No. 24-1161

IN THE

Supreme Court of the United States

MAVERICK GAMING LLC,

Petitioner,

v.

UNITED STATES, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* CALIFORNIA GAMING ASSOCIATION IN SUPPORT OF PETITIONER

Jeffrey M. Harris
Counsel of Record
Zachary P. Grouev
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

June 12, 2025

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The California Gaming Association ("CGA") is a trade association made up of over 90% of California's state-licensed cardrooms and third-party providers. CGA members generate approximately $5.6 billion of economic impact, 20,000 jobs, and $500 million of tax revenue for the communities in which they operate. CGA members are one of the leading sources of general fund revenue used by many local jurisdictions to provide essential community services.

CGA's mission includes monitoring legislation and regulation and taking legal action to protect its members' interests. CGA members have an interest in ensuring that federal and state regulations are fair, efficient, and consistent with all relevant statutory and constitutional requirements. CGA further has an interest in ensuring that its members can pursue their legal claims in court if necessary. The Ninth Circuit's rule that tribes are always indispensable impairs these interests by allowing non-party beneficiaries to wield sovereign immunity as a sword to shield government conduct from judicial review.

More broadly, CGA has an interest in preventing the Ninth Circuit's erroneous interpretation of the

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. All parties received timely notice of this brief.

Federal Rules of Civil Procedure from nullifying an important check on the administrative state. Congress amended the Administrative Procedure Act in 1976 to waive the United States' sovereign immunity in federal suits seeking equitable relief. But under the Ninth Circuit's interpretation of Rule 19, the APA is a dead letter whenever a tribe benefitting from agency action decides that it does not want litigation challenging that action to proceed; in that event, the tribe can simply assert sovereign immunity, move to dismiss for nonjoinder under Rules 12(b)(7) and 19, and secure dismissal of the suit, including any APA claims.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For almost eighty years, the APA has promised that any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by such action[,] … is entitled to judicial review thereof." Pub. L. No. 79-404, 60 Stat. 237, 243 (1946). The decision below impairs this important statutory right for the more than 67 million Americans, across nine states and two territories, who live and work within the Ninth Circuit's jurisdiction. The Ninth Circuit ruled that whenever federal action benefits a non-party tribe, the tribe is indispensable under Rule 19; thus the suit cannot continue without it "in equity and good conscience." App.7a. Because nothing compels a non-party with sovereign immunity to consent to joinder, that ruling gives tribes that benefit from federal action an absolute right to veto APA suits against the United States. This deeply misguided application of

Rule 19 undermines core constitutional principles and conflicts with the decisions of several courts of appeals. *See* Pet.17-23 (outlining the circuit split).

Under the proper approach, a non-party beneficiary of agency action like the Shoalwater Bay Indian Tribe is not a "Required Party" to an APA suit under Rule 19(a) because: (1) a court can "accord complete relief among [the] existing parties" by setting aside the challenged action; (2) the non-party's ability to protect its interest is not "impair[ed] or impede[d]" as "a practical matter" when the United States defends the challenged action; and (3) there is no risk of an existing party "incurring double, multiple, or otherwise inconsistent obligations." Fed. R. Civ. P. 19(a)(1).

The Ninth Circuit avoided this conclusion by adding a new requirement—total alignment in subjective motivations between the United States and the non-party—found nowhere in Rule 19's text. App.26a. It also identified a nebulous conflict of interest based on the government's past positions on unrelated issues in unrelated cases and vague hypotheticals about potential future litigation. App.31a-32a. This interrogation of the government's motives violated the presumption of regularity and ignored Rule 19's focus on the practical effects of nonjoinder.

Even if a tribe might sometimes be "Required" to be joined, the inability to join a non-party based on its refusal to consent does not mean that every suit raising a claim against the government under such circumstances must be dismissed. *See Auto. United Trades Org. v. State*, 285 P.3d 52, 57-61 (Wash. 2012) ("*AUTO*") (reaching this conclusion after applying

Washington's nearly identically worded Rule 19(b) equivalent to a suit challenging tribal-state fuel tax compacts); *id.* at 61 (collecting similar cases from California, New York, and Wisconsin).

Rule 19(b)'s test for indispensable-party status is rooted in the "equity and good conscience"—or "in short, the justice—of the end result." Wright & Miller, 7 Fed. Prac. & Proc. Civ. §1601 (3d ed. 2025) (quoting Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 Mich. L. Rev. 327, 356 (1957)). Thus, the analysis must be "made in the light of pragmatic considerations." Fed. R. Civ. P. 19(b) advisory comm. note to 1966 amend. The balance of the Rule 19(b) factors—(1) the extent of any potential prejudice; (2) the extent such prejudice could be mitigated by the non-party or the court; (3) the adequacy of a judgment absent the non-party; and (4) the availability of an alternative forum to obtain relief—supports allowing suits like this one to proceed. *See, e.g.*, *AUTO*, 285 P.3d at 57-61.

If allowed to stand, the Ninth Circuit's decision will create a two-tiered system of federal administrative law. Some plaintiffs may pursue their APA claims as Congress intended. Others—those who challenge agency action harming them but benefiting a tribe—will be left at the mercy of a non-party that has every incentive to pocket veto the suit before any court reaches the merits. And because APA claims can be heard only in federal court, "there is no alternative judicial forum in which [a challenger can] seek the relief it requests." App.40a. Worse than permitting a man to be a judge in his own cause, this system makes tribal governments (for which most Americans will never

vote) the ultimate judge in the legal disputes of those harmed by the U.S. government.

Upholding this two-tiered system will curtail the ability of plaintiffs to seek judicial review of harmful agency action across many industries and contexts. Conservation organizations enforcing federal environmental law. *E.g.*, *Diné Citizens Against Ruining Our Env't v. BIA*, 932 F.3d 843 (9th Cir. 2019); *Backcountry Against Dumps v. BIA*, 2022 WL 15523095 (9th Cir. Oct. 27). Farmers and landowners seeking to safeguard their water rights. *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934 (9th Cir. 2022). And advocates on both sides of the commercial gaming industry. *E.g.*, *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020); *Maverick Gaming LLC v. United States*, 123 F.4th 960 (9th Cir. 2024). No matter the specific issue or interest, these parties deserve access to the courts, not a cynical pocket veto.

Nor will the pernicious effects of the decision below be limited to APA claims affecting tribes. Suits challenging government actions benefiting *any* non-party able to assert sovereign immunity (for example, foreign governments) will be subject to dismissal on similar grounds unless the non-party's motivations for defending the challenged action are identical to those of the United States—a test that the federal government will always fail. The same logic will apply to suits challenging state actions that benefit a tribe or foreign government, even when those suits raise an important federal question that Congress has determined should be resolved by a federal court. *Contra*

e.g., *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976) (reiterating the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"). Finally, because many states have adopted joinder rules that closely track Rule 19, the Ninth Circuit's analysis has the potential to create the same problems for state-law plaintiffs asserting purely state-law claims.

Giving non-party beneficiaries of agency action a veto over APA litigation is especially concerning given the weighty legal issues raised by Maverick's suit. Whether states can bootstrap class III gaming authorizations through tribal-state compacts while prohibiting non-tribal entities from engaging in the same conduct is a complex interpretive question of great importance to states, tribes, and the gaming industry. It also implicates a lacuna in this Court's equal protection cases, which have both unequivocally held that "[a]ny exception to the Constitution's demand for equal protection must survive a daunting two-step examination known … as 'strict scrutiny,'" *SFFA v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023), and applied less rigorous scrutiny to classifications with a concededly "racial component" in the context of Indian tribes, *Rice v. Cayetano*, 528 U.S. 495, 519 (2000) (describing the classification at issue in *Morton v. Mancari*, 417 U.S. 535, 549 n.23, 553 n.24 (1974)). Reconciling these decisions is an issue worthy of this Court's review. *See, e.g.*, *Haaland v. Brackeen*, 599 U.S. 255, 333-34 (2023) (Kavanaugh, J., concurring); *W. Flagler Assocs., Ltd. v. Haaland*, 144 S.Ct. 10 (2023) (Statement of Kavanaugh, J., respecting the denial of the application for stay).

Under the Ninth Circuit's rule, however, no federal court will ever opine on these issues—and thus the percolation that often precedes this Court's review will not occur—because almost every case implicating tribal interests will be dismissed on Rule 19 grounds. The compulsory joinder rule was never intended, and should not be construed, to wholly insulate such important questions from judicial review. *See, e.g.*, *AUTO*, 285 P.3d at 60-61.

The Court should grant the petition and reverse the decision below.

ARGUMENT

I. If left uncorrected, the Ninth Circuit's decision threatens to sharply curtail judicial review of government action affecting tribes and foreign governments.

The decision below rests on an atextual interpretation of Rule 19 that warps "equity and good conscience" beyond all reasonable recognition. And upholding it would create a two-tiered system of administrative law with wide-ranging pernicious effects. The Court should reject this unjust use of its compulsory joinder rule.

A. Non-party beneficiaries of agency action are not "Required" parties in APA suits.

Under Rule 19(a), a "person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party 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.

Fed. R. Civ. P. 19(a)(1)(A)-(B). When an APA plaintiff sues the federal government seeking to set aside agency action, neither condition applies if the government defends the suit on the merits.

A court can render an adequate judgment between an APA plaintiff and the government when the plaintiff seeks vacatur and declaratory relief. *See* App.39a-40a. And no one contends that such relief would "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Fed. R. Civ. P. 19(a)(1)(B)(ii). That leaves Rule 19(a)(1)(B)(i), which requires the joinder of non-parties with an interest in the action such that "disposing of the action in the [non-party's] absence may as a practical matter impair or impede the [non-party's] ability to protect [its] interest."

The Tribe's "interest" is clear—the Secretary of the Interior approved amendments to tribal-state

gaming compacts, including amendments submitted by the Tribe, purporting to grant the exclusive right to conduct sports betting in Washington. *E.g.*, App.86a-89a. Maverick seeks to set aside those approvals, arguing that they violated the APA. *See* Am.Compl. (Dkt. 66) ¶¶ 164-76, *Maverick Gaming LLC v. United States*, No. 3:22-cv-5325 (W.D. Wash. July 5, 2022). No one disputes that an APA suit challenging secretarial approval implicates that interest. But Rule 19(a)(1)(B)(i) requires more than an interest—non-parties must also show that resolving the suit in their absence would "impair or impede" their ability to protect that interest "as a practical matter." This pragmatic focus means that there is no need to join a non-party that can be adequately represented by an existing party, as is the case when the United States defends an APA suit. *See Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001) ("As a practical matter, the Secretary's interest in defending his determinations is 'virtually identical' to the interests of [a non-party tribe]."); *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996), *amended* (Aug. 6, 1996) (similar).

Although the Ninth Circuit once acknowledged—like the Tenth Circuit and the D.C. Circuit—that "[t]he United States can adequately represent an Indian tribe unless there exists a conflict of interest between the United States and the tribe," *Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998), it has applied that "conflict of interest" exception so broadly as to swallow the rule. Take the decision below, which applied the Ninth Circuit's novel test that the government and the non-party

must "not just share the same interest in the outcome of the litigation, [but] also shar[e] the same *reason* for that desired outcome." App.29a. Or *Diné Citizens*, where the Ninth Circuit found a conflict because the federal government's interests and the tribe's "might diverge" at some later date if the challengers were to prevail. 932 F.3d at 855. Second-guessing the federal government's motivations violates the agency's "presumption of regularity." *FDA v. Wages & White Lions Invs.*, 145 S.Ct. 898, 922 (2025). And gross speculation about future conflicts is the opposite of the "practical" analysis that Rule 19(a) requires. The same goes for the Ninth Circuit's suggestion that a stale conflict of interest over a different issue thirty years ago means a present conflict exists today. App.31a-32a.

All these excesses are rooted in the misguided idea that it is not enough for the government to mount a vigorous defense—it must also share the tribe's interest in the "consequences" of upholding a challenged action. App.45a (Miller, J., concurring). But that is circular. The Ninth Circuit defines the "consequences" for tribes in terms of their "sovereign and economic interests," App.29a, which the United States will never share because APA suits do not seek damages and Congress has waived the government's sovereign immunity for federal suits seeking equitable relief. So the Ninth Circuit's real rule is that the United States can *never* adequately represent a non-party tribe—the exact opposite of what it said in *Center for Biological Diversity*. This novel "the-government-is-never-adequate" principle represents a sharp break from the practice of other courts of appeals, which instead apply the ordinary "adequate-unless-conflicted" rule

found in *Center for Biological Diversity*. *See* App.47a-48a (Miller, J., concurring); Pet.17-23 (collecting cases).

When combined with its equally egregious Rule 19(b) analysis, the Ninth Circuit's approach to Rule 19(a) "threatens to 'sound the death knell for any judicial review of executive decisionmaking' in the wide range of cases in which agency actions implicate the interests of Indian tribes." App.47a (Miller, J., concurring) (cleaned up). But nothing about Rule 19(a)'s "practical" approach requires an interpretation that would ensure that "'no one, except a Tribe, could seek review of' agency actions affecting tribal interests." *Id.* (cleaned up).

B. Under these circumstances, an interested non-party is not "indispensable."

Even if the Ninth Circuit were right that non-party tribes are almost always "Required" to be joined in APA suits (it is not), that would not compel the subsequent conclusion that an interested non-party's strategic decision not to consent to joinder requires dismissing the suit.

Since 1966, Rule 19(b) has required courts to consider four factors when evaluating whether a "Required Party" that cannot be joined is "indispensable" such that the suit cannot continue "in equity and good conscience" without it. Fed. R. Civ. P. 19(b), advisory comm. note to 1966 amend. Those factors are:

> (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.

Fed. R. Civ. P. 19(b)(1)-(4). Contrary to the decision below, all four factors support allowing Maverick's claims to proceed to the merits.

The first factor—the extent of potential prejudice—is similar to the "Required Party" analysis under Rule 19(a). But where Rule 19(a) turns on whether the non-party "is so situated that disposing of the action in the [non-party's] absence *may as a practical matter* impair or impede the [non-party's] ability to protect [its] interest," Fed. R. Civ. P. 19(a)(1)(B)(i) (emphasis added), Rule 19(b) further considers "the *extent*" of that potential prejudice, *id.* 19(b)(1) (emphasis added). Thus, even if the Ninth Circuit had been right that the abstract possibility of a future conflict meant that a non-party tribe's interests might be prejudiced "as a practical matter" under Rule 19(a), it was error to duplicate that analysis in Rule 19(b) without considering "the extent" of any potential prejudice. *See* App.38a. Any proper "extent" inquiry would have to reckon with what the Ninth Circuit ignored—that

the potential prejudice to a non-party beneficiary when the government defends its own action is highly speculative. Prejudice that is, at best, conditional on a series of uncertain events must be seriously discounted in the analysis.

The second factor—potential mitigation—also cuts strongly in Maverick's favor. Any potential prejudice a court might discern could be easily mitigated by allowing the Tribe to participate as an *amicus*. The Tribe's continued participation as a friend to the court (and a watchful eye over the briefing) would no doubt encourage the government to vigorously defend the challenged action. And Justices of this Court often extensively engage with *amici* in important constitutional cases like this one, so there is little chance that the Tribe's arguments will go unheard. *See, e.g.*, *Harvard*, 600 U.S. at 254-55, 258, 275, 285, 293 (Thomas, J., concurring); *id.* at 323, 330, 336, 341, 355, 363, 371 (Sotomayor, J., dissenting, joined by Kagan, J., and Jackson, J.).[2] The only real benefit that the Tribe loses as an *amicus* is the ability to argue that the case should be dismissed under Rule 19. But the Court should not accept the circular proposition that the potential inability to execute a procedural end-run around judicial review is ipso facto justification for permitting the maneuver in the first place.

The Ninth Circuit rightly conceded that the third and fourth factors—the ability to render an adequate

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[2] Justice Jackson joined the dissenting opinion "only as it applie[d] to" the companion case. *Harvard*, 600 U.S. at 317 n.*

judgment without the Tribe and the absence of an alternative forum for Maverick to pursue its APA claims—cut against dismissal. *See* App.39a-41a. But although it admitted that "there is no alternative judicial forum in which Maverick could seek the relief it requests," App. 40a, the Ninth Circuit never articulated why the total absence of an alternative judicial remedy—what other circuits have explained is a "critical consideration under Rule 19(b)," *Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 500 (7th Cir. 1980)—should not *almost always* compel a court to allow the suit to continue. *Compare* App.40a-41a, *with Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1413 (10th Cir. 1996) (explaining that the absence of an alternative judicial forum often weighs "'conclusively'" against dismissal); *AUTO*, 285 P.3d at 60-61 (similar).

AUTO, where the Washington Supreme Court considered a compulsory joinder challenge to a trade association's suit alleging that tribal-state fuel tax compacts violated the Washington Constitution, is a particularly effective deconstruction of the Ninth Circuit's flawed Rule 19(b)(4) analysis.[3] The Court began by tracing the history of the indispensable party rule

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[3] Although it provides a persuasive example of how to faithfully apply Rule 19(b) to a similar fact-pattern, *AUTO* does not mean that the Washington Supreme Court is an alternative forum in which Maverick could pursue its APA claims. Those claims can be brought only in federal court. *See* 5 U.S.C. §702.

back several hundred years,[4] through this Court's foundational decision in *Shields v. Barrow*, 58 U.S. (17 How.) 130 (1854), to the 1966 rules amendments, which were designed to "counter th[e] trend" of courts "rubber-stamping [required parties] as 'indispensable'" by "clearly 'condition[ing] a finding of indispensability upon pragmatic considerations,'" *AUTO*, 285 P.3d at 57-58. After analyzing the same four factors in Rule 19(b), the Washington Supreme Court explained that "the quest for 'complete justice,'" *id.* at 60 (quoting *Shields*, 58 U.S. at 139), "ironically leads to none at all" when dismissing a claim against the government based on a non-party tribe's sovereign immunity "would have the effect of immunizing *the State*, not the tribes, from judicial review," *id.* Because that outcome is "at odds with the equitable purposes underlying compulsory joinder," the Washington Supreme Court rightly held that "[w]here no other forum is available to the plaintiff, the balance tips in favor of allowing [a] suit [against the government] to proceed without [non-party] tribes." *Id.* at 60-61.

AUTO demonstrates that a court need not "minimize the importance of tribal sovereign immunity" to understand that the doctrine "is meant to be raised as a shield by the tribe, not wielded as a sword by the State." *Id.* at 60. The Ninth Circuit's contrary rule,

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[4] For a historical account of the rule beginning in 1673 at the English Court of Chancery, see Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum. L. Rev. 1254 (1961) & Reed, *Compulsory Joinder*, *supra*.

which allows non-parties to wield sovereign immunity as a tool of procedural gamesmanship, is wrong.

The Ninth Circuit brushed aside the fact that it was shutting the courthouse doors on Maverick based on a "'wall of circuit authority,'" App.40a, that has been subject to critique, *see Confederated Tribes of Chehalis Indian Rsrv. v. Lujan*, 928 F.2d 1496, 1505 (9th Cir. 1991) (O'Scannlain, J., concurring in part and dissenting in part) ("Given the absence of an alternative forum, proceeding to the merits in this action is the plaintiffs' only hope of obtaining an adequate remedy. In my view, this single factor makes dismissal of the suit so harsh that it may outweigh the other three factors combined."); App.44a-48a (Miller, J., concurring). This Court faces no such obstacle. The touchstones of Rule 19(b) are "[e]quity and good conscience" or "in short, … justice." Wright & Miller, §1601 (quoting Reed, *Compulsory Joinder*, *supra*). None of those terms are compatible with a per se rule insulating government action from judicial review every time a self-interested non-party asserts sovereign immunity as a pocket veto.

C. The Ninth Circuit's rule has created a two-tiered system of administrative law in the state and federal courts.

The decision below confirms that the Ninth Circuit's Rule 19 jurisprudence has created a two-tiered system of administrative law featuring a disfavored class: litigants who seek to challenge government action that benefits a non-party tribe, foreign government, or other entity capable of asserting sovereign immunity in absentia. That class includes litigants

pursuing state and federal claims against state and federal defendants in state and federal courts, all spread throughout the largest federal circuit by population and land area. The perverse effects of this two-track system are best illustrated by examining a series of hypothetical litigants.

When unlawful agency action harms an ordinary litigant by benefiting his business competitor, that litigant has suffered an Article III injury. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 384-85 (2024). Because of the APA, the litigant also has a federal cause of action, an express waiver of the government's sovereign immunity, and a judicial remedy to redress the harm that the government caused him. 5 U.S.C. §§702, 706. Whether this litigant can obtain relief turns on the merits, which often involve pure questions of law reviewed by the court *de novo*. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412-13 (2024).

A second kind of litigant is identically situated to the first except that his business competitor is an Indian tribe or a foreign sovereign rather than a private corporation. Although this litigant has the same Article III injury, the same cause of action, the same sovereign immunity waiver, and the same judicial remedy, whether he can obtain relief does *not* turn on the merits if he lives in the Ninth Circuit. Instead, the second litigant's right to judicial review is conditioned on obtaining preclearance from his competitor. If the tribe or foreign sovereign does not like the suit (and what business competitor would?), it can simply move to dismiss for nonjoinder under Rule 19—confident

that cases like *Diné Citizens* and *Maverick Gaming* have stacked the deck no matter how vigorously the government promises to defend the challenged action.

As the decision below makes painfully clear, that the second litigant lacks any other legal remedy makes no difference. *See* App.40a-41a. Though he could reasonably complain that permitting his competitor to exercise a pocket veto abridged his "substantive right[s]," 28 U.S.C. §2072(b), the Ninth Circuit has ruled that a tribe's "sovereign interest" in preventing the U.S. government—an independent sovereign that has waived immunity—from being sued trumps the APA, the Constitution, and the principles of "equity and good conscience" enshrined by this Court in Rule 19(b).

The six years since *Diné Citizens* show just how broadly the Ninth Circuit's pocket veto rule will sweep if it is upheld. *Jamul Action Committee* short-circuited community organizations' efforts to challenge the construction of a tribal casino. 974 F.3d at 988, 996-98. *Backcountry Against Dumps* stopped an environmental suit in its tracks before the court could review the BIA's approval of a development lease. 2022 WL 15523095, at *1. *Klamath Irrigation* barred the claims of "irrigation and drainage districts, farmers, and landowners" challenging the government's allocation of water rights. 48 F.4th at 938, 942. *Deschutes River Alliance v. Portland General Electric Company* halted a Clean Water Act citizen suit. 1 F.4th 1153, 1156 (9th Cir. 2021). And all these issues, while serious, are just the beginning. *See infra* 23-25.

Indeed, APA plaintiffs are not the only losers under the Ninth Circuit's upside-down regime. A third litigant suing to invalidate *state* administrative action that unlawfully favors a tribal or other foreign competitor based on a federal constitutional challenge will lose his case the same way if it is brought in federal court or removed there by a strategic defendant. Although this litigant might be able to pursue his federal claim in state court, the practical result is that he has been denied a federal forum despite Congress granting district courts subject-matter jurisdiction over the case. *See* 28 U.S.C. §1331. In all but a few narrow circumstances inapplicable here, this Court has recognized such abdication as a dereliction of duty because the judicial branch has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). In contrast to the caution with which this court has approached abstention, the Ninth Circuit's interpretation of Rule 19 has effectively created a novel "sovereign beneficiary" doctrine with no clear basis in law.

Even if a litigant can bring his case in state court and keep it there, there is still no guarantee that he will receive a decision on the merits. Many state courts in the Ninth Circuit's jurisdiction have nearly identical compulsory joinder rules patterned after Rule 19. *See, e.g.*, Nev. R. Civ. P. 19; Cal. Civ. Proc. Code §389; Wash. Sup. Ct. Civ. R. 19; N.M.R. Ann. 1-019. Given this similarity, it is no surprise that defendants and non-party tribes often cite Ninth Circuit decisions applying Rule 19 as persuasive authority or that some state courts have relied on those precedents

to reach similarly unjust results. *See, e.g.*, *Srader v. Verant*, 964 P.2d 82, 91-92 (N.M. 1998). The only saving grace is that other state courts have refused to rubber stamp the Ninth Circuit's faulty application of the compulsory joinder rule. *See AUTO*, 285 P.3d at 61 (collecting cases from New York, California, and Wisconsin).

II. The Ninth Circuit's decision makes it substantially less likely that a federal court will address the important legal questions surrounding tribal-exclusivity regimes.

The decision below interpreted Rule 19 to nullify the APA whenever agency action benefits a non-party tribe that does not consent to be joined. That decision was wrong on the merits. And it would have pernicious effects throughout the state and federal legal systems if upheld. One of the most concerning of those effects is that the Ninth Circuit's rule would eliminate much of the practical opportunity for federal courts to address the important legal questions surrounding tribal-exclusivity regimes.

Maverick's APA claim alleged that the Secretary of the Interior was obliged to disapprove the challenged tribal-state compact amendments because they contained exclusivity provisions granting tribes a statewide commercial monopoly over certain forms of class III gaming. Am.Compl. ¶¶93-128, 168-70. Among other things, Maverick argued that such provisions violate IGRA, *id.* ¶168, and unconstitutionally "discriminat[e] on the basis of race and ancestry," *id.* ¶¶156, 169.

Maverick's principal argument is that tribal-exclusivity regimes violate IGRA because class III gaming on Indian lands is lawful only if "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. §2710(d)(1)(B). In other words, federal law "ensur[es] that each class III gaming activity remains illegal on Indian lands unless [the state] 'permits' the same … activity by non-tribal entities." Am.Compl. ¶99.

The challenged compact amendments flout this antidiscrimination principle because Washington prohibits non-tribal entities from engaging in certain Class III gaming activities. *See id.* ¶¶57-92. Far from permitting "any person, organization, or entity" to engage in these activities "for any purpose," only tribes can engage in exclusive gaming activities, even outside Indian land. *See id.* Tribal-exclusivity regimes like Washington's violate IGRA's state-permission requirement and undermine congressional intent that class III gaming must "be legal absent [a] Tribal-State compact" to be legal *under* a tribal-state compact. *Citizen Band Potawatomi Indian Tribe of Okla. v. Green*, 995 F.2d 179, 181 (10th Cir. 1993).

Setting aside the statutory question, whether a law purporting to grant Indian tribes a statewide commercial monopoly comports with the Constitution is an issue of first impression under this Court's precedent. *See W. Flagler Assocs., Ltd.*, 144 S.Ct. at 10 (Statement of Kavanaugh, J., respecting the denial of the application for stay).

On the one hand, "ancestry" classifications often serve as a "proxy for race." *Rice*, 528 U.S. at 514. These

classifications "implicat[e] the same grave concerns as a classification specifying a particular race by name" because "it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Id.* at 517; *Harvard*, 600 U.S. at 220 (quoting *Rice*). Thus, "'[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (Op. of O'Connor, J.)). On the other hand, this Court has applied a less restrictive standard of scrutiny to concededly racial classifications affecting Indian tribes under certain narrow circumstances. *See Rice*, 528 U.S. at 519-20 (discussing *Morton*).

The tension between these two lines of case law after *Harvard* is palpable. *See W. Flagler Assocs., Ltd.*, 144 S.Ct. at 10 (Statement of Kavanaugh, J., respecting the denial of the application for stay) (citing *Harvard*); *Brackeen*, 599 U.S. at 333-34 (Kavanaugh, J., concurring). But rather than brief the merits of an important constitutional question, which would have teed it up for this Court's review, the Tribe filed a motion discussing only whether Rule 19 compelled dismissal. *See* Mot. to Dismiss (Dkt. 85), *Maverick Gaming LLC*, No. 3:22-cv-5325 (W.D. Wash. Oct. 3, 2022). And although the United States correctly argued that the Ninth Circuit's precedent on Rule 19 was wrong,

it agreed with the Tribe that circuit precedent required dismissal without reaching the merits. *See* U.S. Resp. to Mot. to Dismiss (Dkt. 94) at 6, *Maverick Gaming LLC*, No. 3:22-cv-5325 (W.D. Wash. Oct. 24, 2022).

As the full Court and six sitting Justices have recently acknowledged, percolation is an important component of presenting this Court with a discrete legal question ripe for review.[5] By resolving cases on Rule 19 grounds, the Ninth Circuit's rule short-circuits that process for a wide range of important issues affecting Indian tribes and similarly situated non-parties. Indeed, one of this Court's most notable decisions on the intersection of Indian law and equal protection might never have happened had a tribe sought to intervene and dismiss using the procedural end-run that the Ninth Circuit has blessed.

Morton v. Mancari involved an employment preference for members of federally recognized tribes with a certain quantum of Indian blood. 417 U.S. 535 at 549 n.23, 553 n.24. That preference was, to some extent,

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[5] *See, e.g.*, *All. for Hippocratic Med.*, 602 U.S. at 380; *Trump v. J.G.G.*, 145 S.Ct. 1003, 1013 (2025) (Sotomayor, J., dissenting, joined by Kagan, J., Jackson, J., and Barrett, J.); *Gonzalez v. United States*, 145 S.Ct. 529, 533 (2025) (Statement of Sotomayor, J., respecting the denial of certiorari, joined by Gorsuch, J.); *Labrador v. Poe*, 144 S.Ct. 921, 933-34 (2024) (Kavanaugh, J., concurring in the grant of stay, joined by Barrett, J.); *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 587 U.S. 490, 496 (2019) (Thomas, J., concurring).

framed as benefiting tribal governments by systematically preferencing their members such that beneficiary tribes would have had articulable economic and sovereign interests in maintaining the jobs that the federal government had already provided. Under the Ninth Circuit's rule, either the United States or a non-party tribe could have moved to dismiss on the basis that the tribe was an indispensable party that could not be joined. Even if the United States opposed the maneuver as it did in *Diné Citizens* and was prepared to vigorously defend the tribal preference—as it did in *Morton* and here—the Ninth Circuit's holding that the United States' interest in defending challenged action "differs in a meaningful sense from the Tribe's sovereign interest" in benefiting from such action would inevitably doom the suit. *See* App.32a.

The *Morton* hypothetical is the tip of the iceberg. The Ninth Circuit's rule would let a non-party tribe pocket veto APA litigation challenging almost any government action raising a similar equal protection issue. For example, government action purporting to grant tribe members disproportionate voting power—almost exactly what this Court struck down in *Rice*—could be insulated from judicial review so long as the tribe asserted a "sovereign interest" in maintaining its clearly unconstitutional preference. Such outcomes cannot be (and, outside the Ninth Circuit, are not) the law.

Interpreting Rule 19 to permit these perverse results would be antithetical to "equity and good con-

science" and this Court's exhortation almost two centuries ago that lower courts should "'do complete justice'" in applying the compulsory joinder rule. *AUTO*, 285 P.3d at 60 (quoting *Shields*, 58 U.S. at 139). But to the detriment of litigants like Maverick who have been denied their day in court for years, the Ninth Circuit has done exactly that.

CONCLUSION

For these reasons, the Court should grant the petition and reverse the decision below.

Respectfully submitted,

Jeffrey M. Harris
Counsel of Record
Zachary P. Grouev
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

June 12, 2025

Counsel for Amicus Curiae