyle*, 680 N.W.2d 666 (Wis. 2004), *overruled on other grounds as stated in Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408 (Wis.

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[4] "Because CR 19 is based on and is substantially similar to [Rule] 19, we may look to the abundant federal cases interpreting that rule for guidance." *Automotive,* 285 P.3d at 55; *see* App. 121a-122a.

2006), the Wisconsin Supreme Court found a lawsuit regarding the governor's authority to enter into gaming contracts with tribes could proceed without the tribes, because dismissing the case would "deprive this court of its own core power to interpret the Wisconsin Constitution and resolve disputes between co-equal branches of state government." *Id.* at 670, 683.

Although *Panzer* did not perform an indispensable party analysis *per se*, it cited with approval *Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W.2d 474 (Wis. Ct. App. 2002) (analyzing Wisconsin's corollary to Rule 19 – Wis. Stat. § 803.03),[5] finding its own conclusion consistent with the *Dairyland* analysis. *Panzer*, 680 N.W.2d at 683 n.20. In *Dairyland*, a Wisconsin court of appeals rejected the federal courts' approach to Rule 19, finding prejudice to an absent tribe is not determinative:

> If the prejudice factor controls the indispensable party determination, there would be little point in conducting a separate indispensable party inquiry. The rule could simply say that a party is both necessary and indispensable whenever the requirements of [the state equivalent of 19(a)] are satisfied, but that is not what the rule provides.

*Dairyland,* 655 N.W.2d at 485.

The court ruled the lawsuit should proceed because any prejudice to the tribes was outweighed by the fact that dismissal would leave plaintiff without an adequate remedy, and "an important legal issue having

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[5] App. 123a-128a.

significant public policy implications will evade resolution." *Id.* at 487.

New York's highest court has held tribes that are necessary parties are not indispensable in a challenge to the governor's authority to enter into gaming agreements with Native American tribes. *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047, 1057-59 (N.Y. 2003). Weighing the five factors of CPLR 1001(b),[6] New York's version of Rule 19(b), the Court of Appeal held tribal immunity is outweighed by the lack of an alternative forum for plaintiff, and more importantly, the public's interest in judicial review of executive branch decisions:

> [I]f we hold that the Tribe is an indispensable party . . . no member of the public will ever be able to bring this constitutional challenge. In effect, the Executive could sign agreements with any entity beyond the jurisdiction of the Court, free of constitutional interdiction. The Executive's actions would thus be insulated from review, a prospect antithetical to our system of checks and balances.

*Id.* at 1058.

Like Petitioners here, plaintiffs in these lawsuits sought equitable relief against decisions by state actors in excess of their lawful authority. Absent clarification from this Court, the ability to obtain relief for executive overreaching when a "required party" has tribal immunity will be significantly hampered. Federal courts should have discretion to do equity in these situations, as Rule 19(b) allows, as *Provident* compels, and as state high courts have done.

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[6] App. 117a-120a.

### 3. Recent Law Review Articles Criticize the Application of Rule 19 in Cases Involving Tribal Immunity as Contrary to the Plain Language and Intent of Rule 19.

In addition to state high courts, legal commentators have noted the perverse effects of federal courts' application of Rule 19 in cases involving tribal immunity. *See* Katherine Florey, *Making Sovereigns Indispensable:* Pimentel *and the Evolution of Rule 19*, 58 UCLA L. Rev. 667, 682-97 (2011); Ross D. Andre, Comment, *Compulsory [Mis]joinder: The Untenable Intersection of Sovereign Immunity and Federal Rule of Civil Procedure 19*, 60 Emory L.J. 1157, 1179-96 (2011); Nicholas V. Merkley, *Compulsory Party Joinder and Tribal Sovereign Immunity: A Proposal to Modify Federal Courts' Application of Rule 19 to Cases Involving Absent Tribes as "Necessary" Parties*, 56 Okla. L. Rev. 931, 947-49 (2003).

These commentators criticize federal courts' current application of Rule 19 as being at odds with the plain language and intent of the rule as set forth in *Provident*. *See, e.g.*, Florey, *supra*, at 686 ("Despite courts' efforts to locate the rule of indispensable sovereigns within *Provident*'s analysis, the policy nonetheless remains both anomalous within the realm of Rule 19 jurisprudence and potentially in tension with *Provident*'s broader mandates."); Andre, *supra*, at 1197 ("While the overall trend in Rule 19 jurisprudence since its revision in the 1960s has been toward flexible solutions to each unique dispute, its treatment in the context of sovereign immunity is an outlier."); Merkley, *supra*, at 955-56, 966-67 (arguing that federal courts' application of Rule 19 in cases involving absent tribes fails to serve the interests of the plaintiff

and society at large because of an overemphasis on the potential prejudice to the tribe).

### D. This Court Should Grant Review to Affirm That a Rule 19 Analysis Must Be Equitable and Fact Specific, as the Dissent Recognized.

While the Ninth Circuit majority mischaracterized Petitioners' action as a property dispute (App. 29a-30a), the dissent correctly viewed it as a dispute about whether the University complied with NAGPRA in designating the La Jolla remains as "Native American." App. 36a. The dissent stated that "all parties have 'have an equal interest in an administrative process that is lawful,'" and that there is no legally protected interest in an agency's procedures. App. 38a & n.2 (citing *Makah Indian Tribe v. Verity,* 910 F.2d 555, 558-59 (9th Cir. 1990)).

Applying Rule 19 to the underlying Writ Petition, the dissent held that KCRC was not a "necessary" party because it had only a general interest in the University's determination about whether the remains were "Native American" under NAGPRA, and that the University had an identical interest in defending its designation.[7] App. 35a-40a. The dissent

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[7] The dissent's finding that KCRC and the tribes are not "necessary parties" under Rule 19(a) is consistent with Tenth Circuit rulings that in a suit challenging an administrative decision, any prejudice to absent tribes is reduced by the presence of the administrative decision maker, whose interest in defending its decision is aligned with the tribe's interest in having the decision upheld. *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001), *superseded by statute on other grounds as stated in Citizens Exposing Truth About Casinos v. Kempthorne,* 492 F.3d 460, 462 n.1, 468 (D.C. Cir. 2007); *Kansas v. United States*, 249 F.3d 1213, 1225-27 (10th Cir. 2001).

found that because all four Rule 19(b) factors favored proceeding with the litigation, KCRC was not an "indispensable" party, and the litigation should proceed. App. 40a-43a.

Consistent with the rationale of *Provident*, 390 U.S. at 116-19, the dissent applied Rule 19(b) in a manner that gave weight to the facts alleged and the relief sought in the Writ Petition. App. 35a-36a, 40a-42a. By failing to conduct the same analysis, the majority opinion ignored this Court's directive in *Provident*.

Because the majority of federal courts automatically dismiss cases under Rule 19 when a necessary party has tribal immunity, this Court should grant review to clarify how Rule 19 applies in these cases and to mandate compliance with *Provident*.

## II. THE SCOPE OF DISTRICT COURTS' AUTHORITY TO ADJUDICATE DISPUTES UNDER NAGPRA IS AN ISSUE OF NATIONAL IMPORTANCE THAT WARRANTS IMMEDIATE REVIEW.

When a tribe has immunity, it may not be sued unless the tribe waives its immunity or Congress abrogates it. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 416-18 (2011); *see also id.* at 418-23 (holding arbitration provisions in contract constituted clear waiver). Any such waiver must be "clear"; likewise, Congress must "unequivocally" express its intent to abrogate immunity. *See id.* at 418 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)).

Both the district court and the Ninth Circuit considered whether Congress abrogated tribal immunity in enacting NAPGRA, but concluded it did not. App. 23a-25a; 57a-60a. The lower courts applied the "unequivocally expressed" standard in an overly narrow fashion to reach this result.

NAGPRA provides both an independent basis for jurisdiction and a private right of action for "any person alleging a violation of [NAGPRA]." 25 U.S.C. § 3013; *Bonnichsen v. United States*, 969 F. Supp. 614, 627 (D. Or. 1997). The plain language of § 3013 and NAPGRA's other provisions make clear that Congress intended district courts to adjudicate competing interests in Native American remains, notwithstanding the judge-created doctrine of tribal sovereign immunity.

### A. The District Court and the Ninth Circuit Hold NAGPRA's Enforcement Provision Does Not Abrogate Tribal Immunity.

On its own initiative, the district court analyzed whether tribal immunity applied, since Congress expressly gave district courts jurisdiction to hear NAGPRA claims. App. 57a-65a. The district court noted only one case that discussed the issue indirectly, *Rosales v. United States*, 89 Fed. Cl. 565, 584-86 (Fed. Cl. 2009),[8] but found *Rosales* did not expressly consider whether tribal immunity applied under

[8] *See also Rosales v. United States*, No. 07CV0624, 2007 WL 4233060, at *6-10 (S.D. Cal. Nov. 28, 2007) (dismissed on the alternate ground that plaintiffs failed to allege federal agencies had any duties under NAGPRA); *Hawk v. Danforth*, No. 06-C-223, 2006 WL 6928114, at *1 (E.D. Wis. Aug. 17, 2006) (declining to address tribal immunity and questioning whether it applied).

NAGPRA. App. 57a, n.10. The district court concluded that NAGPRA's enforcement provision, 25 U.S.C. § 3013, did not waive tribal immunity (assuming a "required party" can assert tribal immunity in a dispute between non-tribes over whether particular remains are covered by NAGPRA). App. 58a-60a.

The Ninth Circuit also concluded NAGPRA's enforcement provision did not abrogate tribal immunity, premised on the assumption that the tribes and KCRC would be immune absent waiver or congressional abrogation. App. 23a-24a. The majority opined that 25 U.S.C. § 3013 contained no language expressly abrogating tribal immunity, and rejected Petitioners' other arguments on the immunity issue. App. 24a-25a.

### B. The Lower Courts' Decisions Defeat Congress' Clear Intent to Allow Judicial Review, and Destroy NAGPRA's Ability to Resolve Claims for Covered Items Held By Museums.

Read as a whole, NAGPRA unequivocally expresses congressional intent to give district courts authority to resolve disputes arising under NAGPRA. In addition to the fact that 25 U.S.C. § 3013 authorizes a private right of action for declaratory and injunctive relief, the following provisions of NAGPRA show Congress intended to give district courts the power to render binding decisions in disputes involving one or more tribes:

- 25 U.S.C. § 3002 – NAGPRA's "Ownership" provision, governing Native American cultural items discovered on Federal or tribal lands, contemplates that multiple tribes could make competing claims. *See*,

*e.g.*, 25 U.S.C. § 3002(c)(2) (establishes "preponderance of the evidence" standard for ranking strength of cultural relationship when evaluating competing claims).

- 25 U.S.C. § 3003 – NAGPRA's "Inventory" provision requires covered entities to identify the geographical and cultural affiliation of each item. *See* 25 U.S.C. § 3003(a), (b)(2). This requirement facilitates the identification of tribal claimants.
- 25 U.S.C. § 3005 – NAGPRA's "Repatriation" provision contemplates that more than one tribe may assert a right to repatriation, *and that district courts could resolve competing claims*. *See* 25 U.S.C. § 3005(e) ("Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this chapter, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition *or the dispute is otherwise resolved* pursuant to the provisions of this chapter or *by a court of competent jurisdiction*.") (emphasis added).
- 25 U.S.C. § 3006 – the federal regulation implementing NAGPRA's "Review Committee" provision expressly states that any action of the Review Committee established by the Secretary of the Interior is *advisory only and not binding*. *See* 43 C.F.R. § 10.16(b); *see also Fallon Paiute-Shoshone*

*Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1221-22 (D. Nev. 2006) (confirming same).

- 25 U.S.C. § 3009(3) – "[n]othing in [NAGPRA] shall be construed to . . . deny or otherwise affect access to any court."[9]

Although none of these provisions directly references tribal immunity, no "magic words" are required to show Congress' intent to abrogate it. *See F.A.A. v. Cooper*, 132 S. Ct. 1441, 1448 (2012). Rather, Congress need only express its intent "unequivocally." *See C & L Enterprises*, 532 U.S. at 418; *Santa Clara Pueblo*, 436 U.S. at 58-59.

In the analogous context of voluntary waiver, this Court has held a tribe's agreement, in a standard form construction contract, (1) to arbitrate disputes, (2) be governed by Oklahoma state law, and (3) to have arbitral awards enforced in "any court of competent jurisdiction of [Oklahoma]," was clear evidence of waiver. *See C & L Enterprises*, 532 U.S. at 414, 418-22. Here, Congress decreed that district courts have jurisdiction over "any action brought by any person" alleging violation of a statute that specifically created a system to adjudicate repatriation and ownership disputes between multiple tribes. Just as the arbitration clause in *C & L Enterprises* would be meaningless if a party asserted sovereign immunity (*id.* at 422), Congress' provisions for review and enforcement of NAGPRA disputes would be meaningless if a tribal claimant asserted immunity.

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[9] 25 U.S.C. § 3009(4) also states nothing in NAGPRA is intended to "limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations," but this provision does not specifically reference tribal immunity.

The Ninth Circuit did not address the effect on tribal immunity of any provision other than the enforcement provision. App. 23a-25a. Under the majority's holding, any tribe designated by a museum to receive remains could cut off other parties' access to the courts by asserting tribal immunity. This holds true even if the repatriation decision is unsupported by the evidence; there is another tribal claimant with a potentially superior claim; or non-qualifying remains were erroneously included on an inventory, as here.

Even if the United States could still bring suit against a tribe, as the Ninth Circuit suggests (App. 25a-26a), that would not resolve disputed claims for items held by museums, because the United States does not represent the museums' interests, nor is there a NAGPRA requirement that the United States file suit on their behalf. Likewise, the United States does not represent the interests of Petitioners, and cannot be compelled to sue on their behalf. The Ninth Circuit's holding thus creates significant disparity in access to the courts based on the identity of the repatriating party – federal agencies would have access while museums would not – a result not supported by the plain language of NAGPRA.

Taken together, all of NAGPRA's provisions show Congress intended to make district courts available to resolve disputes involving one or more tribal claimants. *See* 25 U.S.C. §§ 3005(e), 3006, 3013; 43 C.F.R. § 10.16(b). If one tribe could cut off relief for all other parties by asserting immunity, Congress' intent would be subverted. But that is the binding result of the Ninth Circuit holding that the tribes are immune, and Congress did not abrogate that immunity. The majority opinion renders NAGPRA useless as a tool to resolve competing claims for items held by museums,

despite unequivocal language authorizing courts to resolve these disputes.

### C. In The Alternative, This Case is an Excellent Vehicle to Consider Whether the Doctrine of Tribal Immunity Extends to Situations in Which No Relief is Sought Against the Tribe, and There is No Other Forum That Can Bind the Parties.

This Court recently upheld the doctrine of tribal immunity in a suit against a tribe arising from off-reservation commercial activities. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2032-39 (2014). The *Bay Mills* majority emphasized, however, that Michigan was not without recourse to right the wrong it alleged, and reserved judgment on whether immunity would apply if there were no other recourse. *Id.* at 2036, n.8 ("We need not consider whether the situation would be different if no alternative remedies were available."); *see also* App. 72a (noting University did not contest that relief would effectively be unavailable to plaintiffs); *Nevada v. Hicks*, 533 U.S. 353, 364-65 (2001) (tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties); *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir. 1980) ("There has to be a forum where the dispute can be settled."). This case presents just such a situation, because there is no alternate forum, theory, or strategy that would allow Petitioners to challenge the University's designation of the La Jolla remains as "Native American," if the lower courts' rulings are upheld.[10]

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[10] This Court may address whether immunity extends to tribes joined under Rule 19 to a NAGPRA claim, because the district

In contrast to this Court's opinion in *Bay Mills*, 134 S. Ct. at 2035, the district court here rejected any argument that the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), could be used to join the tribe or KCRC. App. 78a-79a. Observing that personal-capacity suits are appropriate "only where individual assets or personal actions are targeted," the district court opined that advocating for repatriation could not support such a suit, and was almost certainly constitutionally protected. App. 78a.

Although 25 U.S.C. § 3003 requires that inventories be completed "in consultation with" tribal governments, NAGPRA does not grant the La Posta Band and KCRC any authority to decide whether the La Jolla remains qualify as "Native American." This Court has not determined whether a tribe's interest in preserving its original natural rights in matters of local self-government is sufficient to support immunity in disputes under NAGPRA, a statute that governs how non-members interact with tribes and grants jurisdiction to district courts to resolve disputes. 25 U.S.C. §§ 3003(b)(1)(A), 3005(e), 3007, 3013.

Tribal self-determination does not benefit from transferring human remains that have no relationship to a presently existing tribe, people, or culture. *See Bonnichsen*, 367 F.3d at 876. Tribal immunity should not extend to situations where no relief is sought against a tribe and no other forum is available. Whether tribes may assert immunity under these

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court's opinion addressed whether tribal immunity may be asserted as a defense to NAGPRA claims, and because both the district court and the Ninth Circuit addressed whether KCRC was entitled to immunity as an "arm of the tribe." *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); App. 26a-27a; 57a-62a & n.10.

circumstances is a matter of national importance because, absent clarification, parties whose interests are affected by NAGPRA – including tribes – will find themselves without a forum to resolve their disputes.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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