No. 06-1204

In the Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, PHILIPPINE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, PHILIPPINE NATIONAL BANK, AND ARELMA, INC.,

Petitioners,

v.

MARIANA J. PIMENTEL, THE ESTATE OF ROGER ROXAS, AND GOLDEN BUDHA CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents do not deny the central reality of this case: despite having expressly acknowledged the Republic's claim to the Arelma assets and the validity of its assertion of sovereign immunity, the Ninth Circuit permitted the district court to award those assets to another claimant after adjudicating (and rejecting) the Republic's claim on the merits *in its absence*. In doing so, the court of appeals did more than make it impossible for the Republic to recapture funds that were stolen from it by its former President, interfere with ongoing litigation that is pending in the Philippine courts, and frustrate Philippine domestic policy regarding the appropriate use of assets recovered from former President Marcos; it also defeated the central purpose of the immunity doctrine – preventing foreign sovereigns from having their rights adjudicated against their will in courts of other nations.

The decision below should not stand. It cannot be reconciled with principles of sovereign immunity that have been applied repeatedly by this Court and other courts of appeals. It causes friction in the United States' relationship with an important ally. And, if undisturbed, it will undermine the international system for combating official corruption, which emphasizes the importance of returning misappropriated assets to the country of origin. Indeed, the government of Switzerland recently stated that last point in the strongest terms: it sent a diplomatic note to the United States State Department explaining that the Ninth Circuit's decision in this case discourages international cooperation in recovering stolen assets, runs counter to efforts undertaken by Switzerland to assist the Republic in recapturing assets stolen by Marcos, and negates the Philippines' sovereign interests. Further review by this Court accordingly is warranted.

A. Principles Of Sovereign Immunity Require Dismissal Of A Suit Under Rule 19 When A Sovereign Is A Necessary Party

We showed in the petition (at 13-19) that the Ninth Cir-

cuit's rule cannot be reconciled with fundamental principles of sovereign immunity because it allows a court to adjudicate ownership of property claimed by a sovereign despite the sovereign's assertion of immunity – and to do so based upon the court's *ex parte* assessment of the merits of the sovereign's claim. Respondents have nothing to say in response to this point. Indeed, respondents acknowledge that the Ninth Circuit's test turns on an evaluation of the strength of the sovereign's claim on the merits. Opp. 8-10, 14-15.[1] This approach puts a sovereign to a Hobson's choice: it either appears and participates in the litigation, notwithstanding its sovereign immunity from suit, or it allows the court to dispose of its interests on the basis of its *adversary's* presentation and without the sovereign's involvement. Under this perverse rule, all that the sovereign gets out of its assertion of immunity is exclusion from the proceeding at which its interests are adjudicated.

This case demonstrates the problem in the starkest terms. The Republic has what the Ninth Circuit acknowledged to be a "substantial" claim to the assets at issue. See Pet. App. 40a.[2] The interpleader action here is intended to definitively

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[1] Respondents assert that the Ninth Circuit did not "inquire into the merits of the Republic's asserted claim, but instead assumed the validity of the claim" and held it barred by the New York statute of limitations. Opp. 14. In fact, however, dismissal on statute of limitations grounds *is* a judgment on the merits. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995).

[2] Actually, the Republic's claim to the Arelma assets is considerably more than substantial. The judgment of the Philippine Supreme Court awarding Marcos' Swiss assets to the Republic demonstrates in considerable detail that Marcos stole those assets from the Republic (see *Republic of the Phil.* v. *Honorable Sandiganbayan*, G.R. No. 152154 (Phil. July 15, 2003), at 37-51), and the Swiss Federal Supreme Court agreed that the illegal provenance of the assets is beyond reasonable dispute. See, *e.g.*, *Fed. Office for Police Affairs* v. *Fondation Maler, Arelma, Inc, et al.*, No. B

determine ownership of those assets. As the Ninth Circuit also acknowledged, the practical effect of the judgment for respondents is to "deprive the Republic of the Arelma assets." Pet. App. 10a. Yet the Ninth Circuit's affirmance of that judgment was expressly based on the court's purported determination that the Republic would not prevail if it litigated its claim to the assets. *Id*. at 7a-9a. That is precisely the sort of determination that principles of sovereign immunity are meant to foreclose. See Pet. 13-19.[3]

65471/29 (Swiss Fed. Sup. Ct. Dec. 19, 1997). Respondents nevertheless assert that the Republic in this proceeding has not "come forth with evidence that the money at issue belonged to it." Opp. 4. But that is because, in this proceeding, the Republic asserted its sovereign immunity and did not participate on the merits *at all*. Respondents' argument on this point therefore is precisely what is wrong with the Ninth Circuit's rule permitting litigation to continue on the merits after an affected sovereign asserts immunity. Respondents get no further in their complaint (Opp. 4) that PNB and Arelma did not advance evidence supporting the Republic's claim to the assets. As the Ninth Circuit recognized, PNB's interest in the litigation is as an escrow holder of Arelma's shares; pursuant to the escrow agreement, its obligation is simply to dispose of the Arelma assets in accord with the judgment of a Philippine court. See Pet. 3.

[3] This case also demonstrates how an inquiry into the merits can go fatally wrong when the sovereign does not participate. The Ninth Circuit believed that the Republic was not entitled to the Arelma assets because a suit by the Republic against Merrill Lynch would be barred by the New York statute of limitations. Pet. App. 8a. Had the Republic been before the court, it could have pointed out that the state statute of limitations is irrelevant here. The Philippine courts already have determined that they have *in rem* jurisdiction over the assets at stake here (see Pet. 18 n.7), and they also have *in personam* jurisdiction over the parties. If the Republic obtains a favorable judgment to the Arelma assets in the Philippine courts, that judgment will be enforceable in New York. See, *e.g.*, N.Y. C.P.L.R. §§ 5230(b), 5303, 5307, 6201(5). Moreover, Merrill

Respondents nevertheless insist that the Republic's sovereign immunity cannot be dispositive because Rule 19(b) requires in all cases the "balancing of a series of factors." Opp. 7. See *id*. at 8-10, 14-15. But this Court's guidance in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 119 (1968), makes clear that, in the application of Rule 19(b), some factors are "compelling by themselves" while others are "subject to balancing against opposing interests." See Pet. 12-13. Rule 19 thus "does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist." 390 U.S. at 119. As we explain in the petition, sovereign immunity – given its lengthy historical pedigree and the significance of the values it serves – surely is one of those interests that are "compelling by themselves." Principles long applied by the Court in this context therefore require dismissal of this suit.

B. The Ninth Circuit's Ruling Conflicts With Decisions Of Other Courts Of Appeals

We also showed in the petition (at 19-21) that the Ninth Circuit's ruling cannot be reconciled with decisions of other courts of appeals, which have held that the absence of a "necessary" sovereign requires, or strongly supports, dismissal of the action under Rule 19.[4] Observing that the deci-

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Lynch made quite clear that it would deliver the assets to whoever was held to be their rightful owner by the Sandiganbayan. See Pet. 5 n.3. That should have made recourse to the New York courts altogether unnecessary.

[4] If the appellate and district court decisions invoked by respondents actually agreed with the Ninth Circuit's interpretation of Rule 19, they simply would establish a broader conflict in the lower courts. In fact, however, those decisions do not support the holding below that a "necessary" sovereign may not be indispensable. Of the decisions listed by respondents for the proposition that "[n]umerous cases can be cited where litigation has continued despite assertions of immunity by sovereign parties" (Opp. 11),

sions cited in the petition involved the United States, individual states, or Indian tribes, respondents maintain that those cases "are not analogous" to one involving a foreign nation because sovereign domestic entities "operate within the jurisdiction of the United States and, if a case is dismissed after assertion of sovereign immunity, other means exist to address and resolve the suit." Opp. 12. But that distinction is wrong, for several reasons.

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one involved a sovereign Indian tribe that was *not* "necessary" at all under Rule 19(a) because the United States appeared to defend the Tribe's interests (*Artichoke Joe's* v. *Norton*, 216 F. Supp. 2d 1084, 1118-1119 (E.D. Cal. 2002), aff'd on other grounds, 353 F.3d 712 (9th Cir. 2003)); another involved a foreign nation that was subject to suit because it brought a counterclaim and waived its immunity (*Lord Day & Lord* v. *Socialist Republic of Vietnam*, 134 F. Supp. 2d 549, 557-559 (S.D.N.Y. 2001)); and the third involved application of New York state joinder law, which differs in its terms from Rule 19(b). *Saratoga County Chamber of Commerce, Inc.* v. *Pataki*, 798 N.E.2d 1047, 1058-1059 & n.9 (N.Y. 2003). Other decisions cited by respondents for the proposition that "many courts, in many circumstances, have allowed civil actions to proceed even when important parties are missing" (Opp. 16; see *id*. at 16-19), are wholly off the point. Some involved tribes that were not necessary parties because the United States participated in the litigation and protected their interests. *Kansas* v. *United States*, 249 F.3d 1213, 1225-1227 (10th Cir. 2001); *Sac & Fox Nation of Missouri* v. *Norton*, 240 F.3d 1250, 1258-1260 (10th Cir. 2001). In others, litigation would not prejudice the absent party. *United States ex rel. Steele* v. *Turn Key Gaming, Inc.*, 135 F.3d 1249, 1252 (8th Cir. 1998); *Mescalero Apache Tribe* v. *State of New Mexico*, 131 F.3d 1379, 1384 (10th Cir. 1997); *Wyandotte Nation* v. *City of Kansas City*, 200 F. Supp. 1279, 1296 (D. Kan. 2002); *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Dev. Corp.*, 418 F. Supp. 798, 811-813 & n.5 (D.R.I. 1976). And another did not involve a sovereign at all. *Imperial Appliance Corp.* v. *Hamilton Manufacturing Co.*, 263 F. Supp. 1015 (E.D. Wis. 1967).

For one thing, there were *no* alternative remedies available in any of the cases cited in the petition that held domestic sovereigns indispensable; indeed, some of those decisions specifically noted the *unavailability* of adequate alternative remedies but nevertheless held "dismissal of th[e] suit * * * mandated by the policy of * * * immunity." *Wichita & Affiliated Tribes of Okla.* v. *Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986). See *Davis* v. *United States*, 343 F.3d 1282, 1293-1294 (10th Cir. 2003). On the other hand, so far as Rule 19(b) is concerned, adequate alternative remedies are no less available when foreign than when domestic sovereigns are involved: under Rule 19(b), "[t]here is no guaranty that the plaintiff can proceed in a court in the United States. The preferred alternative forum may be in a foreign country." 4 *Moore's Federal Practice* § 19.05[5][b], at 19-100 (3d ed. 2006) (citing cases). Most fundamentally, the foreign policy implications of suits impinging upon the interests of other countries means that the immunity of foreign nations is, if anything, entitled to *greater* protection than that of domestic sovereigns. Cf. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 446 (1979) (more searching inquiry required under the Foreign than the Interstate Commerce Clause).[5] Respondents would turn that principle upside down.

Similarly, we argued in the petition (at 21-24) that, wholly apart from considerations of sovereign immunity, the

[5] Indeed, one of the decisions relied upon by respondents (Opp. 16) suggests that it is Indian tribal immunity that might be entitled to a lesser level of protection, noting this Court's "statement that the judicial concept of tribal immunity developed 'almost by accident' and the Court's admonition that, at least in the commercial context, the doctrine should be curtailed by Congress." *Davis* v. *United States*, 192 F.2d 951, 960 (10th Cir. 1999). This case, in contrast, does not arise in a commercial setting and involves a doctrine of foreign sovereign immunity that has always been "part of the fabric of our law." *Nat'l City Bank of New York* v. *Republic of China*, 348 U.S. 356, 358 (1955).

Ninth Circuit departed from the analysis of *Provident*, the holdings of other courts of appeals, and the policy of Rule 19(b) in its application of the Rule's equitable factors. Respondents make no response at all to this point. For this reason as well, review of the decision below is in order.

C. The Ninth Circuit's Decision Will Discourage International Cooperation In Combating Official Corruption And Cause Friction In The United States' Foreign Relations

Finally, respondents have nothing to say about the most disturbing aspect of Ninth Circuit's decision: it provides the clearest imaginable illustration of the ways in which litigation in United States courts that is intended to settle the rights of a foreign nation may interfere with core sovereign interests. Here, the Republic's interest is profound. As we explain in the petition (at 2-3, 27), the Philippine government has made recovery of assets stolen by former President Marcos an urgent national priority. To counteract the corrosive effects of the pervasive corruption of the Marcos regime, the democratic government of the Republic has pursued continuing litigation in the Philippines' independent court system against the estate of its former President, seeking to recover assets that will be put to the public use that will benefit the broadest range of Philippine citizens.[6]

It is hard to picture a case that is less appropriate for adjudication in this country, or more fraught with the potential to disrupt relations among allies. While the Republic has no

[6] Respondents are simply incorrect in asserting that there was no case pending in the Philippines "seeking determination of the ownership of the Merrill Lynch account." Opp. 4. The Republic has consistently informed both the Pimentel class and the federal courts that its initial forfeiture petition in the Sandiganbayan *did* seek the Arelma assets. See, *e.g.*, ER 0106 (Republic's 1991 petition "covered the Arelma assets, including the funds in the Merrill Lynch account"). Swiss authorities thus required transfer of the Arelma shares to PNB.

objection to its citizens litigating in United States courts to assert claims involving assets actually in the Marcos estate – and said as much in an *amicus* brief filed with the Ninth Circuit in the *Hilao* class action litigation, as respondents now note (Opp. 20; see *Trajano* v. *Marcos*, No. 86-2448 (9th Cir.), Br. of the Republic of the Philippines, 1986 WL 732853) – the Republic has a paramount interest in adjudicating claims of corruption and financial misfeasance by its former President, which is the precise matter at issue here. Not only does the ruling below purport to adjudicate those claims, it does so in favor of other Philippine residents. Most disturbing of all, the Ninth Circuit's decision is explicitly based on its stated disagreement with the democratically elected Philippine government about appropriate priorities for the use of funds recovered from Marcos and the court's belief that a judgment for the Pimentel class here would have "symbolic significance." Pet. App. 9a. It is hard to imagine a less appropriate exercise of the judicial function or a disposition more likely to result in an affront to Philippine sovereign interests.

While that is enough to warrant review of the case by this Court, the importance of the decision below transcends its particular impact on the Philippines. The Ninth Circuit's decision threatens to undermine the broader system of international efforts to combat official corruption by returning misappropriated assets to their country of origin, a policy that is reflected in the United Nations Convention Against Corruption, has been endorsed by the United States, and was effectuated by the decisions of the Swiss Federal Supreme Court returning Marcos-related assets to the Philippines. See Pet. 25 & n.11, 28-30. The decision below will encourage courts to disregard this international preference for the return of assets and make the recovery of stolen funds more difficult.

For just that reason, on April 5 of this year the Swiss government sent a note to the United States Department of State (attached as an appendix to this brief), raising concerns

about the Ninth Circuit's decision and seeking the assistance of the United States in having that decision set aside. The Swiss note explained that "[r]eturning illicit assets to their country of origin through close international cooperation constitutes an important pillar of Swiss policy toward combating the inflow of illegal funds," adding that "Swiss Federal Supreme Court decisions in 1997 and 1998 affirmed that, under international law, the Philippines should have the opportunity to determine the appropriate manner in which the Marcos funds should be used for compensating victims of human rights violations of the Marcos regime." App., *infra*, 1a.

The Swiss note therefore concluded:

> Switzerland wishes to highlight that the importance of close cooperation between governments in dealing with the recovery of illicit assets is recognized explicitly by the United Nations Convention on Corruption, which was signed by the United States, the Philippines and Switzerland. The rulings of the U.S. courts at issue appear to run counter to the current trends in multilateral cooperation represented by the Convention and by Switzerland's own prior actions in assisting the Philippines. In effect, the Merrill Lynch rulings appear to assert that U.S. courts should have a priority in authority over the Philippines in resolving the disposition of Marcos assets, and in doing so seem to negate the Philippines' sovereign interests. For these reasons, Switzerland believes that the court decisions, in their language and result, could make future intergovernmental cooperation in such matters more complicated. Switzerland is confident that the United States Government shares Switzerland's concern, and that it will take all the necessary steps to ensure that the court decisions are reversed or appropriately modified.

App., *infra*, 1a-2a. Given Switzerland's central role in international efforts to repatriate stolen assets, these comments

are entitled to special weight.

Although these considerations were addressed at length in the petition (at 25-30), respondents disregard them entirely. Their only answer to the foreign policy implications of the Ninth Circuit's decision is the statement that the Foreign Sovereign Immunities Act of 1976 was intended to eliminate political considerations from the resolution of assertions of sovereign immunity by foreign nations. We completely agree with that observation. But the FSIA has played its part here: it plainly *accords* the Republic sovereign immunity, as the Ninth Circuit recognized. See Pet. App. 33a-39a. The problem, of course, is that the court of appeals proceeded to wholly vitiate that immunity as a practical matter through its misapplication of Rule 19(b).

If there is any uncertainty about the practical implications of this decision, the Court could seek the views of the United States. But as we suggested in the petition, the nature of the proceeding here should leave no doubt about either the error of the Ninth Circuit's legal analysis or the destructive impact of its decision. The holding below frustrates the application of Philippine law, precludes the Republic from recovering stolen assets, undermines broader international efforts to fight official corruption, and serves as a considerable irritant to the United States' relations with other nations. It should be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2007

EMBASSY OF SWITZERLAND

The Embassy of Switzerland presents its compliments to the U.S. Department of State and has the honor of communicating that Switzerland requests the assistance of the United States in relation to the case of *Merrill Lynch v. ENC Corp. et al*., as reported at 446 F.3d 1019, 464 F.3d 885, and 467 F.3d 1205, and which is now the subject of a petition for certiorari to the U.S. Supreme Court under the name *Republic of the Philippines v. Pimentel*, No. 06-1204. In the Merrill Lynch case, an interpleader action involving assets previously sent to the United States by Ferdinand Marcos, the Court of Appeals for the Ninth Circuit held that the participation of the Philippines was not indispensable to determining ownership of the assets and affirmed the award of those assets by a U.S. District Court to a class action group of Philippine citizens.

Returning illicit assets to their country of origin through close international cooperation constitutes an important pillar of the Swiss policy toward combating the inflow of illegal funds. Accordingly, Switzerland has cooperated closely and successfully with the Philippines on the return of the assets of Ferdinand Marcos. Swiss Federal Supreme Court decisions in 1997 and 1998 affirmed that, under international law, the Philippines should have the opportunity to determine the appropriate manner in which the Marcos funds should be used for compensating victims of human rights violations under the Marcos regime. Ultimately, Switzerland returned assets valued at approximately $600 million, with the understanding that the Philippines, in dealing with the claims of the class action plaintiffs group, would follow procedures consistent with the United Nations Convention Against Torture and the United Nations International Covenant on Civil and Political Rights - Pact II.

Switzerland wishes to highlight that the importance of close cooperation between governments in dealing with the recovery of illicit assets is recognized explicitly by the

United Nations Convention on Corruption, which was signed by the United States, the Philippines and Switzerland. The rulings of the U.S. courts at issue appear to run counter to the current trends in multilateral cooperation represented by the Convention and by Switzerland's own prior actions in assisting the Philippines. In effect, the Merrill Lynch rulings appear to assert that U.S. courts should have a priority in authority over the Philippines in resolving the disposition of Marcos assets, and in doing so seem to negate the Philippines' sovereign interests. For these reasons, Switzerland believes that the court decisions, in their language and result, could make future intergovernmental cooperation in such matters more complicated. Switzerland is confident that the United States Government shares Switzerland's concern, and that it will take all the necessary steps to ensure that the court decisions are reversed or appropriately modified.

The Embassy of Switzerland avails itself of this opportunity to renew to the U.S. Department of State the assurances of its highest consideration.

Washington, D.C., April 5, 2007

United States Department of State
Washington, D.C.