ORAL ARGUMENT NOT YET SCHEDULED

No. 21-5265
(consolidated with No. 22-5022)

UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

WEST FLAGLER ASSOCIATES, LTD., et al.,
Plaintiffs-Appellees,

v.

DEBRA HAALAND, et al.,
Defendants-Appellees,

SEMINOLE TRIBE OF FLORIDA,
Movant-Appellant.

Appeal from the United States District Court
for the District of Columbia
No. 1:21-cv-02192 (Hon. Dabney L. Friedrich)

ANSWERING BRIEF FOR FEDERAL APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The parties who have entered an appearance in this appeal are:

(1) *Plaintiffs-appellees*: West Flagler Associates, Ltd., a Florida Limited Partnership d/b/a Magic City Casino; Bonita-Fort Myers Corp., a Florida Corporation d/b/a Bonita Springs Poker Room.

(2) *Defendants-appellees*: United States Department of the Interior; Debra Haaland, in her official capacity as Secretary of the Interior.

(3) *Movant-appellant*: Seminole Tribe of Florida.

In addition, the following entities have entered an appearance as amicus curiae in this appeal or the consolidated appeal No. 20-5022: Monterra MF, LLC; Armando Codina; James Carr; Norman Braman; 2020 Biscayne Boulevard, LLC; 2060 Biscayne Boulevard, LLC; 2060 NE 2nd Avenue, LLC; 246 NE 20th Terrace, LLC; No Casinos; State of Florida; the National Indian Gaming Association; the United South and Eastern Tribes Sovereignty Protection Fund; the California Nations Indian Gaming Association; the Arizona Indian Gaming

Association; Confederated Tribes of Siletz Indians; Coquille Indian Tribe; Estom Yumeka Maidu Tribe of the Enterprise Rancheria; Guidiville Rancheria of California; Redding Rancheria; Rincon Band of Luiseno Indians; Tunica-Biloxi Tribe of Louisiana; Wampanoag Tribe of Gay Head (Aquinnah); Wilton Rancheria; and Yuhaaviatam of San Manuel Nation.

B. Rulings under Review

The ruling under review is the district court's November 22, 2021 order and opinion granting plaintiffs' motion for summary judgment, denying the federal government's motion to dismiss, and denying the Seminole Tribe's motion to intervene. Joint Appendix 554, 555-79.

C. Related Cases

Counsel is unaware of any related cases (other than the consolidated appeal) presently pending in this Court or any other court, within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ *Rachel Heron*
RACHEL HERON

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APA	Administrative Procedure Act
IGRA	Indian Gaming Regulatory Act

INTRODUCTION

The district court entered judgment against the federal government and vacated final agency action in this Administrative Procedure Act ("APA") lawsuit against the Secretary of the Interior—erroneously, for the reasons explained by the federal government in consolidated appeal No. 22-5022. The Seminole Tribe of Florida suggests an additional ground for reversal: that the district court erred by barring the Tribe from intervening for the limited purpose of filing a motion to dismiss on the ground that the Tribe is a required and indispensable defendant under Federal Rule of Civil Procedure 19, which cannot be joined due to sovereign immunity. While the federal government and the Tribe both seek reversal, the Tribe's preferred path is in tension with circuit precedent and, if adopted, could functionally nullify the APA's waiver of federal sovereign immunity in the wide swath of cases where federal agency action benefits a tribe or state that cannot be joined to litigation without consent.

Thus, while this Court should reverse for the reasons stated in the government's appeal, the district court's denial of the Tribe's motion should not be disturbed.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the claim it resolved in West Flagler's favor under 28 U.S.C. § 1331, because that claim arises under a federal

statute, 5 U.S.C. § 701 *et seq.* JA 50, 559-61. The district court's judgment resolved all claims against all defendants. JA 554. This Court therefore has jurisdiction under 28 U.S.C. § 1291. The Tribe's appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B) because judgment was entered on November 22, 2021, and the Tribe noticed an appeal on November 23, 2022. JA 554, 580.

STATEMENT OF THE ISSUES

Whether the federal government is the only required and indispensable defendant in this APA challenge to federal agency action, such that the Tribe's proposed motion to dismiss for nonjoinder lacks merit and there is no cause to reverse the district court's denial of the Tribe's motion to intervene for the sole purpose of filing that motion to dismiss.[1]

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are set forth in the addendum to the Tribe's opening brief.

[1] In the interest of avoiding duplicative briefing on an issue raised in a footnote by the Tribe and by the State of Florida (which has participated as amicus only in these consolidated cases), the government notes that its analysis regarding joinder of the Tribe applies equally to joinder of Florida. Op. Br. 17 n.3; State Amicus Br. (No. 22-5022) 16 n.3.

STATEMENT OF THE CASE

I. Traditional joinder rules

The Tribe's appeal illuminates the potential tension between, on one hand, the public's ability to challenge federal agency action that Congress has elected to subject to judicial review, and on the other hand, a broad construction of traditional joinder rules. Relevant to that tension, the Supreme Court has long recognized that traditional joinder rules may be inapplicable "[i]n a proceeding . . . narrowly restricted to the protection and enforcement of public rights." *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940).

Where the traditional rules do apply, a nonparty to civil litigation is "required to be joined if feasible" under Federal Rule of Civil Procedure 19(a) when one of two criteria is met:

> (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).[2]

When joinder of a required nonparty is not feasible—as, for example, when the nonparty is shielded from suit by sovereign immunity—"the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed," *i.e.*, whether the nonparty is 'indispensable' to the action. Fed. R. Civ. P. 19(b). In making that determination, courts should consider four factors:

> (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.

Id.

[2] A prior version of Rule 19 labeled parties meeting these requirements as "necessary." *See Vann v. Kempthorne*, 534 F.3d 741, 745 n.1 (D.C. Cir. 2008).

II. Judicial review of Secretarial decisions to take no action on an IGRA compact

Plaintiffs challenge the legality of federal agency action—specifically, the Secretary of the Interior's failure to act on a gaming compact between the State of Florida and the Tribe, which was submitted for her approval pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* A detailed discussion of IGRA's regime regarding gaming on Indian lands appears in the government's opening brief in consolidated appeal No. 22-5022. As relevant here, IGRA sets out a compacting process by which states and tribes may reach mutual decisions about the conditions under which "class III gaming" (which includes the kind of gaming at issue in this case) may be conducted on Indian lands. *See generally id.* § 2710(d)(3).

IGRA requires a compact to be submitted to the Secretary before it may go into effect. *Id.* § 2710(d)(3)(B). "If the Secretary does not approve or disapprove a compact . . . before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter [*i.e.*, IGRA]." *Id.* § 2710(d)(8)(C).

This Court considered whether the Secretary's failure to act on a submitted compact is subject to judicial review in *Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011). It expressly held that Congress intended to subject such inaction

to judicial review where plaintiffs claim the Secretary had a duty to disapprove the compact because the compact is inconsistent with IGRA. *Id.* at 379-84.

III. The present APA challenge

In 2021, the State of Florida and the Tribe entered into a gaming compact that authorizes the Tribe to operate an online sportsbook from its Indian lands in Florida, which Florida has elected to allow customers throughout the State to access for the purpose of placing wagers. JA 676, 686-93, 756-57. The State and Tribe project that the Compact would provide significant financial and other benefits to both sovereigns. *See* JA 674-75, 766. But under IGRA, a compact may not take effect unless submitted to the Secretary for approval. 25 U.S.C. § 2710(d)(3)(B). The State and Tribe accordingly submitted the Compact to the Secretary for approval. JA 668. The Secretary did not act timely, JA 214, and after 45 days the Compact was thus "considered to have been approved," to the extent consistent with IGRA. 25 U.S.C. § 2710(d)(8).

The plaintiff gaming rooms (collectively, "West Flagler") consider the Tribe's online sportsbook a competitive threat to their brick-and-mortar facilities. They subsequently filed this APA action against the Secretary, claiming that the Secretary's inaction was unlawful because the Secretary had a duty to disapprove the Compact. JA 50-53. West Flagler offered two theories why: *first*, that the Compact violates IGRA itself, and *second*, that it violates other federal laws. *Id.*

For relief, West Flagler requested "[a]n order vacating and setting aside the Secretary's approval of the Compact as unlawful," as well as attorneys' fees and costs and "[s]uch other and further relief as the Court deems just and proper." JA 54. West Flagler did not request any relief running against the Tribe or the State and named only federal agencies and officers as defendants. JA 18, 54.

West Flagler filed a motion for summary judgment one month after filing its complaint. JA 6. Consistent with the court's scheduling order, *see* JA 5, the federal government responded with a timely combined opposition and cross-motion to dismiss. *See generally* JA 419-69. In that filing, the government argued that West Flagler lacked Article III standing and that it failed to state any plausible claim for relief. JA 429-54. Accordingly, the government asked the district court to dismiss West Flagler's lawsuit in full. JA 429. Because the government maintained that West Flagler's claims should be dismissed on threshold grounds, it did not specifically rebut West Flagler's APA merits arguments. However, after the district court ordered the government to address the merits, the government promptly filed a supplemental memorandum explaining that the Secretary acted lawfully and that the Compact does not violate the laws cited by West Flagler. JA 521-52.

Meanwhile, the Tribe filed a motion to intervene for the limited purpose of filing its own motion to dismiss. JA 239-59. The Tribe proposed to present one

additional ground for dismissal not raised in the federal government's motion: that the Tribe is a required party under Rule 19(a) which cannot be joined due to sovereign immunity, and that equity and good conscience demand that the challenge to federal action be dismissed in its absence under Rule 19(b). JA 270-84.

The federal government opposed dismissal on that particular ground, explaining that the United States is generally the only required and indispensable defendant in an APA lawsuit. JA 496. The government itself can adequately represent a nonparty's interest in seeing federal action upheld, such that "disposing of the action in the person's absence" will not "as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i); *see Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996). The government affirmed that, here, it was prepared to defend the Secretary's decision on all issues "properly before the Court." JA 499-500.

The district court ultimately denied the federal government's motion to dismiss, held that the Secretary had an obligation to disapprove the Compact because the Compact violates IGRA, and vacated the Secretary's constructive approval. JA 562-66, 572-79.

With regard to the Tribe's arguments, the district court began by addressing the substance of the Tribe's proposed motion to dismiss. JA 566-67. It concluded

that the Tribe is a "required party" within the meaning of Rule 19(a) because it "has an interest in the validity of [its] compact" which "would be directly affected by" the relief West Flagler seeks. JA 567. The court did not ask whether existing defendants could adequately represent that interest, such that proceeding in the Tribe's absence would not, as a practical matter, impair the Tribe's ability to protect that interest under Rule 19(a). Instead, it immediately proceeded to determine whether Rule 19(b) requires that the action be dismissed in the absence of the Tribe, which enjoys sovereign immunity and cannot be joined without consent. *See id.*

Under Rule 19(b), the district court determined that the Tribe's interests were adequately represented when weighing the potential prejudice to the Tribe under Rule 19(b)(1). JA 569. It explained that both the federal government and the State, which participated as *amicus curiae*, "share the Tribe's position on the key issue in this case—*i.e.*, that the Compact is consistent with IGRA." *Id*. The Tribe "never identifie[d] how its litigation interests differ from those of the other sovereigns," and the court declined the Tribe's invitation "to simply assume that their interests conflict." *Id.*

Turning to the remaining Rule 19(b) factors, the district court found that all weighed against dismissal. *See* JA 569-71. In particular, the court recognized that dismissal on these facts could systematically deprive the public of a forum for

challenging Secretarial compact approvals, contrary to Rule 19(b)(4). As the court explained, "holding that the Tribe is indispensable in this case, where the Tribe has made no particularized showing of prejudice, would require treating tribes as indispensable in *every* case that challenges the Secretary's approval of a gaming compact." JA 570. The court declined to adopt a rule that "those approvals will *never* be subject to judicial review," particularly in light of *Amador County*, which concluded that Congress intended them to be reviewable. *Id.* It accordingly held that the Tribe's motion to dismiss lacks merit, and thus that its motion to intervene for the sole purpose of filing that motion to dismiss is moot.[3] JA 571.

The Tribe appealed and filed an emergency stay motion in this Court, arguing that its Rule 19 arguments were likely to succeed on appeal. *See* ECF No. 1924081, at 2. The federal government "advise[d]" this Court that "while it does not join the Tribe's motion for stay pending appeal and does not agree with all analysis presented in that motion, it also does not oppose the motion." ECF No. 1924494, at 2. A divided panel denied the stay. ECF No. 1925401. The federal government went on to file its own timely notice of appeal and continues to argue that the decision below should be reversed on grounds unrelated to joinder. *See generally* No. 22-5022, ECF No. 1959740.

[3] This brief does not address whether the district court could have instead granted the motion to intervene and *then* considered and denied the motion to dismiss.

SUMMARY OF ARGUMENT

The federal government is generally the only required and indispensable defendant in an APA challenge to the legality of the government's own actions. While this Court has not adopted a categorical exemption to traditional joinder rules in APA cases, its precedent recognizes that the government can normally represent a nonparty's interest in seeing federal action upheld, unless there is a demonstrated conflict between the government and the nonparty. Absent such conflict, the nonparty is not required within the meaning of Rule 19(a), let alone indispensable under Rule 19(b). Here, the government shares the Tribe's interest in seeing the Secretary's inaction allowing the Compact to go into effect upheld and has defended that result both in the district court and in its affirmative appeal from that court's adverse decision. Because the government's advocacy protects the Tribe's interest in the challenged action even in the Tribe's absence, the district court could—and should—have rejected the Tribe's motion to dismiss on the ground that the Tribe is not a required party under Rule 19(a), without considering Rule 19(b).

Should this Court reach Rule 19(b), the Tribe's arguments for overturning the district court's weighing of the equities are unavailing. While respect for an absent sovereign's immunity is in some contexts a significant consideration when deciding whether a case must be dismissed, it is not a dispositive weight in favor of

dismissal—particularly on the facts of this case, where dismissal would render functionally immune from review an entire class of agency actions that this Court has concluded Congress intended to make reviewable.

Thus, while the district court erred in granting judgment to West Flagler for the reasons stated in the federal government's companion appeal, the particular grounds presented by the Tribe are not a proper basis for dismissal.

STANDARD OF REVIEW

This Court considers *de novo* whether a nonparty is required to be joined if feasible under Rule 19(a), to the extent that determination involves a legal conclusion. *See S.E.C. v. Bilzerian*, 378 F.3d 1100, 1102, 1107-08 (D.C. Cir. 2004); *W. Maryland Ry. Co. v. Harbor Ins. Co.*, 910 F.2d 960, 963 n.6 (D.C. Cir. 1990); *see also Aguilar v. Los Angeles Cty.*, 751 F.2d 1089, 1092 (9th Cir. 1985). This Court's Rule 19 decisions have not squarely stated whether the determination that an existing party will adequately represent an absent party's interest is a conclusion of law. However, the Court has noted in cases involving intervention as of right under Federal Rule of Civil Procedure 24(a) that whether an existing party adequately represents a movant "involve[s] a measure of judicial discretion and hence [is] reviewed for abuse of that discretion." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003).

If this Court reaches the Rule 19(b) inquiry, it reviews "the district court's application of Rule 19(b)'s equity and good conscience test for abuse of discretion," although "questions of law that inform a district court's Rule 19 determination are reviewed *de novo*." *De Csepel v. Republic of Hungary*, 27 F.4th 736, 746 (D.C. Cir. 2022).

ARGUMENT

I. The federal government should generally be the only required and indispensable defendant in APA litigation.

As a threshold matter, it bears noting that the traditional joinder framework encapsulated by Rule 19 may have limited applicability "[i]n a proceeding . . . narrowly restricted to the protection and enforcement of public rights." *Nat'l Licorice*, 309 U.S. at 363. As the Supreme Court has explained, in such cases, "there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Id.* And in fact, expansive application of traditional joinder rules in challenges to federal action could effectively "sound[] the death knell for any judicial review of executive decisionmaking," by making it impossible for courts to hear challenges to agency action that benefits nonparties who cannot feasibly be joined. *Conner v. Burford*, 848 F.2d 1441, 1460-61 (9th Cir. 1988); *cf. Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977); *but see Diné Citizens Against Ruining our Environment v.*

Bureau of Indian Affairs, 932 F.3d 843, 860-61 (9th Cir. 2019), *cert. denied* 141 S. Ct. 161 (2020).

Because this Court has not, to date, recognized a categorical rule exempting APA challenges from Rule 19 under the public-rights doctrine, this brief will also address the traditional Rule 19 inquiry. *See, e.g.*, *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1497 (D.C. Cir. 1997); *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1995).[4] But the federal government first notes that faithful application of the first principles underlying that inquiry should normally yield the conclusion that the government itself is the only required and indispensable defendant in an APA challenge to government action.

To elaborate, in an APA lawsuit, the question to be resolved is whether challenged agency action will be sustained or held invalid because the agency acted unlawfully. *See* 5 U.S.C. § 706(2). The APA itself does not authorize any

[4] Instead, this Court has held that the public-rights exception from the traditional Rule 19 framework applies where Rule 19 would "require the joinder of a large number of persons whom it is infeasible to join in the lawsuit" and where the "particular issues . . . involve[] a matter of the type of transcending importance." *Cherokee*, 117 F.3d at 1497; *see also Kickapoo*, 43 F.3d at 1500. This case does not involve a "large number" of allegedly required nonparties. West Flagler does, however, challenge approval of a Compact that authorizes the Tribe to operate an online sportsbook that Florida has elected to make available to customers throughout the entire State. JA 676, 686-93, 756-57; *cf. Kickapoo*, 43 F.3d at 1500 (noting district-court decision applying exception in challenge to "federal action affecting 170 million acres of public lands").

relief against non-federal entities. *See id.* §§ 702, 706. Thus, put in Rule 19 terms, a court can "accord complete relief" on an APA claim so long as the federal government participates. Fed. R. Civ. P. 19(a)(1)(A). And a nonparty's absence puts the federal government at no greater risk of "incurring double, multiple, or otherwise inconsistent obligations" than necessarily inheres in APA litigation, given that agency action can often be challenged by multiple aggrieved parties in multiple jurisdictions. *Id.* 19(a)(1)(B)(ii).

Likewise, while an adverse judgment setting aside agency action under the APA could have consequences for nonparties (and the public more generally), it leaves those nonparties in the same position they would have been had the agency never taken the action that the reviewing court has determined to be unlawful. In other words, while an APA challenge may threaten nonparties' (admittedly, sometimes significant) derivative interest in seeing federal action upheld, it does not generally threaten any interest that is wholly independent of federal action. Relying on the federal government's defense of its own conduct should not be understood to "impair or impede" a nonparty's ability to protect their interest in government action that Congress elected to make subject to judicial review in the first place, Fed. R. Civ. P. 19(a)(1)(B)(i), let alone to "prejudice" the nonparty to such an extent that equity favors dismissal. *See id.* 19(b)(1)-(2). Indeed, a contrary rule would risk depriving the public of an "adequate remedy" for allegedly

unlawful agency action in the many cases in which an interested nonparty cannot be joined, *id.* 19(b)(4)—and threaten to frustrate Congress' decision to waive the federal government's own immunity to enable APA review. *See* pp. 26-31, *infra*.

Concluding that the government is normally the only required and indispensable defendant for APA review in district court also properly minimizes any divergence between the availability of such district-court review and the parallel APA review that occurs directly in a court of appeals. When direct APA review is available in a court of appeals, the only required party is the federal agency whose action is subject to review. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1102-03 (D.C. Cir. 2019). The same should (at least normally) be true when APA review is conducted in the first instance in district court.

For these reasons, dismissals for nonjoinder in APA actions should at the very least be the exception, not the rule. This Court's Rule 19 precedent is in accord.

II. The Tribe does not satisfy the Rule 19 standards under this Court's precedent.

A. The Tribe is not required under Rule 19(a).

Turning to Rule 19 itself, while the district court rejected the Tribe's nonjoinder argument on the ground that the Tribe is a required party under Rule 19(a) but not an indispensable one under Rule 19(b), this Court may affirm on the

alternate ground that the Tribe is not a required party at all. The district court's own findings support that conclusion.

West Flagler sued federal actors for violating federal law. JA 18, 50-53. Consistent with the APA, it sought an order setting aside the challenged agency action and sought no relief running directly against any nonparty. JA 54. Thus, two of the bases on which a party may be deemed "required" under Rule 19(a) are easily discarded: the court can "accord complete relief" on West Flagler's claim without joining the Tribe, and the federal government will not be subject to "a substantial risk" of multiple inconsistent obligations, for the reasons discussed above. Fed. R. Civ. P. 19(a)(1)(A), (a)(1)(B)(ii).

The district court focused on the remaining Rule 19(a) consideration: whether resolving West Flagler's suit in the Tribe's absence would "as a practical matter impair or impede" its "ability to protect" its interest in the "subject of the action"—that is, the challenged Secretarial inaction. Fed. R. Civ. P. 19(a)(1)(B)(i). This Court addressed when Rule 19(a)(1)(B)(i) requires that an absent tribe be joined to an APA challenge to federal action in *Ramah*. 87 F.3d at 1350-52. In *Ramah*, two tribes challenged the government's allocation of a limited pot of funds among multiple tribes. *Id.* at 1340. This Court considered whether Rule 19(a) required the remaining tribes to be joined, concluding as an initial matter that the absent tribes lacked a legally protected interest in the funds plaintiffs sought to

enjoin. *Id.* at 1351. The Court went on to explain, however, that, "[e]ven if we were to assume that the nonparty Tribes *did* have a legally protected interest . . . we would still conclude that they are not necessary parties." *Id.*

As the Court explained, "[i]f the nonparties' interests are adequately represented by a party, the suit will not impede or impair the nonparties' interest, and therefore the nonparties will not be considered necessary." *Id.* With regard to the absent tribes' interest in the challenged agency allocation, "the United States may adequately represent that interest as long as no conflict exists between the United States and the nonparty beneficiaries." *Id.* The Court found no such conflict because "the nonparty Tribes' only potential interest in this case is in having the enjoined funds distributed according to" the agency decision. *Id.*

Similar reasoning applies here. As in *Ramah*, the Tribe's interest in this litigation is in seeing an "agency action"—namely, the Secretary's "failure to act," 5 U.S.C. § 551(13)—upheld. The district court correctly found that the federal government adequately represents that interest because it shares the Tribe's position "on the key issue in this case" and the Tribe failed to demonstrate any conflict. JA 569-70. The district court made that finding as part of its Rule 19(b)(1) inquiry into the extent of prejudice the Tribe is likely to suffer if the lawsuit proceeds in its absence. But the finding is equally germane to the Rule 19(a) analysis and shows that the Tribe is not a required party. *Ramah*, 87 F.3d at 1351-

52; *cf.* Op. Br. 21 (recognizing that Rule 19(a) and Rule 19(b)(1) analyses are "intertwined"). The Tribe's contrary arguments are unavailing.

First, it is immaterial to the question of adequate representation that the stakes of an adverse decision are different for the federal government and the Tribe. *See* Op. Br. 25-26. There is no question that an order setting aside the Secretary's constructive approval would have significant financial impacts on both the Tribe and State that would not be felt by the federal government itself. But that is often the case when the federal government takes action respecting a third party; it does not follow that the government will not appropriately defend its own action. Moreover, the argument is at odds with *Ramah*, which found no conflict even though setting aside the challenged allocation decision plainly would not affect the government the same way it affected tribes receiving a share of funds. *See* 87 F.3d at 1351. True, the potential financial impact on the absent tribes in *Ramah* was small. But the principle applies to larger financial stakes like those at issue here, too. *Cf. Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001) (holding government could adequately represent absent tribe's interest in agency decision to approve gaming on tribal land).[5] The Tribe's assertion that the

[5] The Ninth Circuit treats the difference between the federal government and a tribe's underlying motivations as evidence that the government is not an adequate representative. *E.g.*, *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, --F.4th--, 2022 WL 4101175, at *7-8 (9th Cir. Sept. 8, 2022). Such decisions are inconsistent with *Ramah*. Moreover, as the Ninth Circuit itself admits, they may

government cannot adequately represent the Tribe because it has overarching responsibilities to the broader public—which was equally true in *Ramah* and indeed in all agency litigation—fails for the same reason.[6]

Second, the Tribe's criticism of the federal government's litigation strategy is not grounds for deeming the government an inadequate representative. At the outset, the Tribe's assertion that this Court has "required" an existing party to make identical arguments as the absent nonparty in order to be an adequate representative under Rule 19 is mistaken. Op. Br. 27. This Court did not ask in *Ramah* whether the government would make every argument that the absent tribes might make before declaring the government an adequate representative. *See* 87 F.3d at 1351-52. True, *De Csepel*, which the Tribe cites, did hold that an absent sovereign would be adequately represented by an existing corporate party to an

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functionally ensure that "no one could obtain . . . review" of federal action relating to tribes and tribal resources "unless the tribe were willing to waive its immunity and participate in the lawsuit." *Diné Citizens*, 932 F.3d at 860-61.

[6] The Tribe draws that proposition, and the related proposition that this Court is "skeptical" of the federal government's ability to represent absent entities, from decisions construing Rule 24(a), governing intervention. Op. Br. 24-25. This Court need not decide whether the similar language in Rules 19(a) and 24(a) must be construed identically. The cited intervention precedents required this Court to make predictions about whether the government would adequately represent a nonparty's interest at an early stage of litigation. *See Crossroads Grassroots Pol'y Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 315-16, 321 (D.C. Cir. 2015); *Fund for Animals*, 322 F.3d at 730-31, 735-37. Here, the Court can review the government's actual conduct.

action to recover stolen artwork, where the existing party was willing and able to make "all" the sovereign's arguments. 27 F.4th at 748. But the Court did not hold (or even consider whether) the existing party would be an *in*adequate representative if some daylight existed between preferred litigation strategies.[7]

The operative question under this Court's precedent is instead whether there is evidence "to indicate that the United States would to any degree *abandon the position of the absent tribes* as a group in favor of the position taken by" the parties "on the other side of the lawsuit." *Cherokee*, 117 F.3d at 1497 (emphasis added). The two Rule 19 cases where this Court has held the federal government could *not* adequately represent an absent tribe in a challenge to agency action are instructive. Both involved a conflict among tribes, all of whom had a trust relationship with the United States. *Id.* In one, this Court held that the federal government was an inadequate representative because it had "twice reversed its position" on the relevant legal issue and "may reverse itself again." *Id.* And in the other, the Court similarly rejected the government as an adequate representative because the government had shown itself "willing to concede a large portion of" the claim in which the absent tribe had an interest. *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986). In other words, this Court found

[7] Out-of-circuit decisions adopting the Tribe's test are in tension with circuit precedent discussed below. *See, e.g.*, *Klamath Irrigation District*, 2018 WL 4101175, at *8.

conflict where the government's bottom-line position—not just its strategy for advancing that position—had deviated from that of the absent tribes.

Here, by contrast, the Tribe proffers differences in strategy. For example, the Tribe faults the government for failing to "engage on the merits" below, Op. Br. 27, but the government did not initially discuss the merits of the APA claim because it did not think that claim properly before the court. *See* JA 419-69.[8] When directed to address the merits, the government "defend[ed] and preserv[ed] its limited role in the 2021 Compact," Op. Br. 27—because that limited role is part of why West Flagler's arguments fail. *See generally* Fed. Op. Br. (No. 22-5022) 21-23, 30-35. It also argued that the Compact does not violate IGRA or the other federal laws cited by West Flagler, even assuming the Secretary had a duty to disapprove a compact on that ground. JA 530-50; Fed. Op. Br. (No. 22-5022) 19-30, 35-42.

Additionally, the Tribe is correct that the federal government did not affirmatively request that approval of the Compact be vacated in part rather than in full. But there was little need for such a request, since West Flagler itself suggested the court could vacate the approval only in part. JA 578, 614-16. The Tribe is likewise correct that the government did not seek dismissal on Rule 19 grounds.

[8] The government has not renewed all of its threshold arguments on appeal, but continues to argue that West Flagler's claims should be rejected in their entirety. Fed. Op. Br. (No. 22-5022) 1-2, 14 n.3.

The reason for that supposed 'omission' is that the government—after affirmatively considering the issue—concluded that the argument lacks merit. With regard to the two remaining issues that the Tribe faults the government for not addressing below, *see* Op. Br. 28-29, neither is necessary to resolving West Flagler's claims, as shown in detail in the government's opening brief. *See* Fed. Op. Br. (No. 22-5022) 28-30; *id.* 29-30, 38-41.[9]

Moreover, to the extent the Tribe wishes to articulate its own defense of the agency action, it may file an amicus brief—as it has in fact done in the federal government's appeal. True, courts generally will not consider arguments raised only by an amicus. *See, e.g.*, *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 n.7 (1984). But this Court has recognized exceptions to that rule. *E.g.*, *Cook v. Food & Drug Admin.*, 733 F.3d 1, 5-6 (D.C. Cir. 2013). And even outside those exceptions, an amicus is free to emphasize or elaborate on arguments made by the parties, or to provide additional information on ancillary issues or the consequences of an adverse decision, which may inform the Court's thinking. In any event, where, as here, the government is defending its own challenged action *and* an absent beneficiary of that action has a way to air its own views of the case,

[9] The same is true of other issues on which the government has taken no position—such as whether the Tribe would violate federal law if it were to take particular actions not required by the Compact in the course of operating its sportsbook. *See id.* 36-41.

proceeding without the beneficiary will not "as a practical matter impair or impede" their "ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i).[10]

Third, the circuit precedent the Tribe cites do not support its position. *Cherokee* and *Wichita* are distinguishable for the reasons already discussed. *See* pp. 21-22, *supra*. And while *Kickapoo* deems an absent sovereign (there, the State of Kansas) a required party under Rule 19(a) in a suit against the federal government, it predates *Ramah* and did not consider whether the government could adequately represent Kansas' interest. *See* 43 F.3d at 1495.[11] Moreover, while that case involved an IGRA compact, the facts presented were far afield from this case. Plaintiff Kickapoo Tribe sought to compel the Secretary to deem effective a compact that Kansas no longer considered valid, essentially attempting to pull the Secretary into a contractual dispute between compacting parties themselves. *Id.*

For all these reasons, this Court should affirm the district court's finding that the federal government adequately represents the Tribe's interest in this litigation. The Tribe is therefore not required under Rule 19(a).

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[10] To be sure, filing an amicus brief does not confer all the same rights and protections as party status—such as the right to appeal if the government does not. *See Cherokee*, 117 F.3d at 1497. That distinction is moot here, given that the government *has* appealed.

[11] The Court similarly deemed absent states required parties in *Cook*, but without inquiring whether the federal government could represent their interest—an issue no party raised. 733 F.3d at 5-6, 11-12.

B. The Tribe is not indispensable under Rule 19(b).

Because this Court can affirm denial of the Tribe's motion on the ground that the Tribe is not a required party under Rule 19(a), it need not address the bulk of the arguments in the Tribe's opening brief, which concern weighing the equities under Rule 19(b). Should this Court nevertheless reach Rule 19(b), the district court did not abuse its discretion in declining to dismiss on these facts.

The district court's conclusion that the Tribe would suffer little prejudice under Rule 19(b)(1) because the federal government adequately represents its interest was consistent with circuit precedent, and the Tribe's contrary arguments are unavailing, for the reasons already discussed. *See* pp. 17-24, *supra*. The Tribe's derivative arguments regarding Rule 19(b)(2) and 19(b)(3) provide no independent grounds for reversal. *See* Op. Br. 29-30. The Tribe's only remaining arguments are that the court gave too little weight to the Tribe's sovereign immunity and too much weight to the fact that dismissal would deprive West Flagler of a forum under Rule 19(b)(4). The court appropriately weighed those factors.

Turning first to sovereign immunity, that a required party is shielded by sovereign immunity is in some contexts an important consideration in determining whether equity favors allowing a lawsuit to proceed in a required party's absence, notwithstanding that it is not listed in Rule 19(b). *E.g.*, *Kickapoo*, 43 F.3d at 1496-97. In this Court's words, the importance of not deciding a sovereign's rights in its

absence leaves "very little room for balancing" the Rule 19(b) factors. *Id.*; *see also Republic of the Philippines v. Pimentel*, 553 U.S. 851, 864-67 (2008). But 'very little room' is not 'no room.' *See De Csepel*, 27 F.4th at 749 (rejecting argument that *Pimentel* mandates dismissal when a required sovereign cannot be joined). "Importantly," before dismissing an action, a court should consider "what, if anything, might protect the [absent sovereign's] interests were the case to proceed in its absence"—including, "[c]ritically," whether any "party with interest aligned with the [absent sovereign]'s remain[s] in the case to guard against prejudice." *Id.* at 749-50. That is what the district court did here. JA 568-69.

On the other side of the balance, deeming the Tribe (or Florida) indispensable would undermine Congress' deliberate decision in enacting the APA to waive the sovereign immunity of the United States—the only sovereign against whom APA relief directly runs, *see* 5 U.S.C. § 706. It would, as the district court appropriately noted, deprive West Flagler—and, indeed, any aggrieved person in other contexts—of any "adequate remedy" for a host of claims challenging federal agency actions, even if the final agency action in question is unlawful (or even unconstitutional). Fed. R. Civ. P. 19(b)(4).[12] That result runs contrary to the

[12] The Tribe's assertion that the federal government would still be able to take enforcement action against a compact it believes is unlawful, while true, misses the point. It is the public's ability to obtain review of the *federal government itself* that is implicated—and lost—under the Tribe's theory.

"strong presumption favoring judicial review of administrative action." *Salinas v. United States R.R. Retirement Bd.*, 141 S. Ct. 691, 698 (2021). And the federal government's own considered decision to disavow a ground for *dismissing* categories of administrative-law actions in which the federal government is the *only defendant* speaks to the importance of judicial review under the APA.

To unpack the consequences for judicial review of agency action, under the Tribe's view of Rule 19, beneficiaries of federal action would be required to be joined to an APA challenge to that action—even where the federal government is mounting its own defense—so long as they can identify some litigation-strategy judgments they would make differently than the government. Myriad federal agency actions benefit absent sovereigns—including, notably, countless decisions the Secretary makes in the field of Indian affairs. If, as the Tribe contends, the fact that those sovereigns cannot be joined because they enjoy sovereign immunity counsels in favor of dismissal, and neither Congress' decision to waive the United States' sovereign immunity nor the public's interest in judicial review of agency action provides a significant counterweight, then the gamut of federal actions benefitting states, tribes, or other sovereigns would be functionally immunized from judicial review. *Cf.* JA 570-71. Joinder rules should not lightly be interpreted to categorically immunize whole classes of agency action from APA review, particularly given that statute's "basic presumption of judicial review [for] one

suffering legal wrong." *Weyerhaeuser Co.* v. *U.S. Fish & Wildlife Service*, 139 S. Ct. 361, 370 (2018).

Moreover, in the particular context of Secretarial decisions to take no action on a submitted IGRA compact, that outcome is in significant tension with *Amador County*'s conclusion that Congress intended courts to review claims challenging the Secretary's inaction on a compact that allegedly violates IGRA. 640 F.3d at 379-83. Granted, *Amador County* did not address whether Rule 19 might independently require dismissal of such claims. But the fact that the Tribe's reading of Rule 19 would render *Amador County* a dead letter—except where a tribe voluntarily elects to waive its immunity—illustrates the potential stakes of its position.

This Court has weighed heavily the threat of constricting judicial review of federal action when addressing joinder issues in the past. For example, this Court has recognized that the general principle that all parties to a contract or lease are indispensable when that contract is challenged must sometimes give way in challenges to federal action that could render private contracts or property interests invalid, where dismissal would deprive the plaintiffs of an alternate judicial forum. *Cf. Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 788-89 (D.C. Cir. 1983). It has therefore reasoned that purchasers of federal land may not be indispensable in a challenge to agency action, even where setting aside agency action would

ultimately render the purchasers' deeds and claimed property rights invalid, to the extent dismissal would deprive plaintiffs of an alternate forum. *See McKenna v. Udall*, 418 F.2d 1171, 1174-75 (D.C. Cir. 1969). The Court deemed the nonparties indispensable in *McKenna* (and held that the lawsuit brought in the District of Columbia should be dismissed) specifically because an alternate forum existed, and distinguished a prior case which declined to dismiss where no alternate forum was available. *Id.* at 1174-77; *see Barash v. Seaton*, 256 F.2d 714, 718 (D.C. Cir. 1958); *see also Naartex*, 772 F.2d at 788-89 (individuals with proprietary interest in federal lease indispensable in action to cancel lease where alternate judicial forum was available).

With regard to absent sovereigns in particular, this Court has likewise indicated that the public interest in judicial review may outweigh the absence of a required sovereign where (as here) dismissal would leave plaintiffs with no judicial forum to challenge government action. *See Stevens v. Bartholomew*, 222 F.2d 804, 806 (D.C. Cir. 1955) (deeming state agencies "conditionally necessary" parties under an earlier version of Rule 19 in challenge to joint federal-state highway project, but noting that "[s]hould the plaintiffs be unable to obtain a decision on the merits in other litigation, the subsequent exercise of jurisdiction by the District Court, even in the absence of the Maryland Commission, is not necessarily foreclosed."); *Heyward v. Public Housing Admin.*, 214 F.2d 222, 224 (D.C. Cir.

1954) (concluding that district court should decline to proceed in absence of state agency, while giving plaintiffs the "[o]pportunity . . . to seek to bring both Federal and State agencies before a court of competent jurisdiction" and leaving open possibility of exercising jurisdiction in agency's absence in a future proceeding "should later circumstances establish the appropriateness of such procedure"); *cf. Cook*, 733 F.3d at 12 (leaving open whether required state parties were indispensable).

The few cases where this Court *has* dismissed a challenge to the federal government for failure to join an absent sovereign are critically different than this one. As discussed above, those cases—*Kickapoo*, *Wichita*, and *Cherokee*—all involved situations in which the Court either failed to consider whether the federal government adequately represented the absent sovereign, or concluded that the government's bottom-line position might deviate from that of the absent sovereign. *See* pp. 21-22, 24, *supra*. This Court's conclusion that the lack of an alternate forum bore little weight cannot be carried over to a case like this one, in which the potential for prejudice to the absent Tribe is negated—or at the very least, mitigated—by the federal government's defense of its own challenged actions. *See De Csepel*, 27 F.4th at 749-50. The district court's balancing of the equities was therefore not an abuse of discretion.

CONCLUSION

For the foregoing reasons, while the decision below should be reversed for the reasons stated by the government in No. 22-5022, the issues raised by the Tribe do not provide an additional basis for reversal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation set forth in this Court's order of July 8, 2022, because the brief contains 7,305 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), according to the count of Microsoft Word.

/s/ Rachel Heron
RACHEL HERON

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, I electronically filed the foregoing final brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Rachel Heron
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