No. _____

In The
Supreme Court of the United States

SAMISH INDIAN NATION,

Petitioner,

v.

STATE OF WASHINGTON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether Eleventh Amendment sovereign immunity and tribal sovereign immunity deprived the lower courts of subject-matter jurisdiction over the Snoqualmie Indian Tribe's claim, requiring dismissal on that ground under United States Supreme Court precedent including *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1996).

2. Whether, under United States Supreme Court precedent including *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) and *Sinochem Int'l Co. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422 (2007), an issue preclusion dismissal is a merits dismissal and excluded from the threshold grounds among which a federal court may choose to dismiss a case before establishing its subject-matter jurisdiction.

3. Whether, under United States Supreme Court precedent including *Sinochem Int'l Co. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422 (2007), jurisdictional issues in this case were not "arduous" or "difficult to determine" because the lower courts could readily determine that they lacked jurisdiction, such that those courts committed reversible error in bypassing determination of their subject-matter jurisdiction and proceeding to dismiss the case instead with prejudice on issue preclusion grounds.

PARTIES TO PROCEEDINGS

This proceeding was initiated by the Snoqualmie Indian Tribe, which was the plaintiff in the district court and an appellant in the Ninth Circuit.

Petitioner Samish Indian Nation intervened in the district court after a judgment was issued, solely for purposes of appeal, and filed its own appeal in the Ninth Circuit. The two appeals were consolidated.

Respondents are the State of Washington, Washington Governor Jay Robert Inslee, and Washington Department of Fish & Wildlife Director Kelly Susewind; Respondents were defendants in the district court and appellees in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

The Samish Indian Nation is a federally recognized Indian tribe. The Samish Indian Nation does not have a parent corporation, and no publicly held corporation owns stock in the Samish Indian Nation.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii): *Snoqualmie Indian Tribe v. State of Washington*, No. 3:19-cv-06227-RBL (W.D. Wash. Order Mar. 18, 2020) (App. 32), *consolidated appeal docketed*, *Snoqualmie Indian Tribe v. State of Washington*, No.

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20-35346 and *Samish Indian Nation v. State of Washington*, No. 20-35353, *decision issued* Aug. 6, 2021, 9th Cir., 8 F.4th 853 (App. 1), *rehearing denied* Nov. 12, 2021 (App. 47).

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OPINIONS AND ORDERS BELOW

The ruling of the district court is unreported. App. 32. The opinion of the court of appeals is reported at 8 F.4th 853. App. 1. The order of the court of appeals denying rehearing is unreported. App. 47.

JURISDICTION

The court of appeals entered its opinion on August 6, 2021. On November 12, 2021, the court of appeals denied a timely petition for rehearing. The Samish Indian Nation timely appeals. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction was invoked by the Snoqualmie Tribe in the district court under 28 U.S.C. §§ 1331, 1362, 1367, 2201.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT

A. The Samish Indian Nation

The Samish Indian Nation (also, "Samish Tribe") was a signatory to the 1855 Treaty of Point Elliott, 12 Stat. 927. *United States v. Washington*, 476 F.Supp. 1101, 1106 (W.D.Wash. 1979) ("*Washington II*"). The district court in *Washington II* found that the Samish Tribe was not entitled to exercise off-reservation treaty fishing rights because it was not federally-recognized at that time and had not continually maintained an organized tribal governing structure from treaty time to the present. *Id.* at 1105-06. On review, the Ninth Circuit held that it was error to deny treaty rights based on federal recognition but upheld the denial of treaty fishing rights after reviewing the record, holding that the district court's finding that the Samish Tribe had not maintained sufficient political and cultural cohesion was not clearly erroneous. *United States v. Washington*, 641 F.2d 1368, 1373-74 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

The Samish Tribe then pursued federal recognition and successfully obtained formal re-recognition in 1996 after a contested case hearing. *See Greene v. Babbitt*, 943 F.Supp. 1278 (W.D.Wash. 1996) ("*Greene III*"); 61 Fed. Reg. 16825-26 (April 9, 1996) (Samish Federal Acknowledgment). Findings were made by the administrative law judge in that proceeding that the Samish Tribe had been dropped from an internal Department of Interior list of recognized Indian tribes without reason and that the Tribe should have been

recognized since at least 1969. *Greene III*, 943 F.Supp. at 1284 (third proposed finding), 1288 n. 13; *Samish Indian Nation v. United States*, 419 F.3d 1355, 1373-74 (Fed. Cir. 2005) ("government wrongfully withheld the Samish federal acknowledgment"; "but for the government's arbitrary and capricious treatment the Samish would have been extended federal recognition prior to 1996").

In 2001, the Samish Tribe filed a Fed. R. Civ. P. 60(b)(6) motion in district court seeking to reopen the judgment against it in *Washington II*, based on its successful federal acknowledgment. *United States v. Washington*, 593 F.3d 790, 793 (9th Cir. 2010) (en banc) ("*Washington IV*"). The district court denied relief. *Id.* The Ninth Circuit reversed, finding that Samish had proved the same standard in its recognition proceeding – maintenance of an organized tribal structure from treaty time to the present – necessary to exercise treaty rights, and that federal recognition was an extraordinary circumstance justifying reopening *Washington II*. *United States v. Washington*, 394 F.3d 1152 (9th Cir. 2005) ("*Washington III*").

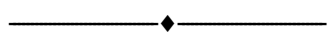
On remand the district court again denied Samish Rule 60(b) relief, *Washington IV*, *supra*, 593 F.3d at 793, and Samish once again appealed. The Ninth Circuit en banc held that the fact that an administrative tribunal reached a different factual finding than the district court reached in *Washington II* did not justify reopening a final court decision under Rule 60(b). *Id.* at 799.

The en banc court also addressed issue and claim preclusion in *Washington IV*, reconciling its previous conflicting decisions in *Washington III*, *Greene v. United States*, 996 F.2d 973 (9th Cir. 1993) ("*Greene I*") and *Greene v. Babbitt* 64 F.3d 1266 (9th Cir. 1995) ("*Greene II*"), in favor of *Greene I* and *II*. *Greene I* and *II* held that federal recognition and treaty rights involved separate although related factual inquiries and had different legal effects, and that federal recognition would have no impact on other tribes' treaty rights. *Washington IV*, 593 F.3d at 795-96. *Washington III* held that federal recognition, based on its factual findings, was sufficient by itself to confer treaty status. *Id.* at 797. The en banc Court denied reopening *Washington II* but created a narrow issue preclusion exception for tribes that had successfully achieved administrative federal re-recognition: such recognition could not be given even presumptive weight in any subsequent treaty litigation, but it would permit such "newly-recognized tribes" to litigate "a claim of treaty rights not yet adjudicated," by litigating its treaty status "anew." *Id.* at 800-01. The Court did not address potential defenses to such claims, including sovereign immunity.

B. Facts and Procedural History

The Samish Indian Nation and Snoqualmie Indian Tribe ("Snoqualmie") are the only two Indian tribes that are recently recognized and that meet the eligibility requirements of the *Washington IV* decision. *United States v. Washington* only involved off-reservation treaty fishing rights; treaty hunting and gathering

rights have never been adjudicated. Snoqualmie initiated the present proceeding by filing a claim in the district court for a declaration that it has treaty hunting and gathering rights. The Samish Tribe moved to appear as an amicus curiae before the district court in order to advise the court of its litigation culminating in *Washington IV* and that decision's impact on the present case. The district court granted the State's Motion to Dismiss and denied Samish's amicus motion as moot. After the district court's dismissal of Snoqualmie's claim with prejudice, the Samish Tribe intervened for the limited purpose of filing a separate appeal because the district court decision also affected the Samish Tribe's legal rights.



REASONS FOR GRANTING THE PETITION

The decision below clearly conflicts with decisions of this Court, disregards federal courts' constitutionally mandated duty to establish jurisdiction over the parties (personal jurisdiction) and cause of action (subject-matter jurisdiction) before ruling on the merits of a case, and resurrects the impermissible "hypothetical jurisdiction" principle this Court expressly rejected over two decades ago. There is no on-point precedent supporting the Ninth Circuit's merits dismissal on issue preclusion grounds without first establishing subject-matter jurisdiction. This departure from established law will have serious consequences; if allowed to stand, the decision below opens the door – again – for *ultra vires* merits rulings in the federal

courts. The Court should grant this petition and remand the case to be dismissed for lack of subject-matter jurisdiction.

A. The Decision Below Is Wrong And Clearly Conflicts With Decisions Of This Court.

The Ninth Circuit below held as what it called a matter of first impression under *Sinochem Int'l Co. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422 (2007) ("*Sinochem*"), that where jurisdictional questions would be "arduous" or "difficult to determine," a federal court may dismiss the case on issue preclusion grounds because an issue preclusion ruling is not on the merits. *Snoqualmie Indian Tribe v. Washington*, 8 F.4th 853, 861-62 (9th Cir. 2021) ("*Snoqualmie*"). The Ninth Circuit stated that neither it nor this Court has ever directly addressed this issue. *Snoqualmie*, 8 F.4th at 861, even though ample precedent contrary to this assumption exists. The Ninth Circuit's decision is wrong and clearly conflicts with decisions of this Court. Not only did the courts below lack subject-matter jurisdiction over this case because of Respondents' Eleventh Amendment sovereign immunity and the sovereign immunity of necessary party tribes, but issue preclusion is not among the threshold non-merits grounds upon which a federal court can dismiss a case without first establishing jurisdiction, because such a ruling is on the merits. Moreover, jurisdictional questions in this case were repeatedly raised, are clear in the law, and were not at all "arduous" or "difficult to determine."

"[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)." *Sinochem*, 549 U.S. at 430-31 (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-102 (1998) ("*Steel Co.*")). "'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case.'" *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Id.* at 94-95 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

This Court in *Sinochem* carved out a very limited exception to that otherwise inflexible rule, establishing that where the court can dismiss a case based on non-merits principles (*forum non conveniens*) and where it would be difficult for a court to determine its jurisdiction, jurisdiction need not be determined first. 549 U.S. at 431-32, 436. The Ninth Circuit below improperly extended and misconstrued *Sinochem*, concluding that it also supports dismissal on issue preclusion grounds without establishing jurisdiction, erroneously concluding that issue preclusion is a non-merits issue. *Snoqualmie*, 8 F.4th at 861-62. This Court has never created an exception allowing a federal court to dismiss a

case on merits-based grounds such as issue preclusion without first establishing its jurisdiction. In extending *Sinochem*, the Ninth Circuit misstated and misapplied that decision's narrow exception to the constitutional requirement that a federal court must first establish its subject-matter jurisdiction, as set out in the Court's earlier decisions including *C.I.R. v. Sunnen*, 333 U.S. 591 (1948) ("*Sunnen*"), *Steel Co.*, *supra*, and *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) ("*Ruhrgas*"). This was clear error.

1. The lower courts lacked subject-matter jurisdiction over the Snoqualmie Tribe's claim because of the Respondents' Eleventh Amendment sovereign immunity and the affected tribes' sovereign immunity.

State sovereign immunity from suit by Indian tribes, and tribal sovereign immunity from suit by other Indian tribes or by States, are settled and clear jurisdictional legal principles that would not have been "arduous" or "difficult" for the lower courts to decide. All parties in this proceeding before the district court and Ninth Circuit acknowledged that state and tribal sovereign immunity are jurisdictional[1] in nature and clear beyond any dispute. *See* n. 11 *infra*.

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[1] Several courts have defined State Eleventh Amendment sovereign immunity and tribal sovereign immunity as "quasi-jurisdictional" because they can be waived by those governments, unlike some other bars to subject-matter jurisdiction. *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000) (citing *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261,

State sovereign immunity from suit by Indian tribes has been addressed several times by this Court, most recently in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 807 (2014), where the Court stated: "We have held that Tribes may not sue States in federal court," citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), and *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64 (1996) ("[T]he Eleventh Amendment [stands] for the constitutional principle that state sovereign immunity limit[s] the federal courts' jurisdiction under Article III."); *Seminole*, 517 U.S. at 47 ("The Indian Commerce Clause does not grant Congress that power (to abrogate the States' sovereign immunity) and therefore cannot grant jurisdiction over a State."). *See Idaho v. Coeur d-Alene Tribe*, *supra* at n. 1, 521 U.S. at 268-69. Federal courts lack subject-matter jurisdiction over a suit by an Indian tribe against a State under the Eleventh Amendment unless a State waives its immunity. *Id.* at 267 ("The Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction."). This principle has been established by this Court beyond dispute. No parties in the present case claim the State has waived its sovereign immunity; the State is shielded by its sovereign immunity and must be dismissed.

267-69 (1997) (state immunity)); *Pistor v. Garcia*, 791 F.3d 1104, 1110-11 (9th Cir. 2015) (tribal immunity). But they are both still jurisdictional.

Likewise, tribal sovereign immunity as a bar to federal court subject-matter jurisdiction in suits against an Indian tribe is clear and settled law. *Bay Mills*, *supra*, 572 U.S. at 788-89 ("Among the core aspects of sovereignty that tribes possess . . . is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' "; "[W]e have time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)," citing *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998)). *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

Tribal sovereign immunity is jurisdictional in nature; without a valid waiver of a tribe's sovereign immunity, the federal courts lack subject-matter jurisdiction over a suit against an Indian tribe. *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) ("[T]he issue of tribal sovereign immunity is jurisdictional in nature. . . ."; "Absent congressional or tribal consent to suit, state and federal courts have no jurisdiction over Indian tribes; only consent gives the courts the jurisdictional authority to adjudicate claims raised by or against tribal defendants."), citing *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 173 (1977) ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe."), citing *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) ("These Indian Nations are

exempt from suit without Congressional authorization.").

This principle also extends to suits by one Indian tribe against another Indian tribe. *See Skokomish Indian Tribe v. Goldmark*, 994 F.Supp. 2d 1168, 1190 (W.D.Wash. 2014) ("Indian tribes may not be joined (under Rule 19), however, where they have not waived sovereign immunity.") *Conf. Tribes of Chehalis Res. v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991) ("Indian tribes, however, are sovereign entities and are therefore immune from nonconsensual actions in state or federal court."), citing *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989); *Skokomish Indian Tribe v. Forsman*, 738 Fed. Appx. 406, 408 (9th Cir. 2018) (unpublished).

Tribal sovereign immunity presents a bar to the court's subject-matter jurisdiction when a required party under Fed. R. Civ. P. 19 cannot be joined for that reason. Here, Snoqualmie claims treaty hunting and gathering rights under the Treaty of Point Elliot, 12 Stat. 927 (1859). The Tulalip Tribes have been adjudicated a successor in interest to the treaty Snoqualmie for off-reservation treaty fishing purposes. *United States v. Washington*, 626 F.Supp. 1405, 1527 (W.D. Wash. 1979); *United States v. Washington*, 459 F.Supp. 1020, 1029 (W.D. Wash. 1978). Tulalip moved before the district court to intervene for the purpose of dismissal, arguing that it was a required party but could not be joined due to its sovereign immunity. Successors to other treaty signatory tribes requested amicus status before the district court to argue that their treaty

rights would also be affected by Snoqualmie's claim and that they were immune from suit. Motion of the Jamestown S'Klallam Tribe, Lummi Nation, Nisqually Indian Tribe, Port Gamble S'Klallam Tribe, Puyallup Tribe of Indians, Suquamish Tribe, and Swinomish Indian Tribal Community for Leave to File Amicus Curiae Brief, Dkt. #26, Jan. 31, 2020.

"There is a 'wall of circuit authority' in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity – 'virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternative] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity.'" *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 857 (9th Cir. 2019), *cert. denied*, ___ U.S. ___, 141 S.Ct. 161 (2020) (brackets in original) (quoting *White v. Univ. of California*, 765 F.3d 1010, 1028 (9th Cir. 2014) (collecting cases)). *See also Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (tribes sharing treaty fishing rights to salmon were required parties to another tribe's claim seeking reallocation of the treaty harvest); *Keweenaw Bay Indian Comty. v. State*, 11 F.3d 1341, 1346-47 (6th Cir. 1993) (absent tribes claiming treaty rights to fish were required parties in other tribe's suit against state to protect fish); *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1281 (10th Cir. 2012) (tribe's request for determination of status of land shared with absent tribe impaired absent tribe's legally protected interest); *Wichita and Affiliated Tribes of Oklahoma v. Hodel*,

788 F.2d 765, 777-78 (D.C. Cir. 1986) (absent tribes were required parties to tribe's request for redistribution of land income). There are no cases, and the district and Ninth Circuit did not cite any, disputing these clear principles. The district court and Ninth Circuit ignored these clear jurisdictional grounds for dismissal, moving ahead instead to merits rulings on issue preclusion.

The lower courts lacked subject-matter jurisdiction over the Snoqualmie Tribe's claim in the present case under core jurisdictional principles. All entities participating in this case agreed with these principles and with their application to the case. *See* n. 11, *infra*. The lower courts committed clear and reversible error.

2. Issue preclusion is not among the threshold determinations a federal court may make before establishing its subject-matter jurisdiction because a dismissal on issue preclusion grounds is on the merits.

In *Sinochem*, *supra*, the Court created a limited exception to the constitutional mandate expressed in *Steel Co.* that a federal court may not rule on the merits of a case without first establishing its subject-matter jurisdiction and personal jurisdiction. *Steel Co.*, 523 at 92-109; *Sinochem*, 549 U.S. at 430-31. "Without jurisdiction the court cannot proceed at all in any cause"; it may not assume jurisdiction for the purpose of deciding the merits of the case. *Steel Co.*, 523 U.S. at

94. In *Sinochem*, the Court created a narrow two-prong test for when a federal court can bypass an initial determination of subject-matter or personal jurisdiction: 1. where a non-merits threshold basis for dismissing a case exists and "when considerations of convenience, fairness, and judicial economy so warrant"; and 2. where it would be arduous for the court to determine whether it has jurisdiction. *Sinochem*, 549 U.S. at 432, 436. Both prongs of the test must be met.

The Ninth Circuit acknowledged in its decision that neither this Court nor it had ever expressly identified issue preclusion as a non-merits threshold ground that qualifies for the *Sinochem* exception, but applied the *Sinochem* exception anyway. 8 F.4th at 861. *Sinochem* involved *forum non conveniens*. The Ninth Circuit failed to acknowledge that this Court has already recognized res judicata[2] as a merits question to be decided only after jurisdiction has been established. *Lightfoot v. Cendant Morg. Corp.*, ___ U.S. ___, 137 S.Ct. 553, 560 (2017) (federal statute did not grant federal courts subject-matter jurisdiction over the cause of action; reversing lower court's dismissal based on issue preclusion for lack of subject-matter jurisdiction); *Huntington v. Laidley*, 176 U.S. 668, 679 (1900) ("[T]he question whether the proceedings . . . afforded a defense – [including] by way of *res judicata* . . . was not a question affecting the jurisdiction of this court, but was a question affecting the merits of the cause. . . ."). This

[2] The Ninth Circuit in *Snoqualmie* stated that res judicata is "a doctrine that comprises both claim and issue preclusion." 8 F.4th at 862.

Court's precedent is clear that a dismissal with prejudice, like the one in this case, is on the merits. Moreover, the Ninth Circuit in *Yokeno v. Sekiguchi*, 754 F.3d 649, 651 n. 2 (9th Cir. 2014), expressly declined to define res judicata as a non-merits-based ground for dismissal under the *Sinochem* test. *See Navajo Nation v. Dep't of Interior*, 996 F.3d 623, 635 (9th Cir. 2021) ("Having established that we have jurisdiction, we turn to the Intervenors' argument that *res judicata* bars the Nation's claim.").

The fact that an issue preclusion dismissal is a merits ruling is further supported and illustrated by this Court's precedent on a related legal principle, by foundational conflict of laws and related principles, and by the Federal Rules of Civil Procedure. First, the district court in the present case dismissed the Snoqualmie Tribe's claims with prejudice. In *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) ("*Semtek*"), the Court discussed at length the distinction between a dismissal with prejudice and one without prejudice for purposes of determining whether a dismissal is on the merits. The Court's conclusion that "dismissal without prejudice" is the opposite of a dismissal upon the merits (and that only certain dismissals with prejudice are a "final decision on the merits" so as to have a claim preclusive effect) confirms that dismissals with prejudice are decisions on the merits. *Semtek*, 531 U.S. at 505-06. This conclusion is consistent with *Sinochem*'s holding that *forum non conveniens* is non-merits but contradicts the lower court's dismissal with prejudice in this case as an asserted

non-merits dismissal. Instead, precedent is clear that a dismissal with prejudice on issue preclusion grounds is a decision on the merits.

The district court in *Sinochem* determined that it had subject-matter jurisdiction over the case but was unable as a matter of first impression to determine whether it had personal jurisdiction over the defendant without ordering discovery; rather than conduct such discovery, the court determined that it could properly dismiss the case under *forum non conveniens* because such a ruling was non-merits, and without prejudice. *Malaysia Intern. Shipping Corp. v. Sinochem Intern. Co. Ltd.*, 2004 WL 503541 (Feb. 27, 2004) (not reported). By contrast, the district court in the present case, affirmed by the Ninth Circuit, conducted no analysis of its jurisdiction over the case or the parties and dismissed Snoqualmie's claims with prejudice on the basis of issue preclusion; that dismissal with prejudice was necessarily on the merits. *See Semtek*, *id.*, 531 U.S. at 505 ("'[W]ith prejudice' is an acceptable form of shorthand for 'an adjudication upon the merits.'" (quoting 9 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 2373, p. 396, n. 4 (1981)).

The Ninth Circuit also relied on *C.I.R. v. Sunnen*, 333 U.S. 591 (1948) ("*Sunnen*") to defend its holding that issue preclusion is not a decision on the merits and therefore may justify dismissal before a court determines its subject-matter jurisdiction. However, the Ninth Circuit decision mischaracterized *Sunnen*, explaining that "[*Sunnen* at 597] provides a strong indication that issue (and claim) preclusion dismissals are

non-merits dismissals." *Snoqualmie*, 8 F.4th at 863. *Sunnen* actually only says that if the *claims* in both cases are identical, res judicata may allow a court to avoid the merits of a case; if the claims are not identical, res judicata does not apply – even if the issue is the same. 333 U.S. at 597-98, 602. Only where the subsequent litigation involves the exact same claim previously litigated can the case be dismissed under res judicata on a non-merits basis without first determining subject-matter jurisdiction. *Id.* at 597. The Court in *Sunnen* held that determining the preclusive effect of the prior case "necessarily require[d] inquiry into the merits of the controversy," because the claims were different. *Id.* at 603.[3]

The Ninth Circuit's reliance on *Sunnen* was erroneous because the claims in the present case are different. The lower courts in the present case gave issue preclusive effect to a treaty fishing rights claim, applying it to bar Snoqualmie's undisputedly separate and unadjudicated claim for treaty hunting and gathering rights.[4] The Ninth Circuit neglected this critical

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[3] In *Sunnen*, the Court held that tax year contracts were different claims even though the contract for each year was essentially identical. *Id.* at 602.

[4] In separate cases brought by another Point Elliott Treaty tribe, the district court and Ninth Circuit expressly confirmed that off-reservation treaty hunting and gathering rights have never been adjudicated by the federal courts and that the *United States v. Washington* litigation only involves off-reservation treaty fishing rights. *Skokomish Indian Tribe v. Goldmark*, 994 F.Supp. 2d 1168, 1174 (W.D.Wash. 2014); *Skokomish Indian Tribe v. Forsman*, 738 Fed. Appx. 406, 408 (9th Cir. 2018) (unpublished) ("No plausible reading of the original [*United States v. Washington*,

distinction in applying *Sunnen*. *Snoqualmie*, 8 F.4th at 862. Under *Sunnen*, a res judicata analysis cannot be used to avoid the merits if the claims are not identical.[5] *Sunnen* provides no authority for the Ninth Circuit's conclusion that an issue preclusion dismissal is non-merits under *Sinochem*.

This Court's precedent is also clear that the district court and Ninth Circuit's application of substantive (rather than procedural) law to the Snoqualmie Tribe's treaty hunting and gathering claim was a ruling on the merits of this new claim. The critical distinction between substance and procedure and the relationship between whether a resulting ruling is on the merits is well illustrated by foundational conflict of laws principles. For example, federal courts sitting in diversity jurisdiction apply federal *forum non conveniens* rules because they are procedural, *American Dredging Co. v. Miller*, 510 U.S. 443, 453-54 (1994), but "[incorporate] the [substantive] rules of preclusion applied by the State in which the rendering court sits."

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384 F.Supp. 312 (W.D. Wash. 1974)] decision or subsequent proceedings and appeals to this court supports the conclusion that the litigation decided anything other than treaty *fishing* rights."). *See United States v. Washington*, 593 F.3d 790, 801 (9th Cir. 2010) (en banc) ("Nothing we have said (on issue preclusion) precludes a newly recognized tribe from attempting to intervene in *United States v. Washington* or other treaty rights litigation to present a claim of treaty rights not yet adjudicated.").

[5] Another case cited by the Ninth Circuit, *Hoffman v. Nordic Nats, Inc.*, 837 F.3d 272 (3d Cir. 2016), correctly applied *Sunnen* because the claims in the two cases analyzed by the Court in *Hoffman* were identical. Where an identical claim has previously been decided, res judicata applies.

Taylor v. Sturgell, 553 U.S. 880, 891 n. 4 (2008) (citing *Semtek*, *supra*, 531 U.S. at 508)). This Court recently confirmed that if a judgment determines that "'the plaintiff has no cause of action' based 'on substantive rules of law,'" the court's decision "'is on the merits.'" *Brownback v. King*, ___ U.S. ___, 141 S.Ct. 740, 748 (2021) (quoting Restatement of Judgments § 49, Comment *a*, p. 193 (1942)); *Semtek*, 531 U.S. at 501-02 ("The original connotation of an 'on the merits' adjudication is one that actually 'pass[es] directly on the substance of [a particular] claim' before the court. Restatement [Second] of Judgments § 19, Comment *a*, at 161). That connotation remains common to every jurisdiction of which we are aware.").[6]

Because the law of preclusion is substantive, *Sturgell*, 553 U.S. at 891 n. 4, a dismissal on issue preclusion grounds is a decision on the merits. *Brownback*, 141 S.Ct. at 748. Since merits-based decisions do not trigger the *Sinochem* exception, the district court and Ninth Circuit in this case committed reversible error because they were required under this Court's precedent, including *Steel Co.*, to first establish jurisdiction before conducting any issue preclusion analysis. *See Steel Co.*, 523 U.S. at 94-95.

Fed. R. Civ. P. 41 provides additional strong support for distinguishing between dismissals without

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[6] The Restatement (Second) moved away from using the term "on the merits" in the context of res judicata "because of its possibly misleading connotations" regarding the preclusive effect of such a decision. *See* Restatement (Second) of Judgments § 19, Comment *a*, at 161 (1982).

prejudice as non-merits and dismissals with prejudice as merits-based. This Court in *Semtek* addressed Rule 41 at some length. 531 U.S. at 501-06. "[Rule 41(a)] makes clear that an 'adjudication upon the merits' is the opposite of a 'dismissal without prejudice,'" *id.* at 505 (quoting Fed. R. Civ. P. 41), whereas Rule 41(b) provides for dismissals which "'[operate] as an adjudication upon the merits,'" subject to a list of limited exceptions, of which venue is one. *Id.*, 531 U.S. at 497. *Forum non conveniens* is, "essentially, 'a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined.'" *Sinochem*, 549 U.S. at 429-30 (quoting *American Dredging Co.*, 510 U.S. at 453 (additional citation omitted)); *see also* Restatement of Judgments § 49, Comment *a*, at 194 (1942) ("[W]here judgment is given for the defendant on the ground that the action is brought in the wrong country, the judgment is not on the merits."). Issue preclusion has no analog among the Fed. R. Civ. P. 41(b) exceptions or Supreme Court precedent which would support its characterization as a non-merits-based dismissal.

Sinochem did not, as the Ninth Circuit stated, "[announce] principles of broader applicability." 8 F.4th at 862. Rather, *Sinochem* created a narrow exception to a federal court's duty to first establish its jurisdiction before ruling on the merits of the case, recognizing that a *forum non conveniens* ruling is not on the merits and allowing federal courts to dismiss on that ground without first establishing jurisdiction. The

Ninth Circuit's decision vastly expands *Sinochem*'s limited exception. Setting aside for a moment the fact that *Sinochem* by its very language is limited to dismissals on *forum non conveniens* grounds, under the Ninth Circuit's own reasoning, the *Sinochem* exception would not apply to the present case because an issue preclusion ruling is on the merits and the *Sinochem* exception has no application to merits rulings. *Sinochem* cannot and does not justify the lower courts' dismissals on issue preclusion grounds before establishing subject-matter jurisdiction.

The district court and Ninth Circuit in the present case failed to establish their subject-matter jurisdiction even though jurisdictional issues had been properly raised and argued, and instead dismissed the case with prejudice based on the substantive law of issue preclusion. These rulings were merits decisions and should not have been made without first establishing the court's subject-matter jurisdiction and constitute reversible error.

3. Jurisdictional issues in this case would not have been "arduous" or "difficult to determine" because the lower courts clearly lacked subject-matter jurisdiction.

Assuming *arguendo* that the first prong of the *Sinochem* test, that the lower courts could dismiss this case on non-merits grounds, was met, *Sinochem* still prohibits issuing a decision without first determining subject-matter jurisdiction unless the second prong of

its limited exception test is met – that it would be "arduous" or "difficult [for the court] to determine" the jurisdictional question. The Ninth Circuit committed additional error by determining that jurisdictional issues in this case would have been arduous or difficult to determine and that dismissal on issue preclusion grounds was "the less burdensome course." *Snoqualmie*, 8 F.4th at 862-63 (citing *Sinochem*, *supra*, 549 U.S. at 436 (whether "subject-matter or personal jurisdiction is difficult to determine"); *Ruhrgas*, *supra*, 526 U.S. at 787-88 (where resolving the threshold issue of subject-matter jurisdiction would have "involve[d an] arduous inquiry")).[7] As discussed in the first section of this petition, the question of both the State's and affected tribes' sovereign immunity and thus the lower courts' subject-matter jurisdiction over this case was both clear and easy to determine. The Ninth Circuit wholly ignored the question of its subject-matter jurisdiction[8]

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[7] *See Herklotz v. Parkinson*, 848 F.3d 894, 899 (9th Cir. 2017) ("The jurisdictional question in this case is not a 'murky problem under *Rooker-Feldman* (citing *In re Athens/Alpha Gas Corp.*, 715 F.3d 230, 235 (8th Cir. 2013)), but a straightforward analysis of diversity jurisdiction – one which overlaps not at all with the preclusion analysis raised on appeal. [The] proposal that we fast-forward to the issue of res judicata is absolutely contrary to the fundamental legal principle that jurisdiction must be established in the first instance.' "). *See also Athens/Alphas Gas*, 715 F.3d at 234 ("[T]he scope of the *Rooker-Feldman* doctrine is sometimes fuzzy on its margins.").

[8] The Ninth Circuit also wrongly held in a footnote that State Eleventh Amendment immunity is not jurisdictional, citing a Ninth Circuit decision that contradicts the Supreme Court precedent cited in Section A.1, *supra*. *See Snoqualmie*, 8 F.4th at 861 n. 4. State and tribal sovereign immunity are jurisdictional; they have been categorized as "quasi-jurisdictional" only because,

and proceeded to issue a merits decision on the Snoqualmie Tribe's previously unadjudicated treaty hunting and gathering claim.

In *Sinochem*, this Court reconciled conflicting Circuit decisions and endorsed a limited exception to the rule confirmed by *Steel Co.* that federal courts ordinarily must establish jurisdiction before proceeding any further:

> If . . . a court can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground. In the mine run of cases, jurisdiction "will involve no arduous inquiry" and both judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum "should impel the federal court to dispose of [those] issue[s] first." *Ruhrgas, AG v. Marathon Oil*, 526 U.S. 574, 587-88 (1999).[9] But where subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course.

549 U.S. at 435. The Court concluded that the facts of that case presented a "textbook" case for dismissal

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unlike some other jurisdictional principles, they can be expressly waived. *See supra*, n. 1.

[9] *Ruhrgas* only decided that there is no priority in jurisdictional determinations, that the court could determine lack of personal jurisdiction before it addressed subject-matter jurisdiction. 526 U.S. at 575, 584.

based on a non-merits threshold determination because jurisdiction would have been difficult for the lower courts to determine:

> This is a textbook case for immediate *forum non conveniens* dismissal. The District Court's subject-matter jurisdiction presented an issue of first impression in the Third Circuit, see 436 F.3d, at 355, and was considered at some length by the courts below. Discovery concerning personal jurisdiction would have burdened Sinochem with expense and delay. . . .

Id.

In the present case, all the involved parties – plaintiff Snoqualmie Tribe, defendants State of Washington and State officials, proposed intervenor Tulalip Tribes, proposed Seven Amicus Tribes, and intervenor Samish Indian Nation – agreed that the State had Eleventh Amendment sovereign immunity and that tribes affected by Snoqualmie's treaty rights claim possessed sovereign immunity from suit.[10] Three separate arguments were raised that the court lacked subject-matter jurisdiction over the Snoqualmie Indian Tribe's cause of action. The first subject-matter jurisdiction defense was an affirmative defense by the State of

[10] The Snoqualmie Tribe asserted that other legal principles allowed its claim to proceed despite the State's and Tribes' sovereign immunity and disputed the State's Article III standing defense. Dkt. #31, Feb. 24, 2020, Snoqualmie Tribe's Response in Opposition to Defendants' Motion for Judgment on the Pleadings. Because it is clear and straight-forward to dismiss for lack of subject matter jurisdiction based on sovereign immunity, there is no need to address any other issue.

Washington and State officials that they possessed Eleventh Amendment sovereign immunity from suit. The second involved tribal sovereign immunity of affected tribes raised in the context of a Fed. R. Civ. Proc. 19(a) necessary party claim. The third was Snoqualmie's lack of Article III standing to bring its claim. These subject-matter jurisdiction defenses were raised at all stages of the proceedings below, together with the position that subject-matter jurisdiction needed to be decided first by the district court before it could address the merits of the Snoqualmie Tribe's claims for relief.[11] No party disputes these principles.

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[11] *See* District Court No. 3:19-CV-06227: State Defendants' Answer, Dkt. #13, Jan. 14, 2020, p. 9 (Affirmative Defenses: #1 State sovereign immunity; #5 lack of subject-matter jurisdiction; #6 tribal sovereign immunity); Tulalip Tribes' Proposed Motion to Dismiss, Dkt. #17-1, Ex. A, Jan. 16, 2020, pp. 2-3, 8-9 (tribal sovereign immunity requires dismissal under Rule 19); State's Motion for Relief from Deadline to Respond to Plaintiff's Partial Summary Judgment Motion, Dkt. #19, Jan. 23, 2020, pp. 2-4 (threshold issue of subject-matter jurisdiction must be addressed first; States pending motion to dismiss will address the State's jurisdictional defenses); Snoqualmie Tribe's Response to States Motion for Relief from Deadlines, Dkt. #20, Jan. 27, 2020, pp. 2-4 (jurisdictional issues should be resolved first); Samish Proposed Amicus Brief, Dkt. #28-1, Feb. 6, 2020, p. 11 (state and tribal sovereign immunity must be decided first); State Motion to Dismiss, Dkt. #29, Feb. 6, 2020, pp. 1-2, 4-6 (State mounting a facial challenge to court's subject-matter jurisdiction); State Reply Brief in Support of Motion to Dismiss, Dkt. #38, Feb. 28, 2020, p. 1 ("The State is clearly immune and should be dismissed."); Samish Tribe's Motion to Intervene for Purposes of Appeal, Dkt. #41, March 24, 2020, pp. 2-3 (State and tribal sovereign immunity issues should be addressed first); Ninth Circuit Appeal, Case Nos. 20-35346, 20-35353: Samish Tribe Opening Brief, Dkt. #10, July 31, 2020, pp. 31-35 (subject-matter jurisdiction issues will have to

It would not have been difficult for the district court to determine it lacked subject-matter jurisdiction over the Snoqualmie Tribe's cause of action, but it did not even address the issue. In fact, the district court and Ninth Circuit ignored "a 'wall of circuit authority' in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity. . . ." *Dine Citizens*, *supra*, 932 F.3d at 857 (quoting *White*, *supra*, 765 F.3d at 1028).

Snoqualmie's claims clearly implicate the treaty rights of tribes that are not party to this case and cannot be joined due to their sovereign immunity. "Among the core aspects of sovereignty that tribes possess . . . is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Michigan v. Bay Mills Indian Community*, *supra*, 572 U.S. at 789 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

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be resolved first on remand); Snoqualmie Tribe Opening Brief, Dkt. #12, July 31, 2020, pp. 47-48 (jurisdictional issues must be addressed first); State Answering Brief, Dkt. #28, Sept. 18, 2020, pp. 38-39 ("State is immune from suit and should be dismissed."), pp. 34-37 (judicial economy warrants bypassing question of subject-matter jurisdiction to address res judicata), p. 37 n. 6 ("The Samish recognizes that other threshold issues must be addressed prior to adjudication of the Snoqualmie's claims."); Interested Party Tulalip Tribes Brief, Dkt. #33, September 25, 2020, p. 6 (Circuit should remand to district court for adjudication of the jurisdictional deficiencies that bar Snoqualmie's suit); Snoqualmie Tribe's Reply Brief, Dkt. #50, Nov. 9, 2020, pp. 22-25 (case should be remanded to rule on subject-matter jurisdiction first; no *Sinochem* exceptions apply); Samish Petition for Rehearing, Dkt. #69-1, Aug. 19, 2021, pp. 3-11 (panel erred by not ruling on subject-matter jurisdiction before addressing issue preclusions; pp. 3-8, State sovereign immunity; pp. 8-11, tribal sovereign immunity).

"Sovereign immunity is jurisdictional in nature. Indeed, the 'terms of . . . consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *F.D.I.C. v. Meyer*, 510 U.S. 471, 474 (1994) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). "And the qualified nature of Indian sovereignty modifies that principle [of sovereign immunity] only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands." *Michigan v. Bay Mills Indian Community*, *supra*, 572 U.S. at 789 (citing *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940)). Tribal sovereign immunity is therefore a "threshold jurisdictional issue." *See F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). Courts, particularly in the Ninth Circuit, have performed the jurisdictional tribal sovereign immunity analysis many, many times. *E.g.*, *White*, *supra*, 765 F.3d at 1028. *Sinochem* does not excuse federal courts from their duty to establish jurisdiction by simply proclaiming that performing the analysis would be "arduous."

The Ninth Circuit also ignored Respondents' Eleventh Amendment sovereign immunity status, noting only in a footnote its view that the Eleventh Amendment "'is not a true limit upon the court's subject matter jurisdiction.'" 8 F.4th 861 n. 4 (quoting *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 760 (9th Cir. 1999), *amended on reh'g*, 201 F.3d 1186 (9th Cir. 1999)). This statement ignores Supreme Court precedent explicitly contradicting this view: "[T]he Eleventh Amendment [stands] for the constitutional principle that state sovereign immunity limit[s] the federal courts'

jurisdiction under Article III." *Seminole Tribe of Fla. v. Florida*, *supra*, 517 U.S. at 64. *See also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97-98 (1984); *Idaho v. Coeur d'Alene Tribe, supra*, 521 U.S. at 267-69. This Court has been clear for the last century or longer that State sovereign immunity under the Eleventh Amendment is a bar to federal jurisdiction. *See Seminole Tribe of Fla.*, *supra*, 517 U.S. at 54 n. 7 (listing cases). State Respondents in the present case immediately raised their Eleventh Amendment sovereign immunity before the district court and the Ninth Circuit, but those courts ignored their duty to first determine their subject-matter jurisdiction and proceeded directly to issue preclusion instead. The State of Washington did not waive its immunity in this case; under *Sinochem*, the State of Washington should have been dismissed. This Court is clear that Eleventh Amendment sovereign immunity is a jurisdictional bar that must be addressed before proceeding to issue preclusion.

Neither the district court nor the Ninth Circuit below conducted any jurisdictional analysis, except to note in a footnote that Article III standing is jurisdictional in nature and requires dismissal if it does not exist. *Snoqualmie*, 8 F.4th at 861 n. 4. The only specific ground the Ninth Circuit cited for its conclusion that it would have been "difficult to determine" jurisdiction was the Snoqualmie Tribe's routine request to amend its complaint if the district court dismissed its case. The Ninth Circuit's opinion relied on this speculative possibility – which the district court would likely have

rejected out of hand because amendment would have been futile – to erroneously conclude that determining subject-matter jurisdiction would have been "arduous" for the district court:

> Here, resolving the threshold jurisdictional issues before the district court would have "involved an arduous inquiry." (*Sinochem*, 549 U.S. at 436) (quoting *Ruhrgas*, 526 U.S. at 587-88). The Snoqualmie's response to the State's facial motion to dismiss included a request to amend its complaint, which would have ultimately triggered a flurry of motions burdening the parties "with expense and delay," and "all to scant purpose: The [d]istrict [c]ourt inevitably would dismiss the case without reaching the merits, given its well-considered [issue preclusion] appraisal." *Id.* at 435. . . . Indeed, the district court's dismissal was consonant with the considerations of judicial economy that motivated the Court's decision in *Sinochem*.

8 F.4th at 863.

There are at least two problems with this substantive statement by the Ninth Circuit. First and foremost, the possibility of the Snoqualmie Tribe amending its complaint did not actually bear upon the court's jurisdiction. Cf. *Sinochem*, 549 U.S. at 435 (additional discovery needed to determine whether court had personal jurisdiction over the defendant). Responding to the State's Motion to Dismiss, the Snoqualmie Tribe requested alternative relief that if the Court granted the State's Motion because Snoqualmie did

not present any plausible claims, it should be permitted under the Federal Rules to amend its complaint to address deficiencies noted. Snoqualmie Response in Opposition to Defendants' Motion for Judgment on the Pleadings, Dkt. # 31, Feb. 24, 2020, p. 24. There can be no amendments that will address a clear lack of subject-matter jurisdiction. In its Reply, the State argued that Snoqualmie should not be permitted to amend its complaint because such amendment would be futile:

> Plaintiff's request to amend its complaint should be denied because amendment would be futile, would result in undue delay in resolving this case, and would waste limited judicial and party resources. Plaintiff might attempt to artfully plead around some deficiencies highlighted in the State's motion to dismiss, but key flaws in the case cannot be avoided in the filing of an amended complaint. The Court should dismiss the complaint both in light of the threshold failings of Eleventh Amendment immunity and lack of standing, and on the alternative bases that the claims are barred by res judicata and Plaintiff has not (and cannot) join indispensable parties.

Reply in Support of its Motion to Dismiss, Dkt. # 38, Feb. 28, 2020, p. 12.

The district court had discretion to reject Snoqualmie's request to amend its complaint on the ground that any amendment would be futile in light of the application of clear principles of sovereign immunity in the case. *See Navajo Nation*, *supra*, 996 F.3d at 634 (denial of leave to amend complaint reviewed for abuse of

discretion). The mere possibility of additional motions practice unrelated to a court's jurisdiction does not meet the *Sinochem* requirement that a court's determination of its jurisdiction would be arduous or difficult to determine. If the mere mention of possible future motions or requests to amend a complaint meets the "arduous" prong of the *Sinochem* exception, that narrow exception will be destroyed and almost every case will qualify for a court's decision on substantive grounds without first determining whether it has subject-matter jurisdiction. This is not what *Sinochem* meant.

Under *Sinochem*, the district court and Ninth Circuit should have simply dismissed the Snoqualmie Tribe's claim for lack of jurisdiction based on tribal sovereign immunity and Eleventh Amendment state sovereign immunity. *See Sinochem*, 549 U.S. at 436 ("If, however, a court can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground."). This case is one of the "mine run of cases" the *Sinochem* Court reiterated should be dismissed for lack of jurisdiction. *See id.* There is no question that both courts lacked jurisdiction over this case; the proper course would have been to dismiss on that ground. Allowing the Ninth Circuit's decision to stand will likely lead to a proliferation of new merits decisions by federal courts lacking jurisdiction and will undermine this Court's baseline holding in *Steel Co.* that unauthorized federal court action offends fundamental principles of separation of powers under the Constitution. The Court should grant this petition and reverse the lower courts' error.

B. The Questions Presented Warrant This Court's Review.

As the Ninth Circuit readily acknowledged, neither this Court nor the Ninth Circuit has previously decided that issue preclusion is among the threshold determinations a federal court may make before establishing its jurisdiction. *Snoqualmie*, 8 F.4th at 861. Because the lower courts clearly lacked subject-matter jurisdiction, their merits rulings were *ultra vires*. The Ninth Circuit's decision that it would have been too arduous for the District Court to determine its subject-matter jurisdiction before issuing a decision on issue preclusion as a threshold matter will eviscerate this Court's *Sinochem* holding that a federal court must in almost all cases determine its subject-matter jurisdiction first, leading to a proliferation of rulings on the merits in cases where the reviewing court lacks jurisdiction.

The district court did not address its subject-matter jurisdiction at all despite its lack of subject-matter jurisdiction being raised by all parties at all stages, and instead proceeded to decide the case on the merits and with prejudice based solely on issue preclusion. *Sinochem*'s application was not raised until the appeal, by the State, but it misinterpreted and misapplied that precedent.[12] State Ninth Circuit Answering

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[12] The State's two references to *Sinochem* in its Ninth Circuit Answering Brief are both erroneous. State Answering Brief, Dkt. #28, Sept. 18, 2020 p. 13 ("A district court decision to address other threshold issues before subject matter jurisdiction is reviewed for abuse of discretion."); pp. 33-34 ("While courts will

Brief, Dkt. #28, Sept. 18, 2020, p. 35. The State also argued in its Ninth Circuit brief that the centrality of its res judicata defense gave the federal court authority to bypass determination of whether it had subject-matter jurisdiction solely on grounds of judicial economy: "[J]udicial economy especially warranted bypassing questions of subject-matter jurisdiction to address the conclusive issue of res judicata." *Id.* at p. 37. The Ninth Circuit adopted this State argument, which distorts *Sinochem*:

> Indeed, the district court's dismissal was consonant with the considerations of judicial economy that motivated the Court's decision in *Sinochem*. . . . Because . . . it was reasonable for the district court to conclude that dismissing on the ground of issue preclusion was "the less burdensome course," the district court did not abuse its discretion in dismissing the Snoqualmie's complaint before first

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often first address the threshold issues of standing and sovereign immunity, they are not required to do so, and their decision to exercise their 'leeway' is reviewed for abuse of discretion. *Sinochem*, 549 U.S. at 431."). *Sinochem* never mentions that a district court's decision to ignore whether it has subject-matter jurisdiction is only reviewed for abuse of discretion. It is a legal issue that is reviewed de novo. *See Navajo Nation*, *supra*, 996 F.3d at 634.

The Snoqualmie Tribe's Circuit Reply Brief, Dkt. #50, Nov. 9, 2020, pp. 22-24, pointed out the State's erroneous application and interpretation of *Sinochem*. *See also* State's District Court Motion to Dismiss, *supra*, Dkt. #29, Feb. 6, 2020, p. 5 (federal court must first determine its subject-matter jurisdiction, with no reference to *Sinochem*).

> establishing its subject matter jurisdiction over the Snoqualmie's claims.

8 F.4th at 863. It committed clear error in doing so.

This ruling violates *Sinochem*'s carefully crafted exception to the mandatory requirement set out in *Steel Co.* that a federal court must first determine its jurisdiction before proceeding to any other issue, and revives the discredited "hypothetical jurisdiction" principle that Justice Scalia expressly rejected and laid to rest in *Steel Co*.

In *Steel Co.*, this Court reaffirmed the basic rule that a federal court must first specifically determine that it has subject-matter jurisdiction before deciding the merits of a specific case. 523 U.S. at 89. The Court in that case declined to adopt the Ninth Circuit's practice of "the doctrine of hypothetical jurisdiction" – " 'assuming' jurisdiction for the purpose of deciding the merits" of a case:

> We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. . . . "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514 (1868). . . . The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the

> judicial power of the United States" and is "inflexible and without exception." *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1994).

Steel Co., 523 U.S. at 94.

The Ninth Circuit's decision in the present case is tantamount to assuming hypothetical jurisdiction. The Ninth Circuit's decision will inevitably lead to a proliferation of new federal court decisions that bypass the question of whether the court has any jurisdiction to entertain the claim brought. The Ninth Circuit's decision must be rejected. This Court should grant this petition and remand to the lower courts for dismissal for lack of subject-matter jurisdiction.

CONCLUSION

"Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case. 'For a court to pronounce upon [the merits] when it has no jurisdiction to do so,' . . . 'is . . . for a court to act ultra vires.'" *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (quoting *Steel Co.*, *supra*, 523 U.S. at 101-02 (alterations in original). The Court's *Sinochem* decision created a limited exception to this foundational rule where a court could dismiss a case on a non-merits basis and where it would have been arduous for the court to first determine its jurisdiction. The Ninth Circuit misinterpreted and misapplied *Sinochem* to uphold

dismissal of the Snoqualmie Tribe's claim based on issue preclusion, as a non-merits decision, and by finding without any factual basis that it would have been arduous to first determine whether it had subject-matter jurisdiction over the case. The rulings below undermine the clear principles and standards set out in this Court's precedent and will likely lead to an expansion of merits decisions by the federal courts in cases where the court lacks subject-matter jurisdiction. The Court in this case must reestablish the clear principles confirmed in *Steel Co.* and *Sinochem.* The Court should grant this petition and remand the case to be dismissed for lack of subject-matter jurisdiction.

Respectfully submitted,

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