No. 15-475

IN THE

Supreme Court of the United States

RAMONA TWO SHIELDS AND MARY LOUISE DEFENDER WILSON, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Petitioners,

v.

SPENCER WILKINSON, JR., *et al.*,

Respondents.

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

BRIEF OF CIVIL PROCEDURE AND TORT LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors whose scholarship and teaching focus on civil procedure and/or tort law. Collectively, *amici* have engaged in extensive research and other professional activities related to the interpretation of Rule 19 and the purposes of joint liability in tort. The *amici* agree that this Court should grant the petition, reverse the Eighth Circuit's decision, and reaffirm the rule that joint tortfeasors are not parties "required" under Rule 19(a). *Amici* are listed below in alphabetical order:

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* represents that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date. Pursuant to Rule 37.3(a), counsel for *amici* represents that all parties have consented to the filing of this brief and/or have filed with the Court a blanket consent authorizing such a brief.

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SUMMARY OF THE ARGUMENT

This case presents an important procedural question with broad implications for plaintiffs who have been harmed by multiple parties. A longstanding rule – endorsed by this Court, the Rules Advisory Committee, and established scholarly opinion – holds that a plaintiff need not name all joint tortfeasors in a single action. In finding that the United States was a tortfeasor whose joinder was required under Rule 19(a), the Eighth Circuit joined an ill-considered recent trend among a minority of circuits that has undermined the joint-tortfeasor rule. If

left to stand, its ruling has the potential both to disrupt federal court practice and to cause significant injustice.

The rule that plaintiffs need not name joint tortfeasors as co-defendants incorporates both procedural and substantive concerns. Procedurally, the rule helps implement the careful balance Rule 19 strikes between complete resolution of disputes and protection of the plaintiff's ability to seek meaningful relief. *See Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110-12 (1968). Substantively, the rule reflects the policies underlying the doctrine of joint-and-several liability in tort. Joint-and-several liability is intended to shift from the injured party to potential defendants both the risk that one or more defendants will be insolvent and the responsibility of seeking contribution from those parties that can afford to pay. As a result, it has never been the plaintiff's obligation to sue all joint tortfeasors.

This Court's unanimous *per curiam* decision in *Temple v. Synthes*, 498 U.S. 5 (1990), unequivocally affirmed that joint tortfeasors are not Rule 19(a) parties, and the majority of circuits have adhered to that rule. Recently, however, a minority of circuits have deviated from *Temple* by suggesting that certain types of joint tortfeasors – those, for example, that have "emerged" as "active participant[s]" in the complaint's allegations – are uniquely "required" under Rule 19 in a way that other joint tortfeasors are not. *See, e.g.*, *Laker Airways, Inc. v. British Airways, PLC*, 182 F.3d 843, 848 (11th Cir. 1999). This trend reflects a misunderstanding of the scope of the joint-tortfeasor rule and threatens to undermine the sound purposes behind it. It also ignores Rule 19(a)'s

clear requirements for determining whether a non-party must be joined.

In the case at hand, the Eighth Circuit embraced and extended this minority position. Petitioners are members of the Three Affiliated and Standing Rock Sioux tribes who own interests in land held in trust for them by the United States. They allege that respondents carried out a scheme to obtain oil and gas leases from them at below-market rates by exerting influence on the Bureau of Indian Affairs (BIA) to obtain its required approval and then resold these leases (and those of both the Three Affiliated Tribes and other allottees) to a third party for approximately $925 million. Although the BIA necessarily played a role in this scheme, petitioners' causes of action against respondents – all private parties – are tort claims that stand alone. If petitioners prevail, the United States will not be bound in any way by the judgment, nor will it suffer any practical disabilities in protecting its legal interests. Nonetheless, the Eighth Circuit concluded that the United States was a Rule 19(a) required party and, further, that the impossibility of joining the United States necessitated dismissal of the entire action under Rule 19(b).

For several reasons, this case presents a particularly appropriate vehicle for the Court to clarify the joint-tortfeasor issue. First, the Eighth Circuit squarely held that a joint tortfeasor is a Rule 19(a) party; other courts have simply speculated that such an outcome might be possible. *See, e.g.*, *Ward v. Apple Inc.*, 791 F.3d 1041, 1049-52 (9th Cir. 2015) (stating that courts should decide on a case-by-case basis whether the "specific interest" held by an absent joint tortfeasor requires joinder, but

finding that it did not in the case before it). Its decision thus deepens the growing divide among the circuits on this issue. *See* Petition for Writ of Certiorari 11-17 (cataloguing the varying approaches taken by the circuits, including the minority of circuits that have departed from the *Temple* rule).

Second, the Eighth Circuit's reasoning has the potential to be particularly disruptive to settled law and settled expectations in this area. The Eighth Circuit found the United States's interest in this matter to be greater than those of an ordinary joint tortfeasor because of its "interest in the administration, enforcement, and interpretation of its laws and regulations" – an interest shared by any governmental entity. If such an interest suffices to render a joint tortfeasor a Rule 19(a) party – and the Eighth Circuit's analysis includes no limiting rule that would preclude this result – innumerable cases could be dismissed under Rule 19(b)[2] based on the mere possibility that a governmental entity might have participated in a private party's tort.

Finally, petitioners have been uniquely and unfairly frustrated in their attempts to obtain relief. If petitioners were ordinary property owners in fee who alleged that a private party had defrauded them of nearly a billion dollars, they would face no obstacle to proceeding with

2. Often, the United States and other sovereign entities cannot be joined because of sovereign immunity. In many cases where an immune party cannot be joined, the Rule 19(b) factors weigh in favor of dismissal. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 869 (2008) (finding that a nonfrivolous claim of sovereign immunity is a "compelling" factor in favor of dismissal at the Rule 19(b) stage).

their claims in an otherwise competent court. In this case, however, the United States holds petitioners' land for their benefit as part of its long-held trust responsibility to these Indian allottees. *See, e.g.*, 25 U.S.C. § 396. One would think that the protected status of petitioners' land should, if anything, counsel for greater solicitude for their legal rights. Ironically, however, the result has been the opposite: The Eighth Circuit's disposition bars petitioners from maintaining their lawsuit.

In *Temple*, the Court intervened to correct decisions that "in flagrant opposition to the Advisory Committee's Note … had held that Rule 19(a)(1) should be construed to require the joinder of potential joint tortfeasors." *See* June F. Entman, *Compulsory Joinder of Competing Insurers: Federal Rule of Civil Procedure 19 and the Role of Substantive Law*, 45 Case W. Res. L. Rev. 1, 47-48 (1994). To forestall the serious harms that would ensue were the Eighth Circuit's flawed approach to be widely adopted, the Court should again take the occasion to clarify and reaffirm the venerable joint-tortfeasor rule.

ARGUMENT

I. THIS COURT'S REVIEW IS NEEDED TO ENSURE THAT LOWER COURTS APPLY RULE 19 IN A MANNER CONSISTENT WITH ITS TEXT AND PURPOSES.

A. Rule 19 reflects a balance of interests in which fairness to the plaintiff weighs heavily.

Rule 19 provides a mechanism by which courts can consider the relationship between a pending proceeding

and strangers to that proceeding. Among its purposes is to join "parties *materially* interested in the subject of an action … so that they may be heard and a complete disposition made." *See* Fed. R. Civ. P. 19, Advisory Comm. Note (1966 Amendments) (emphasis added). Rule 19, however, does not elevate the interests of absent parties or the desire for a complete resolution of disputes above all other considerations. Rather, as discussed below, it reflects a careful balancing of interests that include, *inter alia*, protecting the plaintiff's choice about which joint tortfeasors it wishes to sue and ensuring that the plaintiff is able to obtain relief in at least some available forum.

Although Rule 19 was adopted in 1938 and has centuries-old roots in equity practice, it was substantially revised in 1966[3] in an effort to eliminate "textual defects" and clarify "the proper basis of decision." *See* Fed. R. Civ. P. 19, Advisory Comm. Note (1966 Amendments); *see also* Geoffrey C. Hazard Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum. L. Rev. 1254, 1256-57 (1961) (discussing origins of the necessary party doctrine in the decisions of Lord Nottingham from the late 1600s). According to the Rule's text, courts engage in what may be either a one-part or a two-part inquiry. First, under Rule 19(a), the court considers whether the absent party proposed to be joined meets one of three sets of criteria. If the absent party qualifies under those requirements and

3. While Rule 19 has been amended twice since 1966, subsequent amendments have been minor alterations of the rule's wording that have not resulted in substantive change. *See* Fed. R. Civ. P. 19, Advisory Comm. Note (1987 and 2007 Amendments) (explaining that 1987 amendments are "technical" and 2007 amendments are "stylistic only").

can be joined, the court joins the party and the case proceeds. If those criteria are not met, the case proceeds in the party's absence. In either of these situations, the inquiry terminates; the court either joins the party (in the first case) or proceeds in its absence (in the second) after the first step. Only if a the absent party is a Rule 19(a) required party, but cannot be joined, does the court continue on to Rule 19(b), under which the court considers whether it is more desirable to proceed without the absent party or to dismiss the entire action.

Rule 19 thus enables several outcomes. The court may proceed without a party who turns out not to satisfy Rule 19(a) or Rule 19(b) requirements; it may join a Rule 19(a) party to the federal suit; it may dismiss the case with the expectation that it will be brought subsequently in an alternative forum where all parties can be joined (such as a state court when the Rule 19 party is nondiverse); or it may dismiss knowing that an alternative forum is unavailable. Courts have stressed that, among these possibilities, the last – which may effectively deny the plaintiff relief – is particularly undesirable. *See, e.g.*, *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 70 (1936) (observing approvingly that courts will "strain hard" to find a way to avoid dismissal of actions due to inability to join absent parties). Because courts are justifiably reluctant to award the defendant a windfall at the plaintiff's expense, Rule 19(a) and Rule 19(b) incorporate plaintiff-protective mechanisms to ensure that this outcome happens rarely. *See* Charles A. Wright et al., *Federal Practice and Procedure* § 1602 (3d ed. 2001) ("Wright") (discussing the "judicial desire to resolve legitimate disputes brought before the court rather than leaving the parties without

a remedy" and explaining that the 1966 amendments to Rule 19 make the latter result less likely).

Rule 19(a) ensures that mandatory joinder does not sweep too broadly by requiring joinder only when one of three fairly narrow and specific sets of criteria has been met.[4] One scholar has characterized the Rule 19(a) analysis as a "highly formal assessment of the parties whose joinder might be necessary," with the result that situations in which the Rule 19(a) threshold is met are "relatively unusual." Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 Sup. Ct. Rev. 183, 196-97 (2008). In addition to setting forth particularized criteria that all absent parties must meet before they enter Rule 19's ambit, Rule 19(a) incorporates the categorical rule that joint tortfeasors are merely permissive parties, not mandatory ones. *See* Fed. R. Civ. P. 19, Advisory Comm. Note (1966 Amendments).

For cases in which analysis proceeds past the Rule 19(a) stage, Rule 19(b) provides plaintiffs with an

4. Under Rule 19(a)(1)(A), joinder is required if "in that person's absence, the court cannot accord complete relief among existing parties." Rule 19(a)(1)(B)(i) requires joinder of a "person [who] claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may … as a practical matter impair or impede the person's ability to protect the interest." Rule 19(a)(1)(B)(ii) mandates joinder when disposing of the action in the absence of such an interested person may "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Because the Eighth Circuit's decision rested on potential impairments to the interests of the United States under Rule 19(a)(1)(B)(i), this brief will focus on that provision.

additional layer of protection. Under Rule 19(b), courts take into account the plaintiff's interest directly, by considering (along with three other factors) "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." [5] The Court in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968) emphasized that courts performing a Rule 19(b) analysis must give weight to the plaintiff's "interest in having a forum. . . .the strength of [which] obviously depends on whether a satisfactory alternative forum exists."

Rule 19 thus does not reflect a one-size-fits-all policy favoring joinder at all costs. Rather, the two parts of the rule work together to balance other interests, including the critical factor of fairness to the plaintiff.

B. Rule 19(a) protects the plaintiff's interests by restricting which absent parties qualify as persons to be joined if feasible.

At issue in this case is Rule 19(a)(1)(B), which requires an attempt to join a "person [who] claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may … as a practical matter impair or impede the person's ability to protect the interest." The scope of this provision is limited. Where an absent party's legal position will be significantly and concretely prejudiced – for example, by

5. The other interests the Court identified were those of the defendant, of "the outsider whom it would have been desirable to join," and "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." *Provident*, 390 U.S. at 110-112.

a decision awarding an existing party property to which the absentee holds title – courts have found that the requirements of Rule 19(a)(1)(B) may be met. *See Janney Montgomery Scott v. Shepard Niles, Inc.*, 11 F.3d 399, 407-08 (3d Cir. 1993) (discussing several cases).

At the same time, the mere possibility that pending litigation might have some effect on an absent party does not mean that person possesses an "interest" that the federal decision may "impair or impede" for Rule 19 purposes. Courts have found that a generalized stake in the subject matter of the dispute is not the sort of interest that Rule 19 seeks to protect. Thus, in a suit by environmental groups to require the National Park Service (NPS) to follow certain procedures in approving mining plans, the fact that "naturally, all miners are 'interested' in how stringent the [NPS] requirements [applied to their plans] will be" was not sufficient to render them Rule 19(a) parties despite their pending mining plans before the NPS. *See Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466, 469 (9th Cir. 1986). Further, even where a party does possess a valid Rule 19(a) interest, a federal decision does not "impair or impede" that interest if its effects are not reasonably "direct and immediate." *Janney Montgomery Scott*, 11 F.3d at 407.

Two recent cases exemplify these principles. In *Huber v. Taylor*, 532 F.3d 237, 249 (3d Cir. 2012), the court considered whether local counsel, who shared fiduciary duties with the named defendants, qualified as Rule 19(a) parties in a lawsuit filed against their co-counsel for legal malpractice. Defendants argued that the local counsel were required parties based on contentions that they possessed significant "financial and professional

interests" in the case, among those the possibility that "judgment entered against [defendants] … could preclude [absentees] from defending against any future claims for liability in breach of fiduciary duty, and from disputing any determination regarding their joint failure to disclose critical information to their clients in any [bar] disciplinary proceedings." The Third Circuit found that the unnamed local counsel were not required parties under Rule 19(a), concluding that issue preclusion would likely not apply to local counsel and "the requirements of Rule 19(a) are not satisfied simply because a judgment against Defendants in this action might set a persuasive precedent in any future action against [them]." *Id.* at 250.

Likewise, the Second Circuit recently concluded that the state of New York was not a Rule 19(a) party in an action by commercial truckers who sued the New York State Thruway Authority, alleging that the Thruway Authority unduly burdened interstate commerce by collecting excessive tolls to fund canal-related development projects. *American Trucking Ass'n, Inc. v. New York State Thruway Liability*, 795 F.3d 351, 354 (2d Cir. 2015). The Thruway Authority asserted three interests that New York possessed in the litigation: its state constitutional obligation not to "abandon" the state canal system, which the defendant argued would be imperiled if the state's funding source was declared unconstitutional; its financial interest in raising toll revenue; and its interest in "defending the validity of its own laws." *Id.* at 357-59 (internal citation omitted). The Second Circuit acknowledged that New York had a "large" financial interest in the outcome of the case. *Id.* at 359. Nonetheless, it concluded that, particularly where the state could fund the canal system from other sources of revenue,

the first two asserted interests were not sufficiently direct to qualify as Rule 19(a) "interests." *Id.* at 357-59. The court similarly rejected the third interest, noting that state and federal statutes "are frequently challenged as unconstitutional without the state (or federal) government as a named party." *Id.* at 359. Thus, of the state's claimed interests, the court found that "[n]one … is protected by Rule 19(a)." *Id.* at 357.

C. The joint-tortfeasor rule is necessary to effectuate both Rule 19's balance of interests and substantive tort policy.

The rule that joint tortfeasors are not required parties under Rule 19(a) is rooted in longstanding equity practice. *See, e.g.*, *Lovejoy v. Murray*, 70 U.S. (3 Wall.) 1 (1866) (recognizing that one joint tortfeasor "cannot plead the nonjoinder of the others in abatement"). It also reflects the explicit intention of the Rule's drafters, who specified that the Rule 19(a) standard incorporates "the settled authorities holding that a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability." *See* Fed. R. Civ. P. 19, Advisory Comm. Note (1966 Amendments). In *Temple*, 498 U.S. at 7-8, this Court reaffirmed in a *per curiam* opinion that "[i]t has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit" and found that the district court had abused its discretion in ordering joint tortfeasors joined under Rule 19(a).

The rule that joint tortfeasors do not qualify as Rule 19(a) parties is not simply an arbitrary edict. Rather, it follows directly from the procedural values underlying

Rule 19. An absent joint tortfeasor may be understandably concerned with proceedings that take place in its absence. It is possible, indeed likely, that the proceedings will concern matters that adversely affect the unnamed party's reputation. The named defendant will have every incentive to divert fault to another potentially responsible party and to muster evidence and legal arguments in support of this theory. Such material may not only bring to light further damaging information about the unnamed party but provide valuable fodder to the plaintiff should it seek to pursue that party in future litigation. Whatever the merits of these concerns, they do not create the sort of "interest" that Rule 19(a) contemplates. *See Huber*, 532 F.3d at 249 (rejecting the notion that possible financial and reputational damage rendered joint tortfeasor a Rule 19(a) party). Rule 19(a) is intentionally narrower than that, forcing non-parties into a pending lawsuit only when there is something more concrete at stake.

The joint-tortfeasor rule also ensures that Rule 19 does not undermine the substantive protections that tort law provides to plaintiffs. The aim of joint-and-several liability, as opposed to several liability, is to shift the risk that "one or more legally responsible parties will be insolvent or otherwise unavailable to pay for the plaintiff's injury" from the plaintiff to each jointly liable defendant. Restatement (Third) of Torts: Apportionment Liab. § 18A (2000). In keeping with this risk-shifting rationale, the plaintiff has complete discretion about which joint tortfeasors to name as defendants. *See Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 132 (1912) ("The injured person may sue those who co-operated in the commission of the tort together, or he may sue them singly.").

Further, just as joint tortfeasors must share the risk that one of them will be insolvent, they also must bear the "burden of joining and asserting a contribution claim against other potentially responsible persons." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 18A (2000). Assuming that the absent joint tortfeasor is susceptible to suit, the defendant can normally accomplish this by impleading that party under Fed. R. Civ. P. 14. *See* 7 Wright § 1623. By shifting this responsibility to the defendant, the rule ensures that a prevailing plaintiff will be compensated regardless of whether its co-tortfeasors are subject to the court's jurisdiction.

Applying Rule 19(a) to require the joinder of absent tortfeasors would thus contradict this Court's holding in *Temple*. It would disregard the clear statements of the Advisory Committee. And it would undermine the risk-shifting concerns that animate the device of joint-and-several liability.

II. THE EIGHTH CIRCUIT'S APPROACH REFLECTS A DANGEROUS MISAPPLICATION OF RULE 19(A).

A. The interests the United States asserts in this matter are typical of any unnamed joint tortfeasor.

With respect to this litigation, the United States is in the position of a typical joint tortfeasor. Along with the respondents named here, the United States is alleged to have participated in a scheme according to which petitioners were deprived of the full value of their trust property. For Rule 19(a) purposes, the "interest" of the United States in this litigation runs no deeper, and the

damages plaintiffs seek from private parties will not affect its legal position in any tangible way whatsoever.

In finding the United States to be a Rule 19(a) party in this case, the Eighth Circuit accepted the district court's conclusion that "in order to prevail …, lessors necessarily would have to prove that the United States has acted illegally and breached its fiduciary duty in approving the leases," such that "the federal interests in administering the leases and overseeing the grant of new leases would be affected." *Two Shields v. Wilkinson*, 790 F.3d 791, 795 (8th Cir. 2014). The Eighth Circuit elaborated on this point, explaining that "any determination that particular lands had been illegally titled would potentially cloud the validity of many of the land grants approved by the federal government." *Id.* at 796.

Some of the "interests" recognized by the Eighth Circuit rest on dubious premises. No finding in this case can or will have a binding effect on the United States, a non-party. In consequence, no "cloud" will be cast on the validity of similar transactions, at least in any legal sense. Of course, it is possible that similarly situated parties may take note of the results of this case in determining what their legal rights and remedies may be. But this is a routine and ubiquitous effect of litigation that in no way creates the particularized "interest" that Rule 19(a) requires.

To the extent this case will affect the United States at all, its interests follow from the fact that it is alleged to have participated in a tort. As a result, its position is similar to that of any unnamed joint tortfeasor. The United States – like any party alleged to have participated in wrongdoing – would undoubtedly prefer that its conduct

never be impugned in any legal proceeding. Again, however, this is a widely shared interest of all unnamed joint tortfeasors.

The Eighth Circuit distinguished the United States from a "typical third party which claims no interest beyond contesting allegations about its own improper conduct." Rather, the court suggested, the United States did not claim "'the usual' joint and several liability" because of its "interest in the administration, enforcement, and interpretation of its laws and regulations.'" *Two Shields*, 790 F.3d at 795. But even the United States's interest in administration and enforcement of laws is not entirely distinctive; a private party that engages in many transactions of a similar nature possesses closely analogous interests. Suppose it were not the United States but a private trustee – say, a bank – that had allegedly participated in a breach of fiduciary duties. A suit against other involved parties that did not name the bank could potentially call into question the bank's administration of its internal policies and regulations. None of this, however, would suffice to transform the bank from a typical joint tortfeasor into a party whose "interest" is cognizable under Rule 19(a). *See Huber*, 532 F.3d at 249 (finding that unnamed counsel who (jointly with defendants) owed fiduciary duties to plaintiffs were not required parties in suit for breach of those duties, despite claims that they possessed "concrete, tangible interests, and intangible but profoundly significant professional interests" in the action). Unless one believes that the United States is distinct simply *by virtue* of being a governmental entity, an argument discussed below, it has cited no interest in this case that does not derive directly from its joint tortfeasor status.

B. A party's sovereign status does not except it from the joint-tortfeasor rule.

In citing the United States's interest in "administration, enforcement, and interpretation of its laws and regulations," the Eighth Circuit suggested that Rule 19(a) should apply differently because the United States is a governmental entity. For two reasons described below, the Eighth Circuit's reasoning is misconceived and, if allowed to stand, would have troublesome effects on settled law.

First, courts have routinely applied the joint tortfeasor bar to find that sovereigns were not Rule 19(a) parties, even though all such parties presumably share the United States's general interests in defending the integrity of their official decisions and administering their laws and regulations. For example, in *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 122 (E.D.N.Y. 2000), the plaintiffs sought damages against private banks for conspiring with the Vichy and Nazi regimes in the seizure of Jewish assets. Notably, the French government had taken independent governmental action to address the seizures through formation of a commission to study the issue. *Id.* at 123. Nonetheless, the court had no difficulty concluding that the French and German governments were "joint tortfeasors at most" and that their "complicity … in effecting and perpetuati[ng] the spoliation of Jewish assets does not mandate their joinder." *Id.* at 136-37. *See also Wright v. Linebarger Googan Blair & Sampson, LLP*, 782 F. Supp. 2d 593, 606 (W.D. Tenn. 2011) (where allegedly illegal attorney's fees were collected by defendant pursuant to a contract with the city of Memphis, the city was not a required party because it was "no more than a potential joint tortfeasor"); *Castro-Cruz v. Municipality of San*

Juan, 643 F. Supp. 2d 194, 199 (D. Puerto Rico 2009) (an agency of the Commonwealth of Puerto Rico, which plaintiff had sued in another forum, was a joint tortfeasor whose joinder was not required); *Doe v. Unocal*, 963 F. Supp. 880, 889 (C.D. Cal. 1997) (under joint-tortfeasor rule, Burmese governmental entities were not required parties in an action alleging that defendant oil companies had acquiesced in government human rights abuses).

In non-tort contexts as well, courts have resisted the argument that governmental status alters determinations about which parties are necessary under Rule 19. For example, in *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983), the United States, while not a party to the agreements at issue mandating "teaming" between two government military contractors, was "involved" with the contracts and had "prompted the parties to enter [them]." The court found that this involvement did not override "traditional Rule 19 principles," *id.* at 1046, including the general rule that "[a] nonparty to a commercial contract ordinarily is not a necessary party to an adjudication of rights under the contract." *Id.* at 1044. Likewise, in *American Trucking*, 795 F.3d at 359, the court found that "[n]o precedent supports [the] view" that New York State's declared interest in "defending the validity of its own laws" rendered it a Rule 19(a) party in a suit challenging the constitutionality of tolls assessed by a state highway authority.

Second, the Eighth Circuit's novel "sovereign government" exception to the joint-tortfeasor rule would undermine the claims of countless private plaintiffs seeking to sue only private defendants. In *Pimentel*,

this Court indicated that the Rule 19(b) balance favors dismissal when a Rule 19(a) party cannot be joined because of sovereign immunity. *See Pimentel*, 553 U.S. at 869 (absence of an immune 19(a) sovereign is a "compelling" factor favoring dismissal in the Rule 19(b) calculus); *see also Friant Water Authority v. Jewell*, 23 F. Supp. 3d 1130, 1150 (E.D. Ca. 2014) (applying *Pimentel* to hold that, under Rule 19(b), case could not proceed in the absence of an immune state agency); *TJGEM LLC v. Republic of Ghana*, 26 F. Supp. 3d 1, 12 (D.D.C. 2013) (Rule 19(b) factors required dismissal where Ghana, a Rule 19(a) party, could not be joined). Were the Eighth Circuit's rule to become the norm, courts would have to dismiss innumerable cases by one private party against another – and leave the plaintiff with no remedy at all – if any possibility existed that the United States might share liability with the private defendant. Indeed, because nothing in the logic of the Eighth Circuit's opinion suggests that concern with "administration, enforcement, and interpretation of its laws and regulations" is limited to the United States, the same result – dismissal without any alternative remedy – could apply in any case where any immune sovereign, whether the federal government, a state, or a foreign country, might possibly be a joint tortfeasor.

This irrational and disruptive result would allow private defendants to escape liability for their wrongful conduct based solely on the fortuity that a governmental entity might also be a potential defendant. Moreover, it would be utterly contrary to the purposes of Rule 19, which is designed primarily to consolidate related claims, where appropriate, before a single court – not to frustrate plaintiffs' ability to vindicate their rights.

The Eighth Circuit's judicial amendment of Rule 19 is not necessary to safeguard sovereign interests – either in general or in this specific case. Sovereigns already enjoy distinctive protection in Rule 19 analysis because of the special weight courts give to their interests in determining whether to proceed with or dismiss a case under Rule 19(b). *See Pimentel*, 553 U.S. at 869. Courts have justified this approach as a means of protecting the policies underlying sovereign immunity, on the logic that a sovereign should not be put to the "Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *See Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986). Yet because this practice of granting solicitude for sovereign interests already has harsh consequences for plaintiffs (and affords a windfall to private defendants), it should be limited to scenarios in which the sovereign has already demonstrated a material interest in the case under the generally applicable Rule 19(a) factors. To the extent that sovereigns deserve any special protection, it is sufficient to weigh the Rule 19(b) factors in favor of dismissal once the sovereign already qualifies as a Rule 19(a) party. It is unnecessary and undesirable to protect sovereigns and disadvantage plaintiffs further by lowering the threshold for sovereigns to qualify as Rule 19(a) parties in the first place.

Lowering the Rule 19(a) threshold is particularly inappropriate in this case, where the United States has *waived* its immunity from suit (in the U.S. Court of Federal Claims), but simply has not done so in a forum in which petitioners can also press their claims against defendants. Thus the central concern that has motivated courts' solicitude for absent immune sovereigns – removing any

pressure the sovereign might otherwise feel to waive its immunity – is absent from this case. The United States's waiver also eliminates any concerns that, as the Eighth Circuit put it, its liability will be "tried behind its back." *Two Shields*, 790 F.3d at 796 (citation and quotation marks omitted). The United States already has provided a forum in which it can be sued directly for the same matters and in which it has opportunity to present its side of the story.[6] It can further participate in the Eighth Circuit proceedings as an *amicus curiae* to present its perspective on the "administration, enforcement, and interpretation of its laws and regulations."

Because sovereign immunity is not at play here, the only possible rationale for the Eighth Circuit's decision is that Rule 19 should mandate dismissal of any case that might cast the U.S. government's actions in a bad light. Clearly, that is not and cannot be the law.

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6. In this case, petitioners' damages claims against the United States in the Court of Federal Claims were dismissed on procedural grounds; the case is now on appeal. *See* Petition for a Writ of Certiorari 10. But that is a fortuity; it is always possible that a claim will be resolved on a basis other than the merits of the case. Even if, for example, the United States could have been joined in this action, presumably it could have raised the same defense, such that the claims against respondents would have proceeded without the opportunity for the United States to present its case on the merits.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

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