

No. \_\_\_\_\_

---

---

**In The  
Supreme Court of the United States**

---

---

STATE OF CALIFORNIA; CALIFORNIA GAMBLING  
CONTROL COMMISSION, an agency of the State  
of California; and ARNOLD SCHWARZENEGGER,  
Governor of the State of California,

*Petitioners,*

v.

CACHIL DEHE BAND OF WINTUN INDIANS  
OF THE COLUSA INDIAN COMMUNITY,  
a federally recognized Indian Tribe,

*Respondent.*

---

---

**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

---

---

**PETITION FOR A WRIT OF CERTIORARI**

---

---

EDMUND G. BROWN JR.  
Attorney General of California  
MANUEL M. MEDEIROS  
State Solicitor General  
ROBERT L. MUKAI  
Senior Assistant Attorney General  
SARA J. DRAKE  
Supervising Deputy Attorney General  
PETER H. KAUFMAN  
Deputy Attorney General

*Counsel of Record*

110 West A Street, Suite 1100

San Diego, CA 92101

P.O. Box 85266

San Diego, CA 92186-5266

Telephone: (619) 645-2020

Fax: (619) 645-2012

*Counsel for Petitioners*

## QUESTIONS PRESENTED

In 1999, the State of California and sixty-one federally recognized tribes entered into virtually identical tribal-state class III gaming compacts (Compacts) under the authority of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (IGRA). The Compacts allow those tribes to operate slot machines if they have been issued licenses for those devices from a prioritized and limited license pool established by the Compacts, or if they have obtained a compact amendment allowing them to operate slot machines without reference to that license pool. The questions presented are:

1. In applying Federal Rule of Civil Procedure 19 (Rule 19), may a federal court, consistent with the rule of decision in *Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180 (2008), utilize the authority it has under Rule 19(b) to safeguard (through the shaping of relief) the legally protected interest of an absent sovereign as a basis for finding that the absent sovereign is not a required party within the meaning of Rule 19(a)?

2. May the asserted ability of a court of appeals to resolve inconsistent district court decisions on the same claim for relief be relied upon to conclude that an absent person need not be joined under Rule 19(a)?

TABLE OF CONTENTS

	Page
Petition for a writ of certiorari.....	1
Opinions below .....	1
Jurisdiction .....	1
Statutory provisions involved .....	2
Statement .....	2
Reasons for granting the petition .....	10
I. The Court of Appeals' Importation of an Equitable Rule 19(B) Consideration Into a Rule 19(A) Legal Analysis in Order to Avoid Consideration of an Absent Party's Sovereign Immunity Warrants This Court's Review .....	13
II. The Ninth Circuit's Refusal to Recognize the State's Exposure to Inconsistent Obligations, Enabling the Court to Evade Consideration of the Absent Tribes' Sovereign Immunity, Warrants This Court's Review ....	18
Conclusion.....	20

APPENDIX

Ninth Circuit order amending opinion and denying the petition for panel rehearing and petition for rehearing en banc and amended opinion (August 8, 2008), Case No. 06-16145, <i>Cachil dehe Band of Wintun Indians of the Colusa Indian Community v. State of California, et al.</i> (Appendix A).....	App. 1
---	--------

## TABLE OF CONTENTS – Continued

	Page
Ninth Circuit opinion (Aug. 8, 2008), Case No. 06-16145, <i>Cachil dehe Band of Wintun Indians v. State of California, et al.</i> (Appendix B) .....	App. 33
District court memorandum and order granting defendants' motion for judgment on the pleadings (May 16, 2006), Case No. CIV S-04-2265 FCD KJM, <i>Cachil dehe Band of Wintun Indians of the Colusa Indian Community v. State of California, et al.</i> (Appendix C) .....	App. 64
District court judgment in a civil case (May 16, 2006), Case No. CIV S-04-2265 FCD KJM, <i>Cachil dehe Band of Wintun Indians of the Colusa Indian Community v. State of California, et al.</i> (Appendix D) .....	App. 86
Ninth Circuit memorandum (Aug. 8, 2008), Case No. 06-55259, <i>Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Arnold Schwarzenegger, et al.</i> (Appendix E) .....	App. 87
District court order granting in part and denying in part plaintiff's motion for reconsideration (Mar. 22, 2005), Case No. 04-CV-01151 W, <i>Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Arnold Schwarzenegger, et al.</i> (Appendix F) .....	App. 91

## TABLE OF CONTENTS – Continued

	Page
Ninth Circuit order denying petition for panel rehearing and petition for rehearing en banc (Nov. 14, 2008), Case No. 06-55259, <i>Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Arnold Schwarzenegger, et al.</i> (Appendix G).....	App. 104
Ninth Circuit memorandum (Oct. 6, 2008), Case No. 07-55536, <i>San Pasqual Band of Mission Indians v. State of California, et al.</i> (Appendix H).....	App. 106
District court order granting motion to dismiss second amended complaint (Mar. 20, 2007), Case No. 06-cv-0988-LAB (AJB), <i>San Pasqual Band of Mission Indians v. State of California, et al.</i> (Appendix I).....	App. 109
Ninth Circuit order denying petition for panel rehearing (Dec. 29, 2008), Case No. 07-55536, <i>San Pasqual Band of Mission Indians v. State of California, et al.</i> (Appendix J)....	App. 146
Ninth Circuit petition for rehearing en banc or panel rehearing (Aug. 28, 2008), Case No. 06-16145, <i>Cachil dehe Band of Wintun Indians of the Colusa Indian Community v. State of California, et al.</i> (Appendix K) .....	App. 148
Ninth Circuit petition for rehearing en banc or panel rehearing (Aug. 28, 2008), Case No. 06-55259, <i>Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Arnold Schwarzenegger, et al.</i> (Appendix L).....	App. 169

## TABLE OF CONTENTS – Continued

	Page
Ninth Circuit petition for panel rehearing and suggested rehearing en banc (Oct. 27, 2008), Case No. 07-55536, <i>San Pasqual Band of Mission Indians v. State of California, et al.</i> (Appendix M).....	App. 182
Tribal-State Gaming Compact (Sep. 10, 1999) (Appendix N) .....	App. 197
Amendment to the Tribal-State Compact Between the State of California and the Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation (Jun. 21, 2004) (Appendix O) .....	App. 266
Amendment to the Tribal-State Compact Between the State of California and the Penchanga Band of Luiseno Indians (Appendix P).....	App. 315
Federal Rules of Civil Procedure, Rule 19 (Appendix Q) .....	App. 379

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Enterprise Mgmt. Consultants, Inc. v. United States</i> , 883 F.2d 890 (10th Cir. 1989) .....	17
<i>Fluent v. Salamanca Indian Lease Auth.</i> , 928 F.2d 542 (2nd Cir. 1991).....	16
<i>Haas v. Jefferson Nat. Bank of Miami Beach</i> , 442 F.2d 394 (5th Cir. 1971) .....	13, 14
<i>Keweenaw Bay Indian Community v. Michigan</i> , 11 F.3d 1341 (6th Cir. 1993).....	18
<i>Provident Tradesmens Bank &amp; Trust Co. v. Patterson</i> , 390 U.S. 102 (1968) .....	13
<i>Republic of the Philippines v. Pimentel</i> , 128 S. Ct. 2180 (2008).....	<i>passim</i>
<i>Shields v. Barrow</i> , 17 Howard 130, 15 L.Ed. 158 (1855).....	13
<i>Wichita &amp; Affiliated Tribes v. Hodel</i> , 788 F.2d 765 (D.C. Cir. 1986).....	12
STATUTES	
25 U.S.C. §§ 2701-2721 .....	i
28 U.S.C. § 1254(1) .....	1

TABLE OF AUTHORITIES – Continued

Page

COURT RULES

Federal Rule of Civil Procedure

Rule 19.....	<i>passim</i>
Rule 19(a) .....	<i>passim</i>
Rule 19(b) .....	<i>passim</i>
Rule 19(b)(2).....	16

OTHER AUTHORITIES

Wright & Miller, 7 Fed. Prac. & Proc. 3d § 1604.....	13, 14
---	--------



**PETITION FOR A WRIT OF CERTIORARI**

Arnold Schwarzenegger, Governor of California, the State of California and the California Gambling Control Commission, appearing by and through Edmund G. Brown Jr., Attorney General of California, respectfully petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

**OPINIONS BELOW**

The opinions of the court of appeals (App. A, *infra*, at 1-32; App. B, at 33-63) are reported at 536 F.3d 1034 and 547 F.3d 962. The opinion of the district court is unreported. (App. C, *infra*, at 64-85.)

**JURISDICTION**

The judgment of the court of appeals was entered on August 8, 2008. The judgment was amended and a petition for rehearing was denied on October 24, 2008. (App. A, *infra*, at 1.) This Court has jurisdiction under 28 U.S.C. § 1254(1).



## STATUTORY PROVISIONS INVOLVED

The pertinent statutory provision, specifically Federal Rule of Civil Procedure 19 is set forth in an appendix to this brief. (App. Q, *infra*, at 379-381.)

---

## STATEMENT

In 1999, the State of California (State) and sixty-one federally recognized tribes entered into class III gaming compacts (the Compacts) that provided the tribes the right to operate slot machines and certain banked and percentage card games free of non-tribal competition for twenty years. (See <http://www.cgcc.ca.gov/compacts.asp>; App. N, *infra*, at 197-265.)

Specifically, the Compacts allow each tribe to operate up to 350 slot machines or the number of slot machines that tribe was operating on September 1, 1999, whichever is greater. (App. N, *infra*, at 207.) In addition, the Compacts provide that the tribes may operate additional slot machines if they are able to obtain licenses for those devices from a license pool. (*Id.*, at 209.)

The Compacts limit the number of available licenses according to a formula and require that the tribes pay specified fees in consideration of receiving such licenses. (App. N, *infra*, at 209.) They also establish a priority system for the issuance of these licenses. (*Id.* at 209-10.) The California Gambling Control Commission (Commission), as the trustee of

the fund into which such license fees are paid, calculated the number of available licenses, and utilized the priority system established by the Compacts to issue licenses to tribes that applied for them, until the available licenses were exhausted. From that point onward, the Commission utilized the Compacts' priority system to issue licenses that became available through the return or relinquishment of previously-issued licenses to the license pool. Other than through acquisition of such licenses under the Compacts' priority system, tribes seeking to operate additional slot machines were required to obtain the right to operate those machines through a compact amendment. (App. N, *infra*, at 211; 261.)

After the license pool was depleted, the Governor and various tribes commenced compact amendment negotiations. In those negotiations, the tribes sought to obtain the right to operate slot machines other than through issuance of licenses by the Commission from the license pool established by the Compacts. In 2004, the Governor and five tribes arrived at an agreement on certain amendments to the Compacts; (see <http://www.cgcc.ca.gov/compacts.asp>.) subsequently ratified by the California Legislature under provisions of California law and approved by the Secretary of the Interior under IGRA. In 2007, compact amendments arrived at with several additional tribes in 2006 became effective. (App. A, *infra*, at 10.) The amendments allowed the tribes to operate additional slot machines without licenses, increased the period during which the tribes' slot machines could

be operated and provided a monetary remedy in the event non-tribal class III gaming is permitted in California. In return, the tribes agreed: (a) to increase their revenue sharing contributions to the State over that which was required under the Compacts; (b) to mitigate adverse environmental impacts stemming from their casino operations; and (c) to protect the health and safety of patrons and employees through a series of regulatory measures not found in the Compacts. (See generally, a 2004 compact amendment, App. O, *infra*, at 266-314 and a 2007 compact amendment, App. P, *infra*, at 315-378.)

The terms of these compact amendments render the operation of slot machines under the amendments more costly to the signatory tribes than under the Compacts' license structure. (E.g. compare 1999 Compact per device costs, App. N, *infra*, at 209 with per device costs in a 2004 amendment, App. O, *infra*, at 268-69 and in a 2007 amendment, App. P, *infra*, at 318-19.)

The Cachil dehe Band of Wintun Indians of the Colusa Community (Colusa) filed a breach of compact suit against the defendants in the Eastern District of California asserting that the Commission lacked the authority: (a) to determine the number of available slot machine licenses and (b) to implement the priority system established by the Compacts (fourth claim for relief). Colusa also argued that, even if it had the authority to issue licenses, the Commission miscalculated the number of available licenses (second claim for relief) and did not place Colusa in the correct

priority for the issuance of available licenses (first claim for relief). (App. A, *infra*, at 9-10.)

In separate actions filed in the Southern District of California, two other tribes – the Rincon Band of Luiseno Mission Indians (Rincon) and the San Pasqual Band of Mission Indians (San Pasqual) – sued the State for breach of compact based upon claims that the Commission had miscalculated the number of licenses available. (App. E, *infra*, at 88; App. H, *infra*, at 107.)

All three suits were dismissed by three separate federal district judges under Rule 19 on the ground that the other tribes that were signatories to the Compacts were necessary (required)<sup>1</sup> parties that could not be joined because of their tribal sovereign immunity. The district court in Colusa's suit determined that the absent tribes were required, in part, because the Commission could face inconsistent obligations from multiple suits on the same claims for relief with respect to: (a) the number of available slot machine licenses; (b) the Commission's authority to issue licenses and conduct license draws; and (c) the operation of the Compacts' license priority system. (App. C, *infra*, at 76.)

---

<sup>1</sup> The language of Rule 19 has been amended since the district court decisions. The word "required" replaces the word "necessary" in Rule 19(a).

The district court in the *Rincon* suit likewise concluded the absent tribal signatories to the Compacts were required because the State faced the risk of inconsistent obligations with respect to the number of slot machine licenses available under the Compacts. (App. F, *infra*, at 97.) The district court in the *San Pasqual* suit also determined that the absent tribes were required parties because the State faced the possibility of inconsistent obligations. In addition, it ruled that the five tribes with amended compacts had a contract-derived interest in any calculation of the maximum number of slot machines that a signatory tribe could operate without a compact amendment. (App. I, *infra*, at 130; 137.)

Each district court decision was appealed to the Ninth Circuit. The *Colusa* and *Rincon* appeals were not consolidated, but were argued on the same day. (App. B, *infra*, at 33; App. E, *infra*, at 87.) The Ninth Circuit did not permit oral argument on the *San Pasqual* appeal. (App. H, *infra*, at 106.) The Ninth Circuit issued a decision certified for publication in the *Colusa* appeal, in which it reversed the district court's decision to dismiss each of Colusa's breach of compact claims for relief. (App. B, *infra*, at 63.) The Ninth Circuit held that the district court had abused its discretion in finding the absent tribes were required parties. (*Id.*, at 35.) The Ninth Circuit then issued unpublished memorandum decisions in the *Rincon* and *San Pasqual* appeals in which it reversed the district court decisions based on its decision in

the *Colusa* appeal. (App. E, *infra*, at 87-90; App. H, *infra*, at 106-08.)

The Ninth Circuit denied subsequent petitions for rehearing filed in the *Colusa*, *Rincon* and *San Pasqual* appeals (App. A, *infra*, at 1; App. G, *infra*, at 104; App. J, *infra*, at 146), but did amend its decision in the *Colusa* appeal on October 24, 2008. (App. A, *infra*, at 2-3.) That amendment did not alter the Ninth Circuit's original holding that the absent tribes were not required parties.

In reversing the district court decision in *Colusa*, the Ninth Circuit ruled that because the Compacts did not make the maximum number of slot machines a signatory tribe could operate "legally finite" (App. A, *infra*, at 19), the absent tribes lacked a protected interest arising from the Compacts and, thus, were not required parties to *Colusa*'s second claim for relief regarding the maximum number of slot machines a signatory tribe could operate without a compact amendment. The Ninth Circuit held that even though the Compacts' license limit could not be exceeded without a compact amendment, a suit affecting the license limit could proceed without the absent tribes because the Compacts could be amended to increase the number of slot machines that could be operated with or without licenses. Thus, because the absent tribes could not prevent other tribes from operating additional slot machines upon receiving a compact amendment, the absent tribes had no legally protected interest in the slot machine limit set by the

Compacts to which they were signatories. (*Id.*, at 17-19.)<sup>2</sup>

The Ninth Circuit also held that the State would not be subject to a significant risk of inconsistent obligations within the meaning of Rule 19(a) with respect to the number of slot machine licenses that could be issued because “should different district courts reach inconsistent conclusions with respect to the size of the license pool created under the 1999 Compacts, such inconsistencies could be resolved in an appeal to this court.” (App. A, *infra*, at 20 n.12.)

With respect to Colusa’s first claim for relief regarding the Commission’s implementation of the

---

<sup>2</sup> The Ninth Circuit ruled, therefore, that the very limitation the Compacts place on the ability of signatory tribes to exceed the Compacts’ slot machine license limit operates to make the absent tribes’ interest in that limitation insignificant. Though the inability to prevent an amendment has an impact on the strength of the absent tribes’ interest, that fact alone does not, as the Ninth Circuit presumed, automatically render the absent tribes’ interest in having other signatory tribes obtain an amendment before they may operate additional slot machines either valueless or insignificant. In this case, the Ninth Circuit’s analysis failed to take into account the significant difference in the cost of operating slot machines under the Compacts as opposed to the cost of operating under the amended compacts. (Compare 1999 Compact, App. N, *infra*, at 209 with a 2004 amendment, App. O, *infra*, at 268-69 and a 2007 amendment, App. P, *infra*, at 318-19.) Indeed, if a compact amendment presented an insignificant hurdle, it is difficult to understand why Colusa, Rincon and San Pasqual would even bother to file a suit to obtain the right to operate additional slot machines under the Compacts instead of through such an amendment.



Compacts' priority system for acquiring licenses, the Ninth Circuit reversed the district court's decision by finding that although giving Colusa the relief it sought (placement in a higher priority for the receipt of available licenses) could preclude absent tribes presently possessing a higher priority than Colusa from obtaining licenses they might otherwise receive, these tribes were not required parties. (App. A, *infra*, at 20.) The appellate court reasoned that because the Compacts do not guarantee that any tribe will receive any specific number of licenses or any licenses at all, the priority system established by the Compacts and the greater opportunity to obtain slot machine licenses that system provides did not possess sufficient significance to render the absent tribes' interest a Rule 19(a) protected interest. (*Id.*, at 21-22.)

In addition, while recognizing that a ruling that the Commission had misapplied the Compacts' priority system in issuing past slot machine licenses might adversely affect the validity of licenses issued to absent tribes (App. A, *infra*, at 23-24), the Ninth Circuit concluded that Rule 19 compelled the district court to limit any remedy to prospective relief only, and therefore the absent tribes' interest in their existing licenses would not be prejudiced. (*Id.*, at 24.)

Finally, in reversing the district court's dismissal of Colusa's fourth claim for relief regarding the Commission's authority to issue slot machine licenses or to implement the Compacts' priority system for the receipt of licenses, the Ninth Circuit likewise held that even though a ruling that the Commission

lacked authority to issue licenses could affect the validity of the absent tribes' existing licenses, "Rule 19 necessarily confines the relief that may be granted on Colusa's claims to remedies that do not invalidate the licenses that have already been issued to the absent Compact Tribes," and therefore the absent tribes were not required parties. (App. A, *infra*, at 31-32.)

---

◆

### REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision warrants this Court's review because: (a) it conflicts with the established construction of a rule of civil procedure federal courts must routinely apply in thousands of cases each year; (b) conflicts with this Court's decision in *Republic of the Philippines v. Pimentel*, 128 S. Ct. at 2189-91 by ignoring the sovereign immunity of the absent parties; and (c) threatens the efficient administration of the federal judiciary by condoning the filing of multiple suits on the same claim for relief.

The judgment of the Ninth Circuit acknowledges, as it must, this Court's recent decision in *Republic of the Philippines v. Pimentel*, 128 S. Ct. at 2189-90, in which a Ninth Circuit decision involving Rule 19 was reversed for failure to give "full effect to sovereign immunity" in the analysis required by that rule. (App. A, *infra*, at 14 n.8.) The appellate court's decision, however, avoids giving full effect to *Pimentel's* Rule 19 directive by turning on its head (in its

consideration of Colusa's first and fourth claims for relief) the analytical sequence this Court and other circuits have consistently utilized in complying with that rule. Relying on the asserted ability of the court to shape relief under Rule 19(b) – a consideration relevant only after an absent party has been found to be required under Rule 19(a) – the decision below appears implicitly to recognize a tribal interest sufficient to impart required status to the absent tribes under Rule 19(a). Then, however, the decision, in the epitome of circular reasoning, concludes that because the absent tribes' interests could be protected by a judgment granting only prospective relief, no such interest exists.<sup>3</sup> Through this abnegation of the absent tribes' protected interest, and thus of any claim they might have to required party status, the Ninth Circuit affected to free itself of the obligation to comply with *Pimentel's* mandate to accord the absent

---

<sup>3</sup> The Ninth Circuit, in any event, was simply wrong in concluding that prospective relief would serve to protect the legally protected interest of the absent tribes. In its fourth claim for relief, Colusa argues that the Commission lacked the authority to issue licenses or implement the Compacts' priority system. The Ninth Circuit completely ignored the impact that a ruling that the Commission lacked the authority to issue licenses would have on the absent tribes' ability to obtain licenses until such time as there was agreement on a new license-issuing entity. In this regard, should more licenses become available as a result of a ruling on the Compacts' license limit, that latter ruling would be meaningless to the absent tribes if, for an indeterminate period, there were no entity to issue the now-available licenses.

tribes' sovereign immunity full effect in a Rule 19(b) analysis.

Similarly, by thus avoiding a Rule 19(b) analysis and consideration of the absent tribes' sovereign immunity, the Ninth Circuit's decision also undermines a fundamental purpose this Court and other circuits have identified as underlying this federal rule. That purpose is to avoid exposing a party to the possibility of facing inconsistent obligations stemming from multiple suits on the same claim for relief in different actions by requiring the joinder, under Rule 19(a), of absent parties that might bring the same claim in a different action.

The Ninth Circuit's decision will severely undermine the judicially recognized doctrine of tribal sovereign immunity and what the District of Columbia Circuit has described as society's conscious decision to shield Indian tribes from suit without Congressional or tribal consent. *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986). It will also sow confusion regarding the proper analytic path for Rule 19 determinations through the Ninth Circuit's commingling of Rule 19(b) factors into a Rule 19(a) analysis. In addition, absent this Court's review, the Ninth Circuit's decision could create severe strains in the efficient administration of justice throughout the country by inundating already overburdened district courts with multiple suits raising the same claim for relief. Governor Arnold Schwarzenegger, the State and the Commission,

therefore, respectfully request that this Court grant certiorari in this case.

**I. The Court of Appeals' Importation of an Equitable Rule 19(b) Consideration Into a Rule 19(a) Legal Analysis in Order to Avoid Consideration of an Absent Party's Sovereign Immunity Warrants This Court's Review**

As construed by this Court, other circuits, and influential commentators, Rule 19(a) is designed to bring all interested parties to a controversy before the court so that it might decide the entire controversy and do complete justice by adjusting all the rights involved. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 123 (1968); *Shields v. Barrow*, 17 Howard 130, 15 L.Ed. 158 (1855); *Haas v. Jefferson Nat. Bank of Miami Beach*, 442 F.2d 394 (5th Cir. 1971); *Wright & Miller*, 7 Fed. Prac. & Proc. 3d § 1604. Thus, Rule 19(a) requires that a person subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Rule 19(b) on the other hand is designed to determine whether it is possible to go forward with an action despite the non-joinder of a party whose presence in the suit is desirable, but not feasible. *Haas v. Jefferson Nat. Bank of Miami Beach*, 442 F.2d at 397-98; *Wright & Miller*, 7 Fed. Prac. & Proc. 3d § 1604. As a result, the required analysis compels a court to consider:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

This Court's decision in *Republic of the Philippines v. Pimentel*, 128 S. Ct. at 2193, held that an absent party's sovereign immunity is a factor that must be given substantial consideration under Rule 19(b) in making the determination – whether in equity and good conscience the action should be permitted to proceed in that party's absence, or should be dismissed. The Ninth Circuit's decision, however, utilizes the separate Rule 19(b) consideration of possible avoidance of prejudice through the shaping of relief to conclude that the absent tribes in this case are not required parties under Rule 19(a). By thus relying upon a Rule 19(b) factor to conclude that the absent tribes are not required parties under Rule 19(a), the decision imports into the required party analysis an equitable consideration that is utterly irrelevant to a Rule 19(a) legal analysis, and through this artifice enables the court to ignore the absent tribes' sovereign immunity that could be dispositive of the necessary inquiry under Rule 19(b).

The Ninth Circuit's decision thus replaces the orderly analysis required by this Court's precedents with one that leapfrogs to the finish line when it concludes that the absent tribes are not required because any relief to be accorded must be shaped so as to operate only prospectively, and then relies on that holding to conclude the absent tribes are not required for the adjudication under Rule 19(a). Compounding the circularity of this reasoning, the Ninth Circuit's decision attributes this result to the necessary operation of Rule 19 itself. (App. A, *infra*, at 31.)

Rule 19, however, mandates a process, not a particular result. Thus Rule 19(b)(2) requires only *consideration* of whether shaping of relief may lessen or avoid prejudice to the absent parties. As a result it is only the Ninth Circuit's consideration of Rule 19(b)(2) that resulted in any protection of the absent tribes' interests – not Rule 19 itself. Rule 19 by itself affords no guarantee of judicial shaping of relief for the protection of absent parties. The *existence* of a legally protected interest cannot be dispelled simply by demonstrating that judicial measures *may* be taken to avoid prejudice to it.

In practical effect, the Ninth Circuit's decision constitutes a Rule 19(b) analysis conducted with no consideration whatsoever of the sovereign immunity of the absent tribes. Thus, while the Ninth Circuit considered Rule 19(b) factors such as relief shaping and the adequacy of relief in terms of the avoidance of multiple suits, albeit in the guise of determining whether the absent tribes were necessary parties, it failed to consider the absent tribes' sovereign immunity from suit – a factor this Court and other circuits have construed to have more weight than any other in a balancing of Rule 19(b) factors. As a result, the Ninth Circuit's decision evades compliance with the holding in this Court's recent decision in *Republic of the Philippines v. Pimentel*, 128 S. Ct. at 2189-90 and sidesteps the holdings in decisions of other circuits on the importance of sovereign immunity interests in a Rule 19(b) analysis. *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2nd Cir. 1991); cert.



denied, 502 U.S. 818 (1991) (approving district court's recognition of "paramount importance accorded the doctrine of sovereign immunity under rule 19"); *Enterprise Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989) ("When, as here, a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves" (internal quotation marks omitted)).

The analytic confusion the Ninth Circuit's decision will sow is not limited solely to suits involving sovereigns. It will also affect other cases where absent parties cannot be joined. As discussed above, by importing Rule 19(b) considerations into a Rule 19(a) analysis, the Ninth Circuit essentially performed a Rule 19(b) analysis without considering all required Rule 19(b) factors. Were this analytic path to be adopted by district courts, those courts would, likewise, conduct Rule 19(b) analyses without consideration of all required Rule 19(b) factors. Through this process, federal courts would deviate from the explicit requirements of Rule 19.

## II. The Ninth Circuit's Refusal to Recognize the State's Exposure to Inconsistent Obligations, Enabling the Court to Evade Consideration of the Absent Tribes' Sovereign Immunity, Warrants This Court's Review

As this Court and other circuits have found, the "social interest in the efficient administration of justice and the avoidance of multiple litigation is an interest that has traditionally been thought to support compulsory joinder of absent and potentially adverse claimants under Rule 19(a)." *Republic of the Philippines v. Pimentel*, 128 S. Ct. at 2193 (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737-38 (1977)) (internal quotation marks omitted); *Keweenaw Bay Indian Community v. Michigan* 11 F.3d 1341 (6th Cir. 1993).

Notwithstanding these precedents, the Ninth Circuit's decision assiduously avoids finding the absent tribes to be required parties through its conclusion that even though the State and the Commission might be subject to inconsistent determinations regarding the number of slot machine licenses authorized by the Compacts, the absent tribes are not required parties because the Ninth Circuit could resolve any such inconsistencies on appeal. (App. A, *infra*, at 20 n.12.) This conclusion, unsupported by any precedent, is inconsistent with *Republic of the Philippines v. Pimentel*, 128 S. Ct. at 2193 in which this Court held that it "would not further the public interest in settling . . . dispute[s] as a whole because

[the absent parties] would not be bound by . . . [a] judgment in an action where they were not parties.”  
*Id.*

The Ninth Circuit’s decision, therefore, rests on two presumptions, both of which are erroneous. First, it assumes that an appellate court could bind absent tribal signatories to the Compacts to a judgment. Second, it speculates that all claims for relief regarding the maximum number of slot machine licenses authorized by the Compacts whenever and wherever they are brought either will be appealed in a manner that allows all such appeals to be considered at the same time, or that an appellate court will follow prior decisions on the same question regarding later appeals.

While, in this case, the Ninth Circuit easily conformed the appellate results of three trial court decisions which had not yet been heard on the merits, there is no guarantee of such a result in the future. Thus, the possibility of inconsistent appellate decisions on the same claim for relief exists in cases which do not fortuitously come before the same appellate court on the same issue, in time to permit simultaneous confirmation of conflicting or inconsistent judgments below.

Further, if a subsequent appellate panel were to consider itself bound by a prior appellate decision on the same claim, irrespective of the merit of arguments advanced in favor of a different conclusion, litigants would be deprived of due process. If future

litigants perceived the possibility of such an outcome, individuals and entities that otherwise would be immune from suit or otherwise not subject to joinder could be forced to waive their immunity in order to protect their interests.

---

◆

### CONCLUSION

For the foregoing reasons, petitioners respectfully request that the petition be granted.

Dated: January 21, 2009

Respectfully submitted,

EDMUND G. BROWN JR.  
Attorney General of California  
MANUEL M. MEDEIROS  
State Solicitor General  
ROBERT L. MUKAI  
Senior Assistant  
Attorney General  
SARA J. DRAKE  
Supervising Deputy  
Attorney General  
PETER H. KAUFMAN  
Deputy Attorney General

*Counsel of Record*  
*Counsel for Petitioners*