No. 06-1204

In the Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, ET AL., PETITIONERS

v.

MARIANO J. PIMENTEL, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a foreign sovereign that is a necessary party to a lawsuit under Federal Rule of Civil Procedure 19(a) and has successfully invoked sovereign immunity is, under Federal Rule of Civil Procedure 19(b), an indispensable party to an action brought in the courts of the United States to settle ownership of assets claimed by that sovereign.

2. Whether the Philippines and its Presidential Commission on Good Government (PCGG), having been dismissed from the interpleader action based on their successful assertion of sovereign immunity, had the right to appeal the district court's determination that they were not indispensable parties under Federal Rule of Civil Procedure 19(b); and whether the Philippines and its PCGG have the right to seek this Court's review of the court of appeals' opinion affirming the district court.

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INTEREST OF THE UNITED STATES

This case concerns the proper indispensable-party analysis under Federal Rule of Civil Procedure 19(b) when a necessary party is absent due to its sovereign immunity. At the Court's invitation, the Solicitor General filed an amicus curiae brief at the petition stage of this case.

STATEMENT

1. Ferdinand Marcos was President of the Republic of the Philippines (Philippines) for nearly 20 years. As numerous courts have documented, Marcos engaged in widespread abuses of power, including human rights abuses and misappropriation of vast amounts of money and property. See, *e.g.*, *Hilao* v. *Estate of Marcos*, 103

F.3d 789 (9th Cir. 1996); *Roxas* v. *Marcos*, 969 P.2d 1209 (Haw. 1998); C.A. E.R. 597 (ER) (*Republic of the Phil.* v. *Honorable Sandiganbayan*, G.R. No. 152154 (Phil. 2003)).

In 1972, Marcos created Arelma, S.A. (Arelma) under the laws of Panama and opened an account in its name at Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch) in New York. Pet. App. 45a. The funds placed into that account were allegedly obtained by Marcos through misuse of his public office. *Id.* at 2a. Ownership of Arelma is represented by two bearer share certificates that are held in escrow by the Philippine National Bank (PNB), after being transferred there by an order of the Swiss Federal Supreme Court. *Id.* at 45a-46a, 49a.

The assets in the Merrill Lynch account are the subject of this interpleader action. Arelma claims the assets based on its ownership of the account; PNB's claim is based on its custody of the Arelma shares. The Philippines and the Philippine Presidential Commission on Good Government (PCGG) (together the Republic) claim the funds under a Philippine statute (Rep. Act. No. 1379, 51:9 O.G. 4457 (June 18, 1955)) providing that any property acquired by a public officer through misuse of his office is forfeited to the government *ab initio*.

Respondent Mariano Pimentel represents a class of human rights victims (Pimentel claimants) who obtained a $2 billion judgment against the Marcos estate in February 1995. See *Hilao* v. *Estate of Marcos*, *supra*. The Pimentel claimants seek to execute that judgment against the Merrill Lynch account, claiming that Arelma

was a shell created to hide Marcos's personal assets. Br. in Opp. 3, 5.[1]

2. After Marcos's ouster in 1986, the Philippine government created PCGG to recover Marcos's illegitimate wealth, much of which had been removed from the Philippines. ER 110. In April 1986, PCGG made a request to the Swiss government for mutual assistance, seeking return of Marcos's assets, including the Arelma shares. ER 288, 313. The Swiss government froze those assets, ordering them held until judgment had been reached in Philippine courts as to their ownership. ER 288, 313. The Swiss Federal Supreme Court upheld the freeze in 1990. ER 348-349.

In 1991, PCGG commenced a forfeiture proceeding against Marcos in the Sandiganbayan, a Philippine court with jurisdiction over political corruption cases, based on the Philippine forfeiture statute. ER 174-251.

In late 1997 and early 1998, while the forfeiture action was pending, the Swiss Federal Supreme Court transferred the frozen assets, including the Arelma shares, to an escrow account at PNB pending a final ownership determination by the Sandiganbayan. ER 289, 347-385. After that transfer, PCGG asked Merrill Lynch to transfer the assets it held for Arelma to the PNB account. Merrill Lynch declined, noting that the transfer of the Arelma shares to PNB was provisional only, and that there were other claimants to the fund. ER 393-395.

On September 19, 2000, the Sandiganbayan granted PCGG's motion for partial summary judgment, holding

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[1] Other claimants, the Estate of Roger Roxas and Golden Budha Corporation, are judgment creditors of Marcos's wife. *Roxas*, 969 P.2d at 1231-1233. Their petition for a writ of certiorari, No. 06-1039, remains pending.

that the assets at issue in the motion were forfeited to the Philippines under Philippine law. ER 254-283. Although the Sandiganbayan later reversed its own decision, the Philippine Supreme Court reinstated the partial judgment in the Philippines' favor on July 15, 2003. ER 597-696.

3. On September 14, 2000, Merrill Lynch commenced this interpleader action in federal district court in Hawaii to settle competing claims to the Arelma account's assets. ER 34. As required by 28 U.S.C. 1335(a), Merrill Lynch deposited all $35 million in assets with the court. Pet. App. 46a.

The Republic asserted sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). 28 U.S.C. 1604. The Republic, Arelma, and PNB also all moved to dismiss the interpleader action, contending that the Republic was an indispensable party. ER 50-61, 970, 993; Pet. App. 31a-32a; Fed. R. Civ. P. 19(b). The district court instead dismissed the Republic's claims on the merits, without addressing its assertion of immunity. Pet. App. 32a.

On October 31, 2002, the court of appeals held, on interlocutory appeal, that the Republic was immune. Pet. App. 36a-39a. The court also found the Republic to be a necessary party under Rule 19(a), since "[w]ithout the Republic" as a party, its "interests in the subject matter are not protected." *Id.* at 40a. While the court noted that the Republic's unavailability militated in favor of dismissal under Rule 19(b), it also recognized that the Pimentel claimants and Merrill Lynch had competing interests. *Id.* at 41a. Rather than resolve that conflict, the court ordered a stay of the interpleader suit pending resolution of the Philippine litigation. *Id.* at 42a. The court noted that "later developments may ren-

der it more equitably feasible for proceedings to go forward in this case," such as "resolution of the litigation in the Philippines" or a change in the Republic's immunity status. *Ibid*.

On June 20, 2003, the district court vacated the stay, concluding that the outcome of the proceedings before the Sandiganbayan would have no bearing on the interpleader action because the district court had exclusive jurisdiction over the Arelma assets. ER 697-699. The court certified its order under 28 U.S.C. 1292(b), and the Republic, Arelma, and PNB appealed. The Ninth Circuit affirmed. J.A. 26-27.

On August 14, 2003, while that appeal was pending, the district court denied the motions to dismiss the case under Rule 19(b). Pet. App. 55a-60a. The court held that the Republic did not have a "legally protectible claim" that would be impaired by the interpleader because any claim it might have would be barred by the New York statute of limitations. *Id.* at 57a-59a. The court also rejected the contention that the disputed assets were covered by the forfeiture proceeding in the Philippines. The court found that the petition for forfeiture filed in 1991 did not "seek[] forfeiture of the assets in the Arelma account at Merrill Lynch," and that the Philippine Supreme Court's decision made no mention of Arelma. *Id.* at 56a.[2] The court concluded that, in any event, the Arelma share certificates were irrelevant because Arelma was itself a party to the interpleader action. *Id.* at 57a.

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[2] The forfeiture petition does refer to Arelma and its Merrill Lynch account, though not in the context of a specific prayer for relief. ER 234, 249-250. As discussed below, the Republic specifically moved the Sandiganbayan for judgment regarding those assets in July 2004.

The district court then held a bench trial, and on July 12, 2004, awarded the entirety of the Arelma assets to the Pimentel claimants. Pet. App. 43a-54a. The court concluded that because Arelma was merely the "*alter ego*" of Marcos, it could "reverse" pierce the corporate veil and award the assets to Marcos's creditors. *Id.* at 52a, 54a.

4. On July 19, 2004, the Republic filed a motion with the Sandiganbayan, in the forfeiture proceedings begun in 1991, claiming that the "ARELMA account is now ripe for forfeiture." See C.A. Request for Judicial Notice, Ex. A at 9. It prayed that "judgment be rendered declaring the funds, properties, shares in and interests of ARELMA, wherever they may be located, as ill-gotten assets and forfeited in favor of the Republic of the Philippines." *Ibid.* That motion remains pending.

5. The Republic appealed the district court's final judgment, urging that its absence required dismissal of the entire suit pursuant to Rule 19(b). Arelma and PNB filed a separate appeal challenging the award to the Pimentel claimants as well as the ruling on the Republic's indispensability. See Arelma C.A. Br. 42-44.

The court of appeals affirmed. Pet. App. 1a-11a. It acknowledged that, in "the usual case of interpleader," a sovereign party that cannot be joined due to immunity "is indispensable and so can cause dismissal of the action." *Id.* at 6a. However, it concluded that while prejudice to a foreign state was a "powerful consideration," it was outweighed by other factors. *Id.* at 7a.

The court held that the Republic's failure to obtain a judgment in the Philippines concerning ownership of the assets, even though the Arelma shares had been in escrow at PNB since 1995, was "an equitable consideration * * * to be taken into account." Pet. App. 7a.

The court recognized that "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." *Id.* at 9a. But the court concluded that the Republic would not be prejudiced because "[a]s a practical matter, it is doubtful that the Republic has any likelihood of recovering the Arelma assets." *Id.* at 7a. The court reasoned that any action by the Republic against Merrill Lynch in New York would be barred by the six-year statute of limitations for actions based on misappropriation of public property. *Id.* at 8a-9a (citing N.Y. C.P.L.R. § 213 (McKinney Supp. 2007)).

Responding to the Republic's contention that "it could obtain a judgment regarding the ownership of these assets in the Philippines where it is relieved of any statute of limitations," the court of appeals concluded that the Philippine courts "would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States." Pet. App. 8a. Accordingly, if a Philippine court issued such a judgment, a court in this country "would not be bound to give it effect." *Id.* at 7a-8a.

In considering the adequacy of the judgment in the absence of the Republic, the court found that the award would have"symbolic significance" to the "victims of the former president of the Republic." Pet. App. 9a. Although most of the Pimentel claimants were Philippine citizens who "should find redress from their own government," that consideration was "outweighed by the fact that the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the[ir] president." *Id.* at 9a-10a. The court also concluded that the Pimentel claimants would have no forum in the Philippines in which to raise their claims to the Arelma assets. *Id.* at 10a.

After balancing the factors, the court of appeals concluded that "[n]o injustice" would be done to the Philippines "if it now loses what it can never effectually possess." Pet. App. 10a.

SUMMARY OF ARGUMENT

1. The question whether the Republic is an indispensable party was properly before the court of appeals and is properly before this Court. The Republic appeared in the district court, in response to a summons, and moved for two forms of relief: (1) dismissal as a defendant based on its immunity, and (2) dismissal of the entire action because the Republic is an indispensable party. Although the court of appeals recognized the Republic's immunity, the district court thereafter denied the Republic's broader request for dismissal under Rule 19(b).

The Republic satisfies both requirements for taking an appeal from that order: standing and "party" status. The court of appeals acknowledged that, "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." Pet. App. 9a. The Republic therefore has standing to appeal.

Nor does the fact that the Republic was dismissed as immune deprive it of party status for purposes of appeal. It is self-evident that the Republic would be a party to an appeal challenging dismissal of the Republic based on its immunity. It is likewise a "party" for purposes of appealing an order adverse to it. This Court has, in other contexts, recognized that a party that is not bound by a judgment, but is adversely affected by it, may intervene for purposes of taking an appeal. And many lower courts have allowed immune parties to intervene for the limited purposes of raising a Rule 19(b)

objection. That rule reflects the common sense reality that, especially in an interpleader action, the failure to dismiss the action may deprive the sovereign's immunity of much of its practical effect. Here, because the Republic was already a party, it had no need to intervene.

In any event, even if the Republic could not appeal the Rule 19(b) order, Arelma and PNB could. They also moved to dismiss under Rule 19(b), and this Court has recognized that any defendant has standing to appeal on the ground the district court lacked jurisdiction over an indispensable party.

2. The lower courts' Rule 19(b) analysis failed to afford adequate weight to the Republic's immunity. This Court has recognized that, under Rule 19(b), some considerations can be "compelling by themselves." *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 119 (1968) (*Provident Bank*). Sovereign immunity is such a consideration. It is not merely a technical defect in the court's ability to reach the party, but reflects an overriding policy judgment that the party should not have to defend itself in court. The absent party's immunity, therefore, leaves little to be balanced under the other Rule 19(b) factors. Here, the Republic's immunity should have been given even greater weight because of the significant nature of its interests—recovering the vast sums that Marcos misappropriated through abuse of his office.

The court of appeals' error pervaded its consideration of each of the Rule 19(b) factors. Analyzing the first factor, the court's conclusion that the Republic would not be prejudiced depended almost exclusively on its determination that the Republic's claim was time-barred and therefore lacked merit. That analysis—which was, in any event, incorrect—effectively deprived

the Republic of its immunity by adjudicating its claim in its absence.

The court of appeal's analysis of the other factors was similarly flawed. Because the parties have mutually inconsistent claims to a limited fund, the Republic's interests cannot be protected in its absence. To the extent the court suggested that prejudice was mitigated because the Republic could sue Merrill Lynch for a second recovery, it only highlighted the extent to which this litigation cannot serve the fundamental purpose of both interpleader *and* Rule 19: to resolve disputes by wholes. Finally, the court's analysis of the fourth factor—which attached great weight to concerns that respondents would have no forum for relief—ignores the fact that that is a necessary consequence of the policy judgment to recognize a party's immunity.

ARGUMENT

I. THE REPUBLIC WAS ENTITLED TO SEEK REVIEW OF THE RULE 19(b) DETERMINATION, AS WERE ARELMA AND PNB.

A. Although the Republic successfully asserted its sovereign immunity, the district court denied its broader request to dismiss the entire suit under Rule 19(b) because it was an indispensable party. That order prejudiced the Republic's interests, and it was entitled to appeal from it. As discussed below, see p. 18, *infra*, this Court has made clear that *any* defendant may take an appeal to raise the absence of an indispensable party, see *Hanson* v. *Denckla*, 357 U.S. 235, 244-245 (1958), and Arelma and PNB therefore had standing to raise that issue on appeal. When, as here, the "absent" party is an immune sovereign that has appeared in the litigation to assert its immunity and to seek dismissal under

Rule 19(b), there is no reason why it—the party whose interests are most directly at stake—should not also be permitted to raise the Rule 19(b) issue on appeal for itself.

In its order granting certiorari, the Court directed the parties to address the additional question whether the Republic could seek review of the district court's and court of appeals' Rule 19(b) determinations, after it had been dismissed as immune. That question raises two distinct issues: (1) whether the Republic has standing to appeal; and (2) whether it is a "party" for purposes of taking an appeal. See *Devlin* v. *Scardelletti*, 536 U.S. 1, 7 (2002). The Republic satisfies both requirements.

1. The adverse consequences of the judgment on the Republic easily satisfy the requirements of prudential standing to appeal the district court's Rule 19(b) ruling. See *Devlin*, 536 U.S. at 7. The Republic seeks to protect its own interests in the Arelma assets and in meaningful immunity from suit; those interests are unique to it, not generalized grievances; and the Republic is within the zone of interests protected by Rule 19(b) and the FSIA. Indeed, on an earlier appeal, the court of appeals recognized that "[w]ithout the Republic and the PCGG as parties in this interpleader action, their interests in the subject matter are not protected," and they were therefore necessary parties under Rule 19(a). Pet. App. 40a. That same determination would support a non-party's intervention as of right. See Fed. R. Civ. P. 24(a)(2) (intervention as of right if "disposition of the action may as a practical matter impair or impede the applicant's ability to protect its interest"); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 134 n.3 (1967) (noting that Rules 19(a) and 24(a) are "counter-

part[s]"). That interest is also sufficient to satisfy the requirements for standing to take an appeal.

Although the lower courts granted the Republic partial relief—dismissal of it as a party on immunity grounds—that does not mean that it was not adversely affected by the denial of its request to dismiss the entire suit under Rule 19(b). Indeed, the Rule 19(b) ruling deprived the immunity ruling of much of its practical force. As the court recognized, "[i]n practical effect, a judgment in this action," entered in the Republic's absence, "will deprive the Republic of the Arelma assets." Pet. App. 9a.

This Court has recognized that a party that has obtained "some, but not all, of the relief [it] requested" from the district court is an "aggrieved" party entitled to take an appeal. *Forney* v. *Apfel*, 524 U.S. 266, 271 (1998). Although in *Forney* the aggrieved party was the plaintiff, *ibid.*, the same rule applies to a defendant that has obtained only partial success, such as dismissal of the plaintiff's claim without prejudice when it sought dismissal with prejudice. As one leading treatise observes, it is "obvious[]" that "a defendant must be allowed to appeal" in such circumstances. 15a C. Wright et al., *Federal Practice and Procedure* § 3914.6 (3d ed. 2001) (Wright). And the courts of appeals have repeatedly so held. See, *e.g.*, *Briscoe* v. *Fine*, 444 F.3d 478, 495-496 (6th Cir. 2006); *Ashley Creek Phosphate Co.* v. *Chevron USA, Inc.*, 315 F.3d 1245, 1263-1264 (10th Cir.), cert. denied, 540 U.S. 820 (2003); *H.R. Techs, Inc.* v. *Astechnologies, Inc.*, 275 F.3d 1378, 1382-1384 (Fed. Cir. 2002); *Sea-Land Serv., Inc.* v. *Department of Transp.*, 137 F.3d 640, 647 n.4 (D.C. Cir. 1998); *Farmer* v. *McDaniel*, 98 F.3d 1548, 1549, 1553-1554 (9th Cir. 1996), cert. denied, 520 U.S. 1188 (1997); *Disher* v. *In-*

formation Res., Inc., 873 F.2d 136, 139 (7th Cir. 1989). The district court's refusal to dismiss the interpleader action entirely, as the Republic requested, prejudiced its ability to protect its interest in the Arelma assets, and it therefore has standing to appeal that order.

2. The Republic also satisfies the requirement that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). Indeed, although in *Devlin* the Court made clear that it has "never * * * restricted the right to appeal to named parties," 536 U.S. at 7 (allowing appeal by non-named class member), in this case the Republic satisfies even that more stringent standard.

The Republic was named as defendant in the complaint, J.A. 14, and, as required by the FSIA, 28 U.S.C. 1608(a)(3), the district court served the complaint and summons upon it. See ER 954-955, 957. The Republic appeared and moved to have the suit dismissed as against the Republic, on the ground of immunity, and in its entirety, on the ground that the Republic was indispensable See ER 482-485. The district court denied both forms of relief, and the Republic appealed. Pet. App. 32a-33a. Although the Ninth Circuit recognized the Republic's immunity, *id.* at 37a-39a, it deferred resolution of the indispensability question, *id.* at 41a-42a. When, on remand, the district court finally denied the Rule 19(b) motions, the Republic remained a party to that motion (indeed, the Republic had filed such a motion) and as such was entitled to appeal the order denying it.

Even after a defendant has successfully obtained dismissal of the claims against it, the defendant remains a "party" to the litigation until the conclusion of any

appeal. That fact is self-evident when, for example, the plaintiff appeals the dismissal order. The defendant would be a "party" to the litigation entitled to notice of the appeal and to appear as appellee. See F.R.A.P. 3(d) (notice of the appeal to be served upon "each *party's* counsel of record") (emphasis added). If the dismissed defendant remains a "party" for purposes of defending against an appeal by the plaintiff, there is no reason why the dismissed defendant is not also a "party" for purposes of appealing an order that is adverse to it.

This Court's cases upholding intervention for purposes of appeal likewise make clear that even though a party is not technically bound by the district court's merits judgment—as is true of a defendant whose immunity has been recognized—its interests may be sufficiently implicated to warrant permitting it to take an appeal. In *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), the respondent sought to intervene after judgment in order to appeal the denial of class certification (without which the judgment could not bind her). *Id.* at 390. The district court denied intervention. On the respondent's appeal, the court of appeals reversed. *Ibid.* This Court affirmed that the would-be intervenor was a proper party to take an appeal. *Id.* at 394-395. Moreover, the Court made clear that the rule permitting intervention for purposes of appeal extends to "litigation that is not representative in nature, and in which the intervenor might therefore be thought to have a less direct interest in participation in the appellate phase." *Id.* at 395 n.16. See *Bryant* v. *Yellen*, 447 U.S. 352, 366-368 (1980) (upholding intervention for appeal by farmworkers whose ability to purchase excess land was undermined by district court's ruling).

Many lower courts have, in fact, approved of limited intervention under Rule 24(a) as a way for a person not subject to the court's jurisdiction to assert a Rule 19(b) objection. See *United Keetoowah Band of Cherokee Indians* v. *United States*, 480 F.3d 1318, 1323 (Fed. Cir. 2007) (noting Tribe's "limited intervention" to seek dismissal under Rule 19(b); reversing on merits of Rule 19(b) analysis); *Lac Du Flambeau Band of Lake Superior Chippewa Indians* v. *Norton*, 422 F.3d 490, 495 (7th Cir. 2005) (same; affirming dismissal on other grounds); *Salton, Inc.* v. *Philips Domestic Appliances & Pers. Care B.V.*, 391 F.3d 871, 875, 878 (7th Cir. 2004) (same regarding Hong Kong corporation; reversing on merits of Rule 19(b) analysis); *Southwest Ctr. for Biological Diversity* v. *United States Bureau of Reclamation*, 143 F.3d 515, 519-520, 522 (9th Cir. 1998) (same regarding States; affirming denial of motion as moot); *Fitzgerald* v. *Unidentified Wrecked & Abandoned Vessel*, 866 F.2d 16, 17-18 (1st Cir. 1989) (same regarding Puerto Rico; affirming dismissal), overruled on other grounds, *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491 (1998). That rule reflects the common sense reality that Rule 19(b), especially in an interpleader action, operates to protect the interests of absent parties. In this case, there was no need for the Republic to intervene specially to seek dismissal under Rule 19(b), as it had already been made a party to the litigation and raised its Rule 19(b) motion in that capacity.

Depriving a foreign nation of its ability to seek not just its own dismissal on sovereign immunity grounds, but dismissal of the entire action under Rule 19(b) would be particularly anomalous. Denial of the Rule 19(b) dismissal, at least in an interpleader action, deprives the sovereign immunity holding of much of its

practical force. A sovereign may have little choice but to waive its immunity if Rule 19(b) dismissal does not follow the assertion of immunity, and it would undermine the purpose of sovereign immunity to deprive the sovereign of a means to vindicate its obvious interest in the Rule 19(b) question.

3. This Court has previously exercised jurisdiction when the United States appealed in similar circumstances. In *Minnesota* v. *United States*, 305 U.S. 382 (1939), the State sued in state court to condemn land of Indian allottees held in trust by the United States. *Id.* at 383. The complaint named the United States and the allottees as defendants. *Id.* at 383-384. The United States removed to federal court, where it appeared specially, asserted its sovereign immunity, and moved to dismiss the action in its entirety. *Id.* at 384. The district court refused to dismiss the whole suit, finding "that the United States is not a necessary party" because Congress had consented to suit against the Indian allottees directly. *Ibid.* After final judgment, the United States appealed. *United States* v. *Minnesota*, 95 F.2d 468, 469 (8th Cir. 1938); see 305 U.S. at 384. The court of appeals denied a motion to dismiss the appeal, 95 F.2d at 469, and reversed, holding that because the judgment affected the United States' interests "directly and substantially," the action could not be maintained without the United States' consent to suit against it. *Id.* at 470, 472.

This Court affirmed. The Court held that "[t]he United States is an indispensable party defendant to the condemnation proceedings" against property in which it has an interest, 305 U.S. at 386, and that the suit had to be dismissed because the court lacked jurisdiction over the United States, *id.* at 388-389. Although the Court

did not specifically address the question of the United States' authority to appeal, the case illustrates that appeal by an immune sovereign from the denial of a Rule 19(b) motion may be necessary to protect the very interests that the government's immunity and Rule 19(b) were intended to serve.

B. Even if the Republic itself could not appeal on the Rule 19(b) issue, that issue would still be properly before this Court. Arelma and PNB were also named as defendants to the interpleader action, J.A. 13; ER 457-458, were never dismissed, and have independent standing to raise the Rule 19(b) issue.

This Court has recognized that, due to an absent party's general inability to protect itself, and the risk that those present in the litigation may not advance the absent party's interests, the indispensability rule "may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by the counsel." *Minnesota* v. *Northern Sec. Co.*, 184 U.S. 199, 235 (1902). See *Provident Bank*, 390 U.S. at 111 ("When necessary, * * * a court of appeals should, on its own initiative, take steps to protect the absent party."). But while the court *can* raise the issue itself, the advisory committee notes reflect a recognition that the court will generally have to rely on those defendants that are present to bring another party's absence to the court's attention. See Fed. R. Civ. P. 19 advisory committee notes (1966). A present defendant might "seek[] dismissal in order to protect himself against a later suit by the absent person" or "vicariously to protect the absent person against a prejudicial judgment." *Ibid.*; *Provident Bank*, 390 U.S. at 110 n.4 (quoting same). Thus, whether Arelma and PNB sought to protect their own interests or those of the Republic, they were proper parties to raise a Rule

19(b) objection in the district court, as they did. See ER 970, 993.

Having moved to dismiss the action under Rule 19(b), Arelma and PNB were also entitled to appeal the district court's denial of that motion. In *Hanson*, the Court specifically rejected an argument that "appellants lack standing to complain of a defect in [personal] jurisdiction over the nonresident trust companies, who have made no appearance." 357 U.S. at 244-245. The Court explained that, because under state law the trustee "is an indispensable party to litigation involving the validity of the trust," and the suit would therefore have to be dismissed, "any defendant affected by the court's judgment has that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired." *Id.* at 245 (quoting *Chicago* v. *Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77, 83 (1958)). See *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 805-806 (1985) (quoting *Hanson*) (allowing defendant to appeal finding of personal jurisdiction over plaintiff class members); see also *Hagood* v. *Southern*, 117 U.S. 52, 71 (1886) (directing dismissal of complaint upon request of defendant-appellant state officials for failure to join State, which had Eleventh Amendment immunity).

Therefore, even if the Republic could not raise the Rule 19(b) issue on appeal, Arelma and PNB were entitled to do so, as well as to bring the issue before this Court.

II. IN LIGHT OF THE REPUBLIC'S IMMUNITY AND PENDING FORFEITURE PROCEEDING IN THE PHILIPPINES, THE ACTION SHOULD HAVE BEEN DISMISSED OR STAYED PURSUANT TO RULE 19(b)

Rule 19 provides for mandatory joinder of persons "needed for just adjudication." Rule 19(a) describes persons who must be joined if feasible. For example, under Rule 19(a)(2)(i), if a person "claims an interest relating to the subject of the action," and "disposition of the action in the person's absence may * * * as a practical matter impair or impede the person's ability to protect that interest," that person must be joined if feasible. Fed. R. Civ. P. 19(a)(2)(i).[3]

If a person described in Rule 19(a) cannot be made a party for some reason, the court must determine, under Rule 19(b), "whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded as indispensable." Rule 19(b) provides that the "factors" to be considered in making that determination "include" the following four:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an ade-

[3] All quotations to the federal rules are to the version in effect at the time of the lower courts' decisions.

> quate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). "The decision whether to dismiss * * * must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Provident Bank*, 390 U.S. at 118-119.

In its first opinion in this case, the court of appeals held that the Republic is immune under the FSIA. Pet. App. 30a-39a. The court further held that the Republic should be joined if feasible, and that it was "difficult to see how this interpleader action can proceed in [its] absence." *Id.* at 40a-41a. Having recognized that the Republic was an absent, but necessary, party, the court of appeals entered a stay pending future proceedings in the Philippines. *Id.* at 42a.

On subsequent appeal, however, the court of appeals concluded that the Republic's absence did not require dismissal or a stay under Rule 19(b). Pet. App. 6a-10a; J.A. 27. That ruling fails to give appropriate weight to the Republic's immunity and reflects a misunderstanding of the Rule 19(b) factors, especially as applied when the absent party is a sovereign entitled to immunity. Under a proper analysis, the litigation should have been dismissed without prejudice, or at least stayed, pending a final judgment in the Philippine courts in the forfeiture proceeding.

A. An Absent Party's Sovereign Immunity Should Weigh Heavily In The Rule 19(b) Analysis

This Court has recognized the importance of sovereign immunity to the indispensable-party analysis in cases where the United States is the absent party. In

Minnesota v. *United States*, for example, the Court held that the suit must be dismissed because it was a "proceeding against property in which the United States has an interest," and the United States had not consented to suit. 305 U.S. at 386, 388-389. In *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371 (1945), the Court similarly held that where "the suit is essentially one designed to reach money which the government owns," the "government is an indispensable party." *Id.* at 375.

The Court did not, in those cases, weigh the United States' interests against the plaintiff's interest in a forum or other countervailing considerations. Rather, as the Court observed in *Provident Bank*, some factors can, in an appropriate case, be "compelling by themselves," 390 U.S. at 119, and sovereign immunity is such a factor. Other courts of appeals have recognized that where "a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Enterprise Mgmt. Consultants, Inc.* v. *United States*, 883 F.2d 890, 894 (10th Cir. 1989) (quotation marks omitted); see *Wichita & Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986) (same); *Fluent* v. *Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir.) (recognizing the "paramount importance accorded the doctrine of sovereign immunity under [r]ule 19"), cert. denied, 502 U.S. 818 (1991); see also 7 Wright § 1617, at 254 ("No doubt because of the sovereign-immunity concept, the application of Rule 19 in cases involving the government reflects a heavy emphasis on protecting its interests.").

That sovereign immunity will often be compelling in itself is not to suggest that an immune sovereign is auto-

matically indispensable. For instance, in certain circumstances, the interests of the absent sovereign may be adequately protected by another party that may properly represent its interests, cf. *Heckman* v. *United States*, 224 U.S. 413, 444-445 (1912) (interests of absent Indian grantors adequately represented by the United States), or relief might be structured so as not to prejudice the absent sovereign, see *Idaho ex rel. Evans* v. *Oregon*, 444 U.S. 380, 386-391 (1980). Nonetheless, sovereign immunity is different from other considerations. When an interested party is absent because of its sovereign immunity, it is not the same as "a case where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield [the defendant] from suit without" its consent. *Wichita & Affiliated Tribes*, 788 F.2d at 777.

Thus, a court must be especially mindful of the significance of the absent party's sovereign immunity—not only as a compelling factor in its own right, but also as it considers the other factors under Rule 19(b). That approach is necessary to ensure that the court does not subvert the purposes for which the immunity was granted. See, *e.g.*, 4 J. Moore et al., *Moore's Federal Practice* § 19.05[2][c], at 19-93 (2007) ("[C]ourts are reluctant to require the absentee to protect its own interest if intervention would result in the absentee's waiving an immunity to suit."). Thus, even though the Republic's immunity did not obviate the need to consider the four factors identified in Rule 19(b), it should have received far greater weight than it did. This is especially so in an interpleader action, when the difficulties of protecting absent parties while vindicating the underlying purposes of interpleader are particularly acute.

As explained below, under a proper analysis of those factors, giving appropriate consideration to the Republic's immunity, this case should have been dismissed or stayed. The Ninth Circuit's failure to do so was especially problematic because the suit impairs the Republic's critical sovereign interest in repatriating funds illegally obtained by its former president's misuse of his office. The significance of that sovereign interest is reflected in the extent of international cooperation the Republic has received, including the transfer of the Arelma shares and other assets from Switzerland to the Philippines, so that the Republic's forfeiture claim regarding Arelma could be heard by the Sandiganbayan. The impact of the Ninth Circuit's ruling on that international cooperation and the Republic's critical sovereign interests has in turn led to complications in the United States' foreign relations. See Pet. App. 65a-66a; Pet. Cert. Reply App. 1a-2a. Those further considerations reinforce the conclusion that the Republic's sovereign immunity, together with a proper analysis of the four factors identified in Rule 19(b), required dismissal or stay of this suit. See Fed. R. Civ. P. 19(b) advisory committee notes (1966) (listed factors "are not intended to exclude other considerations").

B. Under A Proper Rule 19(b) Analysis, The Action Should Have Been Dismissed Or Stayed

1. The first factor under Rule 19(b) is the prejudice that would result from adjudicating the case in a party's absence. Under that banner, the court of appeals proceeded to adjudicate the merits of the Republic's claims, finding that the Republic would not be prejudiced because it had "no practical likelihood of obtaining the Arelma assets." Pet. App. 10a. In particular, the court

concluded that any claim by the Republic to the assets would be barred by New York's six-year statute of limitations for misappropriation of public funds. *Id.* at 8a-9a (citing N.Y. C.P.L.R. § 213 (McKinney Supp. 2007)). That was a serious misapplication of the first factor. By resting its analysis so heavily on its assessment of the merits of the Republic's claims, the court in effect deprived it of the benefit of its sovereign immunity. See *Mine Safety Appliances*, 326 U.S. at 375 ("the government's liability can not be tried behind its back") (quotation marks omitted).

Although there may be circumstances in which it is appropriate to give some consideration to the underlying merits in determining the extent of prejudice to an absent party from adjudication without its participation, see *Provident Bank*, 390 U.S. at 115 (noting that it would have been proper to explore the likelihood that claims against the absent party would result in recoveries against him and therefore claims by him against the fund), it is particularly problematic for a court to assess the merits of an absent party's *own* claim when the party's absence is due to its sovereign immunity. The immune party would either have to participate in the litigation (thereby forfeiting a considerable benefit of its immunity) in order to argue the merits of its claim, or risk the possibility that the court will, as here, underestimate the strength of the party's interest. See *Wichita & Affiliated Tribes*, 788 F.2d at 776 ("It is wholly at odds with the policy of [sovereign] immunity to put the [sovereign] to th[e] Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it."); see also *FMC* v. *South Carolina Ports Auth.*, 535 U.S. 743, 762-764 (2002).

Consideration of the first factor should, instead, parallel the inquiry into whether the foreign state is a necessary party under Rule 19(a). See *Wilbur* v. *Locke*, 423 F.3d 1101, 1114 (9th Cir. 2005), cert. denied, 546 U.S. 1173 (2006); *Davis ex rel. Davis* v. *United States*, 343 F.3d 1282 (10th Cir. 2003), cert. denied, 542 U.S. 937 (2004); *United States ex rel. Hall* v. *Tribal Dev. Corp.*, 100 F.3d 476, 479 (7th Cir. 1996). That inquiry concerns only the absent party's "claimed interest." Fed. R. Civ. P. 19(a)(2)(ii). See *Davis*, 343 F.3d at 1289 (Tribe a necessary party because its claim was "neither fabricated nor frivolous"). Under the first prong of the Rule 19(b) analysis, then, the court must be careful not to prejudge the merits of the absent party's interest, especially where the absent party is immune from the court's jurisdiction.

The court of appeals' approach was directly to the contrary. After recognizing the Republic's interests as sufficient to make it a necessary party, Pet. App. 40a, the court proceeded to disregard those interests based on the court's own assessment of the merits of its claim, *id.* at 8a-10a. That was inappropriate; and the court's assessment of the Republic's claim was, moreover, seriously mistaken.

Contrary to the court of appeals' assumption, the Philippines would not have to sue Merrill Lynch in a New York court to establish that Marcos misappropriated the Arelma assets. That claim, which arises under a Philippine law providing that property misappropriated by public officers through abuse of their office is forfeited to the Philippines from the moment it is obtained, Rep. Act. No. 1379, 51:9 O.G. 4457 (June 18, 1955), is presently being litigated against the Marcos estate in a special Philippine court—the Sandigan-

bayan—vested with authority to adjudicate disputes under that statute. A motion for summary judgment with respect to those assets is pending in that court. See C.A. Request for Judicial Notice, Ex. A at 9.

If the Sandiganbayan awards the Arelma shares and assets to the Republic, there is no reason to assume that the Republic would have to sue Merrill Lynch to obtain the assets in Arelma's Merrill Lynch account. Rather, the Republic, either directly or through Arelma, would simply request that Merrill Lynch transfer the assets in Arelma's account to an account in the Philippines. If Merrill Lynch were to refuse, Arelma could bring suit based on the parties' contract. Neither Arelma nor the Republic, its owner, would need to sue on the underlying claim (already adjudicated by the Sandiganbayan) that Marcos obtained the original assets illegally. They thus could seek legal redress without relitigating (subject to New York's statute of limitations) the merits of the underlying public corruption claim, as the court of appeals presumed the Republic would have to do.

The court of appeals believed that "a court of this country would not be bound to give * * * effect" to a judgment by the Sandiganbayan regarding ownership of the Arelma account and its assets because "a court sitting in the Philippines would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States." Pet. App. 8a. The court erred in announcing so categorical a rule regarding that issue, which would be better evaluated in actual litigation to which the Republic is a party, and in which the court has before it an actual Philippine court judgment. It is unnecessary for this Court to decide whether a court in the United States would *always* be obligated to give effect to such a foreign judgment of

forfeiture. It is sufficient to recognize that the court of appeals' categorical rule that United States courts would *never* do so is erroneous.

There are, without question, instances in which a foreign judgment of forfeiture relating to assets located in the United States *may* be recognized and enforced by a court in this country. Indeed, a federal statute specifically provides for enforcement of foreign forfeiture judgments in certain circumstances. See 28 U.S.C. 2467(c) (upon certification by the Attorney General, "the United States may file an application on behalf of a foreign nation in [a] district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States").

Further, the Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, U.S.-Phil., Art. 16, S. Treaty Doc. No. 18, 104th Cong. 1st Sess. (1995) (MLAT), and Chapters IV and V of the United Nations Convention Against Corruption (Oct. 31, 2003, GA Res. 58/4) contemplate cooperation by the two countries on proceedings related to asset forfeiture. The MLAT, for example, provides for the parties, as permitted by their domestic law, to assist each other when the object of a forfeiture proceeding in one country is located within the other country. The MLAT presupposes the existence of jurisdiction in Philippine courts over assets located in the United States, and vice versa. And, in fact, Congress has specifically granted courts in the United States jurisdiction in civil forfeiture proceedings over property located outside the United States. See 28 U.S.C. 1355(b)(2) ("Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, * * * an action or proceeding for for-

feiture may be brought as provided in paragraph (1), or in the United States District [C]ourt for the District of Columbia.") (footnote omitted).[4]

Even assuming arguendo, however, that the Philippine courts could not adjudicate ownership of the actual assets held in the Merrill Lynch account, it is undisputed that the Philippine courts have jurisdiction to determine the ownership of Arelma itself, as the share certificates are being held in escrow in the Philippines. If ownership of Arelma were awarded to the Republic by the Sandiganbayan, there is no reason to assume, as the court of appeals did, that a court in the United States would refuse to recognize that judgment.

Finally, the court of appeals' analysis failed to take into account the logical priority of the Republic's claims over those of the Pimentel claimants. The Pimentel claimants do not assert that they *are* the rightful owners of the Arelma account assets. Rather, they ask the court to award those assets to them in partial satisfaction of their judgment in a separate proceeding against the Marcos estate. Pet. App. 52a. In contrast, the Republic claims that the funds are the proceeds of public corruption and that *these very funds* were therefore forfeited to the Philippines, under Philippine law, at the time Marcos obtained them. If the Sandiganbayan were to find that Arelma and its assets are the rightful property of the Republic, the claims of the Pimentel claimants against those assets would be vitiated. They would

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[4] If the Philippine judgment did not qualify for enforcement under Section 2467(c), there would be a further question whether the judgment would qualify for recognition under principles of international comity. See *Hilton* v. *Guyot*, 159 U.S. 113, 163-164 (1895).

then be seeking to execute a judgment that they possess vis-a-vis *Marcos* against assets of the *Republic*.[5]

2. The court of appeals' erroneous conclusion that the Philippines would not be prejudiced by the interpleader action (because of the asserted weakness of the Republic's claims on the merits) led it to give no consideration to the second Rule 19(b) factor: "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided." Pet. App. 9a. In fact, the nature of this case means that the second factor points strongly towards dismissal. This case involves mutually exclusive claims to a common fund: the Republic claims the fund as property of the Republic, and the Pimentel claimants' judgment far exceeds the value of the Arelma assets. In such a situation, as the court of appeals recognized in its initial ruling, *id.* at 40a, it would be nearly impossible to shape relief so as to avoid harm to the absent parties. See *Provident Bank*, 390 U.S. at 115. Nor, plainly, can the prejudice be lessened by requiring the immune parties to intervene, as that would defeat their immunity. See *Wilbur*, 423 F.3d at 1114. It therefore seems likely that an immune sovereign will almost al-

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[5] In their Supplemental Brief in Opposition (at 8), respondents argued, citing 28 U.S.C. 2467(b)(1)(C), that a Philippine judgment of forfeiture would not be entitled to recognition because respondents could not participate in proceedings before the Sandiganbayan. But there is no reason to believe that the inability of judgment creditors to participate in a forfeiture proceeding, assuming they could not, would render the judgment unenforceable under Section 2467(d)(1)(D). The Pimentel claimants have an interest in the Arelma assets if, but only if, they are assets of the Marcos estate. The proceedings in the Sandiganbayan will resolve the prior question whether the assets are those of Marcos or the Republic.

ways be entitled to dismissal under Rule 19(b) in an interpleader action such as this.

3. The court of appeals also misapprehended the third Rule 19(b) factor—"whether a judgment rendered in the person's absence will be adequate." That factor "refer[s] to the public stake in settling disputes by wholes, whenever possible." *Provident Bank*, 390 U.S. at 111; see *Davis*, 343 F.3d at 1292-1293. It "promotes judicial economy by avoiding going forward with actions in which the court may end up rendering hollow or incomplete relief because of the inability to bind persons who could not be joined." 7 Wright § 1608, at 114.

The court of appeals, however, considered only whether the judgment would be adequate to the "victims of the former president of the Republic," by satisfying at least a small portion of their $2 billion judgment. Pet. App. 9a. But as other courts have noted, the interests of the parties before the court "cannot be given dispositive weight when the efficacy of the judgment would be at the cost of the absent parties' rights to participate in litigation that critically affect[s] their interests," *Hall*, 100 F.3d at 480, especially when a party's absence reflects its right to insist on its immunity from suit.

It is clear, moreover, that the judgment under review here would not satisfy "the public stake in settling disputes by wholes." Indeed, the court of appeals recognized that, because "any judgment entered in this action cannot bind the Republic" due to its immunity, the Republic "would remain free to sue for the Arelma assets in a forum of its choice," Pet. App. 8a, and suggested that "the Republic might seek the equivalent of the assets from their present holder, Merrill Lynch, in New York where they were invested." *Id.* at 8a-9a.

That reasoning directly contravenes the purposes of both Rule 19 *and* interpleader. See *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 737-738 (1977) (noting that in "common fund" suits one interest supporting compulsory joinder is "the interest of the defendant in avoiding multiple liability for the fund"); 7 Wright § 1618, at 274-275 ("When a particular fund or property right is involved in litigation, federal courts must be especially sensitive to the danger of contradictory judicial orders relating to that fund or right."); *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 533 n.15, 534 n.16 (1967) ("the classic situation envisioned by the sponsors of interpleader" was one where the stakeholder was "faced with conflicting but mutually exclusive claims to a policy"). If the court of appeals is correct that the Republic could sue Merrill Lynch, despite the interpleader judgment, then the whole point of the interpleader action is undermined and Merrill Lynch is clearly prejudiced. If the Republic could not, then that underscores the prejudice to the Republic of adjudication in its absence.

4. As a number of courts have recognized, the fact that a party is absent due to its sovereign immunity largely obviates consideration of the fourth Rule 19(b) factor—"whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." "[T]he plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit." *Davis*, 343 F.3d at 1293-1294; see *Seneca Nation of Indians* v. *New York*, 383 F.3d 45, 48 (2d Cir. 2004), cert. denied, 126 S. Ct. 2351 (2006); *Hall*, 100 F.3d at 480-481; *Wichita & Affiliated Tribes*, 788 F.2d at 777. That is especially so in this case, because the Pimentel claimants assert an interest only as

judgment creditors, not as persons claiming an ownership interest in the assets, and because the vast majority of the Pimentel claimants are Philippine citizens who, as the court of appeals recognized, ordinarily "should find redress from their own government" for their injuries. Pet. App. 9a.[6]

When the Rule 19(b) factors are analyzed with a proper appreciation of the importance of the Republic's sovereign immunity, it is clear that the Republic is an indispensable party, and that the action should have been dismissed without prejudice or stayed pending the final judgment of the Sandiganbayan in the forfeiture action.

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[6] In their Supplemental Brief in Opposition (at 3-4), respondents contended that the United States has a duty under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 14, 1465 U.N.T.S. 85 (Dec. 10, 1984), to provide a forum for respondents' claims. However, the Senate ratified the Convention with the understanding that a private right of action is required "only for acts of torture committed in territory under the jurisdiction of that State Party." 136 Cong. Rec. 36193 (1990).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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