No. 21-55293

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS J. SEIDER, as Trustee of the Seider Family Trust;
LEAH SEIDER, as Trustee of the Seider Family Trust,

Plaintiffs – Appellants,

v.

CITY OF MALIBU,

Defendant – Appellee.

On Appeal from the United States District Court
for the Central District of California
Honorable Percy Anderson, District Judge

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question) and 42 U.S.C. § 1983 (cause of action for violation of the Constitution or federal law).

The district court issued a final judgment in favor of Defendant. This Court therefore has appellate jurisdiction under 28 U.S.C. § 1291.

The final judgment was issued on March 15, 2021. The notice of appeal was filed on March 26, 2021, rendering it timely under Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion in dismissing the Seiders' challenges to four provisions of Malibu's Local Coastal Program for failure to join the California Coastal Commission as a required party under Federal Rule of Civil Procedure 19.

2. Whether the Seiders' First Amendment challenges to the required indemnification agreement on Malibu's coastal development permit application are ripe.

3. Whether the Seiders plausibly alleged that the indemnification agreement violates the First Amendment as applied to their application for a sign permit.

INTRODUCTION

Like many Americans, Dennis and Leah Seider want to put up a sign in their backyard to inform the public of the boundaries of their private property. But the Seiders live in Malibu and their backyard is Pacific Ocean beach, so getting approval to put up their sign is no simple task. Malibu's Local Coastal Program (LCP) requires a Coastal Development Permit (CDP) for most signs and flatly prohibits others. Unfortunately for the Seiders, Malibu prohibits signs that "restrict public access to State tidelands, public vertical or lateral access easement areas, or which purport to identify the boundary between State tidelands, and private property." Malibu Local Implementation Plan (LIP) § 3.15.3(X).[1] When Dennis inquired about a permit, Malibu's planning director told

[1] The Local Implementation Plan is one component of an LCP. Malibu's LIP is available at https://www.malibucity.org/DocumentCenter/View/4421/Malibu-Local-Implementation-Plan-LIP-?bidId (last visited June 30, 2021). At Malibu's request, the district court took judicial notice of the LIP. ER-012 (Order at 6).

him that the LCP prohibited even an accurate sign describing his property line. ER-028–29 (Complaint ¶¶ 31, 38).

Dennis was inclined to apply anyway, but then he noticed the indemnification provision on Malibu's application for a CDP, which requires a permit applicant to agree to indemnify Malibu "against all liability and costs relating to the City's actions concerning this project."[2] Concerned about the potential for unlimited liability should Malibu be sued for *granting* the Seiders a permit, Dennis chose not to apply. The Seiders instead sued Malibu for injunctive and declaratory relief, challenging both the LCP provision and indemnification clause as violations of the First Amendment.

But the heart of this appeal does not concern the merits. Indeed, Malibu *agrees* that the above LCP provision—and three others the Seiders also challenged—are unconstitutional.[3] It nevertheless moved to

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[2] Malibu's CDP application is available here: https://www.malibucity.org/DocumentCenter/View/13101/Application_Uniform?bidId= (last visited June 30, 2021). As noted below, the relevant language is reproduced in the complaint. *See* ER-022–23 (Complaint ¶ 22).

[3] In response to this lawsuit, Malibu enacted Ordinance 483 to repeal the challenged LCP provisions. *See* https://www.malibucity.org/AgendaCenter/ViewFile/Item/ 4869?fileID=20779 (last visited June 30, 2021). But any amendments to an LCP must be certified by the California

dismiss the Seiders' suit on the ground that the California Coastal Commission—which certified Malibu's LCP nearly two decades ago as California law requires—is a required party under Federal Rule of Civil Procedure 19. The district court agreed. ER-012–14 (Order at 6–8). Yet while the Commission may well have an interest in the subject matter of this case, that interest alone does not make it a required party. Effectively, the district court erred by conflating the showing required for the Commission to intervene as of right with the standard for requiring *dismissal* in the absence of a particular party.

The district court also dismissed as unripe the Seiders' claims that the indemnification clause violates the First Amendment. *Id.* at 014–016 (Order at 8–10). That ruling presents a fundamental problem for permit applicants—one cannot apply for a permit without agreeing to the indemnification clause, and that agreement would likely foreclose any later challenge to the provision. That is why the Seiders challenged it before applying. Although the Seiders cannot be sure that someone would challenge Malibu's decision to grant a permit, the significant potential

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Coastal Commission. In the meantime, Malibu continues to enforce the challenged provisions and sought dismissal of the lawsuit.

liability has *already* chilled their speech by dissuading Dennis from even applying for the necessary permit. Were a pre-application challenge unripe in this context, the Seiders would have to either forego a permit application or risk unknown future liability to speak. As the Seiders show below, that is not the law.

For the reasons stated below, this Court should reverse the judgment of the district court.

STATEMENT OF FACTS

Dennis and Leah Seider are trustees of the Seider Family Trust, which owns the oceanfront property at 26642 Latigo Shore Drive in Malibu, California. ER-023 (Complaint ¶ 11). Like most beachfront owners in California, the Seiders own the beach landward of the mean high-tide line. The Seiders' interest is burdened by an easement that their predecessor dedicated in exchange for a permit to build a single family home in 1976. *Id.* at 026 (Complaint ¶ 23). The lateral access easement generally grants the public the right to traverse the beach up to 25 feet inland of the mean high-tide line. *Id.* But the rest of the beach is unencumbered private property. *Id.* at 029 (Complaint ¶ 37).

Since at least 2018, a sign reading "PRIVATE BEACH" had been positioned on the crossbeams beneath the Seiders house, facing out towards the beach. *Id.* at 023 (Complaint ¶ 25). The Seiders did not deny the existence of the easement; the sign was meant to inform beachgoers that the dry beach directly behind the house was private property. *Id.* (Complaint ¶¶ 24–25). But in May 2020 the California Coastal Commission issued a Notice of Violation of the California Coastal Act. *Id.* at 023–24 (Complaint ¶ 26). In a letter to the Seiders, the Commission said the PRIVATE BEACH sign was unpermitted, that its content was contrary to the 1976 deed restriction, and that it violated Section 3.15.3(X) of the Malibu LIP. *Id.* The Seiders complied with the Commission's demand to remove the sign. *Id.* (Complaint ¶ 26).

Without the sign, the Seiders had a problem. They soon dealt with an influx of trespassers who refused to acknowledge that the dry beach next to their home was private. *Id.* at 024 (Complaint ¶ 28). And worse still, many beachgoers cited the lack of signage in asserting a mistaken belief that they had the right to be on the Seiders' property. *Id.* The problem only increased as the COVID-19 pandemic worsened during the summer and fall of 2020—with the public beaches closed, beachgoers

flooded onto the Seiders' property. *Id.* (Complaint ¶ 29). The lack of signage made it impossible for the Seiders to explain to the throngs of beachgoers where the lateral access easement ended and the Seiders' unencumbered private property began. *Id.* So they resolved to seek a permit for a tailored sign that would do no more than accurately communicate their property boundaries.

Beginning in June, Dennis Seider emailed with Malibu Planning Director Bonnie Blue about potential signs. Dennis proposed a sign that would inform the public of the bounds of the easement and note that the rest of the upland beach is unencumbered private property. *Id.* (Complaint ¶ 30). Blue responded that such a sign would violate the LCP, citing Section 3.15.3(X) of the LIP, which prohibits "[s]igns which restrict public access to State tidelands, public vertical or lateral access easement areas, or which purport to identify the boundary between State tidelands, and private property[.]" *Id.* at 025 (Complaint ¶ 31). Dennis tried again in a subsequent email, proposing a simpler sign that recited the terms of the easement, but Blue rejected that formulation for the same reason. *Id.* at 026 (Complaint ¶ 38).

Despite Blue's repeated assurances that an application would be futile, Dennis resolved to apply formally for a CDP from Malibu. *Id.* at 025 (Complaint ¶ 33). But he changed course after reading the indemnification provision, which requires a permit applicant to

> "indemnify and defend the City of Malibu . . . against all liability and costs relating to the City's actions concerning this project, including (without limitation) any award of litigation expenses in favor of any person or entity who seeks to challenge the validity of any of the City's actions or decisions in connection with this project."

Id. at 023 (Complaint ¶ 22). Dennis believed this provision could subject his family to significant liability even if Malibu ultimately granted his CDP application. *Id.* at 025 (Complaint ¶ 33). When he failed to obtain a waiver from the indemnification provision, Dennis ultimately decided not to apply and instead to sue for prospective and injunctive relief. *Id.* at 025–26 (Complaint ¶¶ 34–36).

PROCEDURAL HISTORY

The Seiders sued Malibu in district court. Their complaint alleged five counts. Counts one and two alleged that provisions of Malibu's LCP, including LIP Section 3.15.3(X) banning signs describing coastal property boundaries, violate the First Amendment. ER-030–33. Counts three and four alleged that, as applied to applications for sign permits, the

indemnification provision violates the First Amendment. *Id.* at 031–33. And count five alleged in the alternative that if a court found that the Seiders' proposed signs did *not* violate the LCP, then Malibu's effective denial of a permit was ultra vires under California law. *Id.* at 033–34.

The district court granted Malibu's motion to dismiss. *Id.* at 004 (judgment). As to the first two counts, the court found the Coastal Commission to be a necessary party under Federal Rule of Civil Procedure 19 and dismissed with leave to amend the complaint to add the Commission. *Id.* at 016. The court dismissed counts three and four without leave to amend, finding the Seiders' claims against the indemnification provision unripe. *Id.* It declined to exercise supplemental jurisdiction over the ultra vires claim. *Id.* The Seiders chose not to add the Commission and instead timely filed this appeal once the judgment became final. *Id.* at 057–59 (notice of appeal).

STANDARD OF REVIEW

This Court reviews de novo a district court's decision to grant a motion to dismiss for lack of standing, ripeness, or failure to state a claim under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020, 1025 (9th Cir. 2021) (failure

to state a claim); *Oklevueha Native American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 834 (9th Cir. 2012) (ripeness and standing). In either case, this Court must accept "all factual allegations in the complaint as true and construe the pleadings in the light most favorable to Plaintiffs." *Oklevueha*, 676 F.3d at 834.

While the Court reviews a district court's dismissal for failure to join a required party for abuse of discretion, "the legal conclusions underlying that determination" are subject to de novo review. *Alto v. Black*, 738 F.3d 1111, 1125 (9th Cir. 2013).

SUMMARY OF ARGUMENT

The district court abused its discretion when it dismissed the Seiders' claims that provisions of Malibu's LCP violate the First Amendment for failure to join the Coastal Commission. The Seiders sought limited prospective relief against Malibu to preclude enforcement of the unconstitutional provisions, which would allow the Seiders to apply for the required sign permit under a system that does not burden their First Amendment rights. Because the California Coastal Act leaves permitting authority to local governments with Commission-certified LCPs, Malibu has permitting authority in this case. The Seiders simply

asked the district court to order Malibu not to enforce the challenged LCP provisions against them. They did not ask the court to order the Commission to do anything.

Rule 19 does not require the Commission's presence to resolve this case. The district court thought otherwise mainly because (1) the Commission wrote Malibu's LCP two decades ago when Malibu would not, and (2) Malibu chose not to defend the challenged provisions on the merits. ER-013 (Order at 7). But the Commission's status as drafter of the LCP is irrelevant—after all, Congress is not a required party for all challenges to federal legislation. And Malibu's decision not to substantively defend the LCP provisions might allow the Commission to intervene, but it provides no basis to *require* dismissal of the Seiders' claims when the Commission itself has not sought party status.

None of Rule 19's required-party criteria are satisfied here. The district court would have no trouble according complete relief between the Seiders and Malibu without the Commission—the fact that the Commission might later reverse Malibu's eventual decision through its appellate jurisdiction does not render incomplete the relief sought in this case. And it is that very appellate jurisdiction that ensures that whatever

interest the Commission may have in the subject matter of this case may be asserted later, and so is in no danger of being impaired here. Finally, Malibu will not be subject to any inconsistent legal obligations if it loses this case. At worst, its decision to grant a permit to the Seiders might be reversed by the Commission. None of these things render the Commission a *required* party in this case.

The district court also erred in dismissing as unripe the Seiders' First Amendment challenges to Malibu's required indemnification agreement. This Court has not required First Amendment plaintiffs to speak first and risk enforcement later. Instead, it has emphasized that a pre-enforcement First Amendment challenge is ripe when the plaintiff has a concrete plan to speak and has self-censored due to a legitimate threat of enforcement. Here, the Seiders know that Malibu will enforce the agreement against them if a third party sues. They reasonably refrained from applying for a sign permit rather than submit themselves to potentially significant liability. And this is likely their only opportunity to challenge the indemnity clause, since express agreement may well be considered a waiver in a later challenge. The Seiders'

indemnification clause claims are ripe, and this Court should proceed to the merits.

On the merits, the Seiders have plausibly alleged that the indemnification provision violates the First Amendment when required as a condition to apply for a sign permit. Because it subjects permittees to substantial liability based on the actions of third parties, it restricts far more speech than necessary to achieve any legitimate purpose it might have.

This Court should reverse the judgment below and remand the case for further proceedings.

ARGUMENT

I. The Coastal Commission Is Not a Required Party for Resolution of the LCP Claims

The Seiders seek narrow relief against Malibu that would permit them to apply for a CDP without enforcement of the allegedly unconstitutional LCP provisions. They seek no relief against the Commission. The Commission's presence is not necessary to adjudicate the Seiders' claims against Malibu. The district court abused its discretion in holding otherwise.

Under Rule 19, joinder of an absent party is "required" on pain of dismissal in three circumstances—where (1) the missing party's absence would prevent the district court from fashioning complete relief among existing parties; (2) proceeding with the suit will impair the absent party's "ability to protect a claimed legal interest relating to the subject [matter] of the action"; or (3) deciding the case in the absence of the missing party would "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations" because of the missing party's interest. *See Alto*, 738 F.3d at 1126 (quoting Fed. R. Civ. P. 19(a)(1)(A)–(B)). None are present here. As a result, the district court erred in dismissing the first two counts of the Seiders' complaint for failure to join the Commission as a required party.

A. The District Court Abused Its Discretion in Finding That the Coastal Commission's Interest in the LCP Renders It a Required Party Under Rule 19(a)

Of the three ways to establish that an absent party is required under Rule 19(a), the district court addressed only one, finding that proceeding would impair the Commission's ability to protect its purported interest in defending the LCP. ER-013 (Order at 7). But, as explained below, the Commission's purported interest in enforcing

unconstitutional provisions of Malibu's LCP is based on irrelevant facts and, in any event, can be addressed in an appeal to the Commission *after* Malibu is enjoined from enforcing the unconstitutional provisions challenged here. Because the district court's finding involved an error of law, the court abused its discretion in finding that the Commission is a required party in this case.

Perhaps most importantly, even assuming the Commission has some interest in the subject matter of this litigation, its outcome will not impair the Commission's ability to protect that interest. This Court has explained that where an absent party "can assert any interest it might have in another action," its legal interest is not impaired by the outcome of the present action. *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1255–56 (9th Cir. 1983). Here, the Commission need not be a party to later assert its interest. Should Malibu eventually grant the Seiders a permit, the Commission maintains appellate jurisdiction over that decision—any two members of the Commission may appeal the grant to the Commission for a de novo hearing. *See* Cal. Pub. Res. Code § 30603(a)(1) (appellate jurisdiction extends to "[d]evelopments approved by the local government between the sea and the first public road

paralleling the sea"); *id.* § 30625(a) (an appealable decision "may be appealed to the [C]ommission by an applicant, any aggrieved person, or any two members of the [C]ommission"); *id.* § 30621(a) ("[t]he [C]ommission shall provide for a de novo public hearing on applications for coastal development permits and any appeals brought pursuant to this division"). If the district court determined that the challenged provisions of Malibu's LCP violate the First Amendment and enjoined Malibu from enforcing them, the Seiders would be free to apply for a permit without those unconstitutional conditions. Should Malibu later grant a permit, the Commission remains free to exercise its appellate jurisdiction over Malibu's granting of the permit and could then assert its interest in the conformity of Malibu's permit grant with the certified LCP. *See id.* § 30603(b)(1) ("The grounds for an appeal . . . shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division."). A decision restraining Malibu from applying the challenged LCP provisions would not affect the Commission's exercise of its appellate jurisdiction.

The district court ignored the appellate process and focused instead on two irrelevant facts: (1) that the Commission "drafted and ratified" Malibu's LCP in 2002; and (2) that the City had indicated it would not defend the challenged LCP provisions against the Seiders' constitutional challenge. That the Commission drafted the LCP cannot render it a required party—after all, legislators draft and ratify statutes every day, and far from being necessary parties, they are *immune* from suit for their legislative acts. *See Bogan v. Scott-Harris*, 523 U.S. 44, 54–56 (1998). And while the drafting process for Malibu's LCP was fraught with conflict,[4] nothing in California law indicates that this history changes the basic fact that certified LCPs and their implementing provisions are local ordinances enforced by the local government. *See Mountainlands Conservancy, LLC v. Cal. Coastal Comm'n*, 47 Cal. App. 5th 214, 220 (2020) (referring to an LIP as "zoning ordinances, zoning maps and any other implementing actions"). No matter how Malibu's LCP was created,

[4] Malibu resisted drafting an LCP so much that the California legislature enacted a law authorizing the Commission to draft one in Malibu's stead. *See City of Malibu v. Cal. Coastal Comm'n*, 121 Cal. App. 4th 989, 992 (2004). Malibu even tried to abrogate the Commission-drafted LCP through a local referendum, but state courts ordered the City to accept the LCP. *Id.* at 993, 999.

the Commission gave up primary permitting authority[5] as soon as it certified the LCP as consistent with the Coastal Act. Cal. Pub. Res. Code § 30519. Malibu's LCP was certified by the Commission in 2002 and now operates like any other. *City of Malibu v. Cal. Coastal Comm'n*, 206 Cal. App. 4th 549, 554 (2012). The district court erred in assuming that the Commission has a greater interest in Malibu's LCP because the Commission drafted it 19 years ago.

Closer to the mark, the district court worried that nobody would defend the challenged provisions without the Commission's joinder. Yet

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[5] The district court noted Malibu's argument that the *Commission*, not the City, has original permitting jurisdiction in this case. ER-015 (Order at 9) ("In addition, it is possible that the ultimate decisionmaker on Plaintiffs' permit application may be the CCC, not the City."). But that argument is based on an incorrect reading of the LCP.

Section 13.10.2 of Malibu's LIP provides that even where "either new development, or a modification to existing development, is proposed on a site where development was authorized in a Commission-issued coastal development," a permit applicant still must apply to the City for a CDP unless the applicant seeks "extension, reconsideration and revocation of the Commission-issued permits" or any "[d]evelopment that would lessen or negate the purpose of any specific permit condition . . . of a Commission-issued coastal permit." The Seiders do not seek modification of the 1976 CDP, nor does their proposed sign—which accurately recites the terms of the easement—"lessen or negate" the purpose of the permit condition requiring dedication of the easement. Since the Seiders' application is not one of the narrow class that must be sent to the Commission, the City must exercise its permitting jurisdiction.

the mere fact the City indicated it would not defend the LCP does not make the Commission a required party. To be sure, the Commission very well may have an interest in defending the LCP sufficient to entitle it to intervention as of right under Rule 24, but it does not follow that it *must* be joined on pain of dismissal.

Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship & Training Committee, 662 F.2d 534 (9th Cir. 1981), illustrates the point. The plaintiffs there brought an employment discrimination claim against a joint labor-management committee, alleging the committee discriminated against women in its apprenticeship program. *Id.* at 536. The district court held that the thousands of employers and dozens of union locals subject to a master agreement to hire apprentices were both "necessary" and "indispensable" parties,[6] *id.*, but this Court reversed. While the panel credited the district court's concern that the employers "might have interests that would be

[6] After the 2007 amendment, "Rule 19 no longer uses the term 'necessary party;' the more modern term is 'required party.'" *Gensetix, Inc. v. Bd. of Regents*, 966 F.3d 1316, 1320 n.3 (Fed. Cir. 2020). "The Rule also no longer uses the term 'indispensable.'" *Id.* But the 2007 changes were stylistic, not substantive. *See id.* (citing Fed. R. Civ. P. 19 advisory committee's note to 2007 amendment). Therefore, cases using the older terms are still binding authority.

unrepresented in the present suit," it held those interests were "not the sort that would make the employers necessary under rule 19." *Id.* at 538. Critically, this Court noted that these parties could move to intervene on remand. *Id. Eldredge* establishes that a party is not "required" simply because it might have an interest that would entitle it to intervene.[7]

That leads to another problem with the district court's conclusion (and Malibu's argument)—the Commission has not actually *claimed* an interest in this case as required by Rule 19. The Commission has been constructively aware of the Seiders' action since, at the latest, December 3, 2020, when Malibu served a courtesy copy of its motion to dismiss on attorney Jamee Patterson at the California Department of Justice. ER-019. Yet even after learning that Malibu would not offer a substantive defense of the challenged LCP provisions, the Commission

[7] As a practical matter, this proposition is obvious. Courts routinely grant motions to intervene as of right when the intervenor could not be considered a "required" party. One recent example is *Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1066–68 (9th Cir. 2018), where this Court reversed the denial of a union's motion to intervene in a group of suppliers' challenge of California's prevailing wage laws. Surely the Court did not mean that the plaintiffs had to sue the *union* in order to seek relief from the state law, and surely California could not have moved to dismiss for failure to join the union had it not moved to intervene. The union had an interest in the outcome, but it was not a required party. The same is true of the Commission here.

has chosen not to seek intervention. Under the law of this circuit, a party that is aware of an action and chooses not to seek intervention is not a "necessary" or "required" party for purposes of Rule 19(a). *See United States v. Bowen*, 172 F.3d 682, 689 (9th. Cir. 1999) (collecting cases for the proposition that where the absent party "was aware of this action and chose not to claim an interest," joinder was unnecessary); *see also Staten Island Rapid Transit Ry. Co. v. S. T. G. Constr. Co.*, 421 F.2d 53, 58 n.6 (2d Cir. 1970) ("As to Rule 19, we note that the Government was not greatly biased by nonjoinder, for it could have intervened had it so desired in order to protect its interest."). Malibu may not "champion an absent party's interests" simply to obtain dismissal of a legitimate claim against it. *See United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 908 (9th Cir. 1994).

For similar reasons, the district court's final justification for labeling the Commission a required party fares no better. The court posited that the Commission "has an interest in enforcing the existing CDP on Plaintiffs' property." ER-013 (Order at 7). But it need not be a party to this case to do that. As the Commission's letter to the Seiders shows, the Commission retains the power to enforce the terms of the 1976

CDP. *Id.* at 043–44. In any event, this action does not seek to alter the terms of the CDP, so it is unclear how the Commission's participation could help it pursue an interest in enforcing that permit. To the contrary, the Seiders wish to place a sign *expressly alerting the public* to the existence of the easement required in the CDP. The Commission's letter referred to a *different sign* which said only "PRIVATE BEACH." *Id.* at 039. The Seiders complied with the Commission's order to remove that sign, as they would comply with any lawful Commission order concerning the 1976 CDP. In short, the Commission may indeed have an interest in enforcing the terms of the 1976 CDP, but the disposition of *this action* will not impair that interest in the least.

The district court's required party analysis suffers from multiple fatal legal defects. Perhaps most obviously, the court ignored the Commission's retained jurisdiction to assert any interest it might have in the Seiders' sign dispute on de novo appeal from the grant of a CDP to the Seiders. Worse still, the court then incorrectly assumed that any interest sufficient to give the Commission a right to intervene under Rule 24 necessarily makes it a required party *without whom the litigation cannot proceed*. And finally, the court permitted Malibu to raise the

Commission's prospective interests even though the Commission is constructively aware of this case and has thus far chosen not to intervene. Perhaps the district court's opinion would have made sense in the context of a motion to intervene, but as an order to join an absent party, it was a clear abuse of discretion.

B. The Remaining Alternative "Required Party" Requirements Are Not Satisfied

Nor can this Court rescue the district court's judgment by relying on the other two "required party" pathways the district court did not analyze.

1. The district court can accord complete relief between the Seiders and Malibu

As this Court has explained, "[t]o be 'complete,' relief must be 'meaningful relief *as between the parties*.'" *Alto*, 738 F.3d at 1126 (quoting *Disabled Rts. Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 879 (9th Cir. 2004)). Whether relief would be "meaningful" is judged based on the causes of action actually before the court. *See id.* at 1127. In *Alto*, that meant the district court could have given the plaintiffs complete relief on their Administrative Procedure Act claims alleging that the Bureau of Indian Affairs unlawfully denied them tribal membership—even without

the tribe as a defendant. *See id.* ("As to the three causes of action that are before us, complete relief—that is, relief limited to that available in an APA cause of action, which is affirmation, reversal or remand of the agency action—can be provided between the parties."). Although the tribe maintained the power to frustrate the effectiveness of the APA relief by refusing to abide by a BIA decision finding the plaintiffs tribal members, that did not render the tribe a required party. *See id.* (should the tribe not abide by a BIA decision, "then questions regarding the availability of further BIA and judicial enforcement will arise"). Simply put, the potential that a non-party's later actions might frustrate the relief awarded does not render the relief incomplete. *See Eldredge*, 662 F.2d at 537 (a defendant "may not avoid its own liability for practices illegal under Title VII by relying on the employers' possible future conduct that might frustrate the remedial purposes of any court-ordered changes").

Here, the district court may grant the Seiders complete relief without the Commission's participation. In the relevant causes of action, the Seiders seek prospective relief against Malibu that would prohibit the City from enforcing several LCP provisions against them. Had the district court granted the relief requested in the first cause of action, it

would have prohibited Malibu from enforcing Section 3.15.3(X) of its LIP, which prohibits the Seiders from erecting any sign that accurately denotes the boundaries of their property. That relief would have permitted the Seiders to apply for a CDP just like any other applicant, without the content-based criteria. And had the district court granted the relief requested in the second cause of action against certain criteria listed in Section 3.15.4(C) of the LIP, it would have prohibited Malibu from denying the Seiders' permit application because of "broadly subjective determinations." *Desert Outdoor Advert., Inc. v. City of Oakland*, 506 F.3d 798, 807 (9th Cir. 2007).[8] Importantly, *none* of the Seiders' requested relief would even require Malibu to issue a permit. Nor would it require the Commission to do anything.

The Seiders' requested relief would be effective against Malibu with or without the Commission's presence. As noted above, the challenged

[8] The Seiders do not contest Malibu's authority to maintain a permitting scheme for signs. They simply maintain that: (1) Malibu cannot deny a permit application based on the content of the proposed sign unless the restriction satisfies strict scrutiny; and (2) the criteria for judging a permit application must be "sufficiently specific and objective so as to effectively place some 'limits on the authority of City officials to deny a permit.'" *Epona, LLC v. County of Ventura*, 876 F.3d 1214, 1222 (9th Cir. 2017) (quoting *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996)).

provisions are local ordinances enforced by the local government. *See Mountainlands Conservancy*, 47 Cal. App. 5th at 220. The Seiders' requested relief seeks to compel Malibu to consider their permit application without enforcing City ordinances the Seiders allege to be unconstitutional. A favorable decision would afford the Seiders "complete relief" on those claims. The Seiders seek no relief against the Commission. Indeed, they likely *could not* seek any relief against the Commission now—because there is no guarantee the Commission will ever take appellate jurisdiction, any claim against that body would "rest[] upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)) (internal quotation marks omitted). And the Commission's potential future action does not render complete relief impossible as between the current parties today. *See Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012) (reversing a district court ruling that an Indian tribe was a required party and noting that "[i]f in the future the plaintiffs believe that other officials are acting in violation of federal law, they may bring

another action against those officials"); *Puyallup Indian Tribe*, 717 F.2d at 1255 (noting in an ejectment action that "[t]he district court can therefore provide complete relief to the parties to this action without joining other parties who might also claim an interest in the same land").

In short, what matters in the "complete relief" inquiry is whether in the absence of the third party, the district court could "accord the complete relief *sought by the plaintiffs*." *Salt River*, 672 F.3d at 1180 (emphasis added). The Seiders seek only prospective injunctive relief against Malibu's enforcement of its own LCP. They do not—and at this time probably could not—seek any relief from the Commission. The Commission need not be bound by the judgment for the relief granted to be effective against Malibu.

2. Judgment in favor of the Seiders would not leave Malibu with inconsistent obligations

Nor would a judgment in favor of the Seiders subject Malibu to any inconsistent legal obligations. "'Inconsistent obligations' are not . . . the same as inconsistent adjudications or results. Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*,

547 F.3d 962, 976 (9th Cir. 2008) (quoting *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1998) (per curiam)). And while a judgment for the Seiders would bind Malibu to process the Seiders' eventual permit application without enforcing the challenged provisions, there is no legitimate possibility that Malibu will be subject to a contrary court order *not* to do so. Rather, the worst that could happen is the Commission might overturn the permit grant on appeal. Even if the Seiders were then to sue the Commission, a judgment in the Commission's favor in that case would not require Malibu to do anything.

In the district court, Malibu argued that the Commission could seek a cease and desist order under Cal. Pub. Res. Code §§ 30809–30810 or file a writ action against it in state court under Cal. Pub. Res. Code § 30802. But neither of those is a realistic option. The purpose of a cease and desist order is to stop *unpermitted* development the Commission believes to be in violation of the Coastal Act or the applicable LCP when the local government will not act. *See id.* § 30810(a)(2). The text and structure of the sections make clear that such an order issues to the party responsible for unpermitted development—which would be the Seiders, not Malibu. *See 11 Lagunita, LLC v. Cal. Coastal Comm'n*, 58 Cal. App.

5th 904, 921 (2020) (cease and desist order issued to property owner). And it does not apply to *permitted* development, so the cease and desist order authorized by § 30802 would not apply to Malibu's decision to grant a permit. The Commission's remedy in the case of a permit grant is simply to exercise its appellate jurisdiction.

Malibu's suggestion that it might be subject to a writ action under Section 30802 is even further afield. That section grants a cause of action to anyone "aggrieved by the decision or action of a local government that is implementing a certified local coastal program . . . *which decision or action may not be appealed to the commission* . . . ." (emphasis added). Because Malibu's implementation of its LCP here is appealable to the Commission, that body would not have a cause of action under Section 30802. Once again, the Commission's remedy would be to exercise its own appellate jurisdiction.

* * *

The district court failed to conduct a meaningful Rule 19(a) analysis. Its failure to even consider, much less follow, much of this Court's precedent was an abuse of discretion. The judgment dismissing counts one and two of the complaint should be reversed.

II. The Seiders Stated a Plausible Claim That the Indemnification Clause Is Unconstitutional as Applied to Them

The district court also erred in dismissing counts three and four—the Seiders' constitutional challenge to Malibu's indemnification clause—as unripe. And while the district court did not reach the merits of the First Amendment question, this Court should do so. For the reasons below, the Seiders have stated ripe and plausible First Amendment claims. The judgment below should be reversed.

A. The Seiders' Indemnification Clause Challenges Are Ripe

This Court has consistently "applied the requirements of ripeness and standing less stringently in the context of First Amendment claims." *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010). Indeed, "the Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences." *Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)). By refusing to agree to the indemnification provision and instead suing, that is precisely what the Seiders have done. The district court's approach would render

the clause impervious to challenge and require the Seiders to assume the risk of significant liability in order to apply for a sign permit.

Typically, this Court considers three factors to determine whether a First Amendment claim is ripe: (1) whether the plaintiff has a concrete plan to engage in protected speech; (2) whether the threat of enforcement will cause the plaintiff to "self-censor"; and (3) history of past enforcement. *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 838–39 (9th Cir. 2014). The Seiders have plausibly alleged facts as to the first two factors, and Malibu's refusal to waive the indemnification agreement and its assertion below that it would enforce the clause against the Seiders satisfy the third factor.

A plan to engage in protected speech need only be "more than hypothetical." *Wolfson*, 616 F.3d at 1059. The Seiders' plans are far from hypothetical. Their complaint details Dennis Seider's repeated efforts to work with Malibu's planning director to devise sign language that would permit the Seiders to obtain a CDP. Further allegations show that the Seiders' desire for a sign was not abstract—rather, based on their interactions with confused beachgoers, the Seiders had reason to believe a sign was necessary to inform the public of the boundary between their

unencumbered private property and the public easement. They viewed a sign as the most sensible way to communicate with the public and deter trespassing on their property. In short, the complaint plausibly alleged that the Seiders had a concrete plan to engage in protected speech by placing a sign in their backyard.

Next, the Seiders alleged that "a threat of potential enforcement" of the indemnification clause has caused them "to self-censor, and not follow through with [their] concrete plan to engage in protected conduct." *Bowen*, 752 F.3d at 839. The complaint specifically alleged that the Seiders chose not to proceed with applying for a permit because they did not want to open themselves to potential liability. ER-029 (Complaint ¶ 36). Dennis Seider even sought an exemption from the indemnification requirement that would have allowed him to apply for a permit without checking the box agreeing to indemnify Malibu's litigation expenses, but the planning director made it clear that Malibu made no exceptions. *Id.* (Complaint ¶ 35). Rather than take the risk of substantial liability, the Seiders chose to "hold [their tongues] and challenge now." *Bayless*, 320 F.3d at 1006. That is precisely what this Court's precedent tells them to do.

The third factor, history of enforcement, is irrelevant here because the City is actively enforcing the indemnity requirement by refusing to grant the Seiders an exception and has made clear that it would charge the Seiders for the cost of defending any permit the City might grant. This inquiry aims to determine whether a plaintiff has established a genuine fear that the challenged provision would be enforced against him. *See Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (noting that the three ripeness factors are meant to evaluate "the genuineness of a claimed threat of prosecution"). But Malibu has not disclaimed enforcement of the indemnification clause. On the contrary, the City asserted below that it *would* enforce the clause if a third party sued to challenge its decision to grant any eventual permit application in the Seiders' case. ER-018 (Memorandum in Support of Motion to Dismiss at 14). So this Court need not delve into Malibu's past use of indemnification provisions in CDP applications to find that Malibu will enforce the requirement against the Seiders here.

The district court did not engage with the three ripeness factors. It instead found the indemnification clause claims unripe on the theory that any injury the Seiders might suffer as a result of enforcement is too

speculative to allow the claim to go forward now. ER-015 (Order at 9). To be sure, the Seiders will not have to pay Malibu's legal fees unless someone challenges Malibu's decision to grant the Seiders a permit. And until such a challenge occurs (indeed, until it has progressed through the legal system to completion), the Seiders have no way to determine the amount of potential liability they may face. But the Seiders must agree to indemnify *now*, simply as a condition to *apply* for the permit to allow them to speak.

Therein lies the problem. California law forecloses a challenge to a permit condition once the applicant agrees to it. *See Lynch v. Cal. Coastal Comm'n*, 396 P.3d 1085, 1089 (Cal. 2017) ("In the land use context, a landowner may not challenge a permit condition if he has acquiesced to it either by specific agreement, or by failure to challenge the condition while accepting the benefits afforded by the permit."). This Court has indicated—albeit in an unpublished memorandum opinion—that such a waiver would preclude even a federal constitutional challenge. *See Griswold v. City of Carlsbad*, 402 F. App'x 310 (9th Cir. 2010). So the Seiders likely could not agree to the indemnification provision to apply for a permit and then later challenge it when Malibu sends the bill. And

even if the Seiders could in theory get around the waiver issue, they should not be put to that decision in a First Amendment case. In short, a pre-enforcement (and pre-application) challenge to the indemnification provision is the only viable way to challenge it.

Regardless of the disposition of the rest of this case, the Seiders will eventually need a permit from Malibu to put up their desired sign. The district court's ripeness approach puts the Seiders to an impossible decision—either agree to the indemnification or *never* put up a sign. That choice between staying silent or risking substantial liability to speak is precisely what this Court's First Amendment ripeness precedents seek to avoid. Instead, this Court permits silenced speakers to challenge stifling laws at the outset and obtain relief before speaking.

Finally, even the district court's chain of speculation reasoning fails. As noted above, Malibu would enforce the provision against the Seiders should a lawsuit be filed challenging an eventual permit grant. Whether a permit will be granted is not all that speculative—particularly if the Seiders prevail in this case—and an application is not necessarily required to challenge an indemnification clause. *See iMatter Utah v. Njord*, 980 F. Supp. 2d 1356, 1363 (D. Utah 2013), *aff'd*, 774 F.3d 1258

(10th Cir. 2014) (noting that the plaintiff refused to sign the required indemnification agreement and then sued). And while it is impossible to know whether a third party will challenge any eventual permit grant, that potential alone is a recognized injury in the First Amendment context. *See id.* at 1381 ("[T]he burden that the indemnification provision imposes on individuals wishing to exercise their First Amendment rights is real. By signing the agreement, an organization exposes itself to an unknown amount of liability. The organization is required to defend the State against all third-party claims alleging some action by a member of the organization, even if those claims are frivolous.").[9] "While this sort of heckler's veto may be unlikely, the important point is that [a speaker] has no way to determine how much liability she is exposing [herself] to by signing the indemnification form." *Id.* The uncertainty about future third party claims does not render the case unripe.

Put simply, the Seiders' challenge to the indemnification provision is ripe because it has already caused them to self-censor to avoid

[9] The district court in *iMatter* cited Judge Berzon's dissent in *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1051 n.26 (9th Cir. 2006), for this proposition. This Court later adopted portions of that dissent in *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1041 (9th Cir. 2009).

significant potential liability. Malibu does not contest that it will enforce the provision. Under this Court's precedent, potential speakers do not have to subject themselves to serious indemnification payments to ripen a case for review. And in this case, simply checking the box to agree to indemnify Malibu would likely preclude a later challenge. For all those reasons, the Court should consider the merits of the Seiders' pre-enforcement, pre-application challenge.

B. Malibu's Indemnification Clause Applied to Sign Permit Applications Violates the First Amendment

This Court should proceed to the merits and find that the Seiders have plausibly alleged that the indemnification clause, as applied to sign permits, violates the First Amendment. While the provision is no doubt content neutral, it is nevertheless a restriction on speech that must be "narrowly tailored to serve a substantial governmental interest." *Long Beach Area Peace Network*, 574 F.3d at 1039. Even assuming Malibu has a substantial interest in requiring indemnification, its broad indemnification clause restricts "substantially more speech than necessary" to achieve its end while ignoring "obvious alternatives that would achieve the same objectives while restricting less speech." *Id.* at 1040.

Three of this Court's cases guide the analysis: *Long Beach Area Peace Network*, 574 F.3d 1011, *Food Not Bombs*, 450 F.3d 1022, and *Kaahumanu v. Hawaii*, 682 F.3d 789 (9th Cir. 2012). In *Long Beach Area Peace Network*, the panel invalidated an ordinance that required "special events" permit recipients to "hold the City harmless from any liability caused by the conduct of the event." *Long Beach Area Peace Network*, 574 F.3d at 1039. The extension of liability to situations "outside the control of the permittee" doomed the ordinance—"[r]equiring permittees to compensate third parties for harm caused by hecklers, counter-protesters, or other persons not part of permittees' organization" simply restricted far more speech than was constitutionally permissible. *Id.* at 1039–41. On the other hand, *Kaahumanu* sustained a "much narrower" indemnification provision that only required permittees for commercial weddings on public beaches to hold the State harmless for *their own* activity. *Kaahumanu*, 682 F.3d at 810.

Food Not Bombs had a more complex disposition, but it supports the distinction the court drew in the later cases. There, the court sustained an ordinance that required applicants for an event permit to agree, among other things, to "defend any and all claims and all legal

actions that may be commenced or filed against the City, its officers, agents, employees, or volunteers." *Food Not Bombs*, 450 F.3d at 1056 n.10. But the ordinance survived because the challengers' only argument was that it was content-based (it was not); they never made a narrow tailoring argument. *See Long Beach Area Peace Network*, 574 F.3d at 1041 ("we did not address the issue of narrow tailoring in *Food Not Bombs* because plaintiffs had challenged the provision only on the ground that it was content-based"). Yet two judges indicated that the ordinance likely would *not* have survived narrow tailoring. *See id.* (noting the opinions of Judges Wardlaw and Berzon).

Judge Berzon was particularly skeptical about the requirement to indemnify the city for its lawsuit defense. In her view, the requirement rendered a permit applicant's speech "contingent on an agreement to cover costs in an unknown amount, generated by third parties over whom the speakers have no control and who may be hostile to them, and who may be seeking damages for injuries caused solely by the content of constitutionally protected activity." *Food Not Bombs*, 450 F.3d at 1052 (Berzon, J., dissenting). That is exactly right. It is one thing to require indemnification for "*meritorious* suits concerning permittees' *actual*

activities," *id.* at 1051, but quite another to require a permit applicant to pay for the defense even of frivolous suits, which "[t]hird parties who disagree with the content of the . . . speech could use" as a "tactic to punish" the speaker, *iMatter*, 980 F. Supp. 2d at 1381. Because these suits are by definition outside the applicant's control, the risk of defending against expensive litigation "may dissuade a large number of potential speakers from exercising their rights." *Id.* That's true regardless of the likelihood of a third party suit in any particular case.

These cases also show that Malibu could tailor its indemnification requirement to restrict substantially less speech. The City could limit the requirement to meritorious suits or even to actions related to the speaker's maintenance of the permitted sign. But it cannot require, as a condition to apply for a CDP to put up a sign depicting constitutionally protected speech, that a permit applicant pay for the City's legal defense in any lawsuit relating to the permit grant. Such a requirement would require a permit applicant to agree to pay for something that is entirely "outside the control of the permittee" and unrelated to his own actions. *Long Beach Area Peace Network*, 574 F.3d at 1040. There are no shortage of individuals and groups who might oppose assertions of property rights

along the ocean, but as currently drafted, Malibu's indemnification clause allows any one of them to impose significant costs on a successful permit applicant. The First Amendment does not tolerate that level of risk for engaging in constitutionally protected speech.

For these reasons, the district court should reach the merits of the Seiders' complaint and hold that they stated plausible First Amendment claims against Malibu's requirement that each applicant for a sign CDP agree to indemnify the City for the defense of future lawsuits in connection with the permit grant.

CONCLUSION

The Seiders respectfully ask this Court to reverse the judgment below and remand the case for further proceedings.

DATED: July 6, 2021.

Respectfully submitted,

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Statement of Related Cases

Plaintiffs – Appellants are aware of no related cases within the meaning of Circuit Rule 28–2.6.

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I hereby certify that on July 6, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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