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April 26, 2022

Clerk of the Court
Attn: Rules Committee
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543

RE: Proposed Revisions to Supreme Court Rules

Dear Mr. Harris and Members of the Rules Committee:

The Native American Rights Fund ("NARF") writes in support of the proposed change to Rule 37 of the Rules of the Supreme Court of the United States removing the requirement for amici curiae to obtain consent or move for leave to file amicus curiae briefs.

NARF also respectfully requests the Clerk of Court add "Indian tribe" to the list of governmental entities for amicus curiae briefing, specifically to the list in proposed Rule 37.6 (and currently provided in Rule 37.4). The specific proposed change would read as follows:

> This disclosure requirement does not apply to a brief presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this

> Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Indian tribe, Territory, or Possession when submitted by its Attorney General or authorized law officer; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

Accordingly, NARF requests that tribes briefing as amici curiae be subject to the 9,000 word limit as set out in current Rule 33.1.

Rule 37 recognizes governmental entities' unique interests in participating as amici curiae out of respect for their inherent sovereignty and/or their exercise of governmental authority, traits shared by Indian tribes. The changes are also reasonable and necessary because cases defining the contours of tribal governmental authority and obligations frequently do not include tribes as parties. These cases often implicate foundational constitutional law principles as well, and tribes should be fully heard as part of the Court's consideration of those issues.

I. Indian Tribes Are Imbued with Inherent Sovereignty.

Indian tribes are "distinct, independent, political communities, retaining their original natural rights." *Worcester v. Georgia*, 31 U.S (6 Pet.) 515, 519 (1832) (Marshall, C.J.).[a] Tribes possess inherent governmental authority, including the

[a] *See also Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (explaining tribes "remain 'separate sovereigns pre-existing the Constitution'") (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (describing "tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction"); *United States v. Kagama*, 118 U.S. 375, 381 (1886) (describing tribes as "having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations"). "The right of tribes to govern their members and territories flows from a preexisting sovereignty . . . ." 1 Cohen's Handbook of Federal Indian Law § 4.01[1][a] (2019).

authority to criminalize conduct,[b] levy taxes, [c] adjudicate disputes,[d] and they possess sovereign immunity.[e] This inherent power makes them similarly situated with other governmental entities currently listed in Rule 37. Indeed, as sovereigns, tribes are imbued with greater authority than cities, counties, or towns, which exercise only the authority delegated by states.[f] Unlike cities and towns, as sovereigns, tribes have an interest in advocating for their sovereign powers and advancing their unique interests and the interests of tribal members.

Including tribes in Rule 37's list of governmental entities is consistent with how other branches of government treat tribes. Congress has long recognized that tribes have inherent authority on par with states.[g] *See* Indian Civil Rights Act, 25

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[b] *United States v. Wheeler*, 435 U.S. 313, 328 (1978) (discussing criminal prosecution and explaining "when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty").

[c] *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980) ("The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.").

[d] *See Williams v. Lee*, 358 U.S. 217, 223 (1959) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations."); *Talton v. Mayes*, 163 U.S. 376, 380 (1896) (explaining Tribe had "power to make laws defining offenses and providing for the trial and punishment of those who violate them when the offenses are committed by one member of the tribe against another one of its members within the territory of the Nation").

[e] *Bay Mills Indian Community*, 572 U.S. at 788 ("Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'") (quoting *Santa Clara Pueblo*, 436 U.S. at 58).

[f] *See Wheeler*, 435 U.S. at 318 (1978) (describing "dual sovereignty" and distinguishing tribes from cities); *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) ("Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities.").

[g] Congress relied on both tribes and states to assist in the response to the COVID-19 pandemic. *See* Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. 116-123, 134 Stat. 147 (2020) ("[N]ot less than $950,000,000 of the amount provided shall be for grants to or cooperative agreements with States, localities, territories, tribes, tribal organizations, urban Indian health organizations, or health service providers to tribes, to carry out surveillance, epidemiology, laboratory capacity, infection control, mitigation, communications, and other preparedness and response activities[.]"). And tribes, like states,

U.S.C. § 1301(2) (2020) ("'[P]owers of self-government' means and includes all governmental powers possessed by an Indian tribe . . .; and means the inherent power of Indian tribes, hereby recognized and affirmed to exercise criminal jurisdiction over all Indians."). Congress has reaffirmed tribes' inherent sovereign powers in reauthorizing statutes like the Violence Against Women Act. 25 U.S.C. § 1304(b)(1) ("[T]he powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons."). Accordingly, Rule 37 should also respect the similar status of states and tribes.

II. Significant Legal Questions Regarding Indian Tribes' Authority and Identity Are Often Litigated in Cases in Which Indian Tribes Are Not Parties.

Questions relating to Indian tribes' governmental authority, treaty rights, and resources often are litigated in cases in which tribes are not parties. In those cases, tribes participate as amici. It is, therefore, critical that tribes have unfettered access to provide fulsome briefing outlining their interests put at issue by other parties.[h]

For example, this term the Court considers *Oklahoma v. Castro-Huerta*, No. 21-429 (docketed Sept. 21, 2021), which directly implicates how conduct on the Cherokee, Muscogee (Creek), Chickasaw and Choctaw Reservations will be regulated. None of the tribes, however, are parties to the suit—in fact, because of the nature of the action, a criminal prosecution, they *cannot* be parties to the suit.[i] Instead, the

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contribute to national preparedness initiatives and are eligible for grants from the Federal Emergency Management Agency. *See* Tribal Homeland Security Grant Program, https://www.fema.gov/grants/preparedness/tribal-homeland-security (last visited April 21, 2022). *See also* S. Rep. No. 698, 45th Cong., 3d Sess., 1–2 (1879). The Senate Judiciary Committee analyzed the Chickasaw Nation's Permit Law and stated that tribes have authority to "enact the requisite legislation to maintain peace and good order, improve their condition, [and] establish school systems" and that "*they undoubtedly possess the inherent right to resort to taxation to raise the necessary revenue for the accomplishment of these vitally important objects*—a right not in any sense derived from the Government of the United States[.]" *Id.*

[h] To this end, removing the requirement that parties request consent or leave to file amicus briefs ensures tribes a voice in these cases. Tribes should also have the 9,000 word limit applicable to government entities.

[i] *See also United States v. Lara*, 541 U.S. 193 (2004); *Wheeler*, 435 U.S. at 313; *United States v. Sandoval*, 231 U.S. 28 (1913).

tribes have filed amicus briefs—subject to the consent requirement and 8,000 word limit.

Castro-Huerta is just the most recent example of this phenomenon; it is not even the only example this term. In *Denezpi v. United States*, No. 20-7622 (docketed Mar. 31, 2021), the Court is evaluating the sovereign authority of the Ute Mountain Ute Tribe and the structure of the Tribe's justice system. Again, the Tribe whose sovereign interests are directly at issue is participating as an amicus. There are countless examples of such cases dating back to the founding. *Johnson v. M'Intosh* and *Worcester v. Georgia* are bedrock Indian law cases which laid the foundation for the next 200 years of Indian law jurisprudence.[j] No tribe, however, was a party in either case.

Cases implicating tribal interests present themselves to the Court in a variety of ways—often without tribes as a party. The Court is regularly asked to decide cases involving inherent tribal authority. *See, e.g.*, *Plains Com. Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008) (analyzing tribal court civil jurisdiction to hear discrimination claim); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (analyzing tribal civil jurisdiction over nonmembers); *Williams v. Lee*, 358 U.S. 217 (1959) (analyzing state jurisdiction over on-reservation activities noting "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves"). In these cases, tribes participated as amicus curiae to voice their concerns and advocate for their interests.

The United States' participation in these cases cannot always adequately represent tribal interests, especially as the positions of the United States and tribes are not always aligned. *See* Brief of Amicus Curiae National Congress of American Indians in Support of Respondent at 6, *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019) (No. 16-1498), 2018 WL 46559224 at *6; *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015), *cert. denied sub nom Little River Band of Ottawa Indians Tribal Gov't v. NLRB*, 136 S. Ct. 2508 (2016).[k]

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[j] *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 542 (1823) (determining validity of Indian land transfers); *Worcester*, 31 U.S. (6 Pet.) at 515 (adjudicating key questions regarding Cherokee Nation's treaty rights and jurisdiction).

[k] *See also* Brief for the United States as Amicus Curiae Supporting Respondent, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 1478583.

The Court also regularly adjudicates tribes' treaty rights without tribes as a party. *See McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020); *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (adjudicating hunting rights under 1868 Treaty between United States and Crow Tribe of Indians); ***United States v. Dion*, 476 U.S. 734 (1986) (assessing hunting rights under** 1858 treaty signed by the United States and by representatives of the Yankton Tribe); *DeCoteau v. Dist. Cty. for the Tenth Judicial Dist.*, 420 U.S. 425 (1975) (holding Lake Traverse Reservation created by 1867 Treaty between United States and Sisseton and Wahpeton bands of Sioux Indians had been terminated); ***Tulee v. State of Washington*, 315 U.S. 681 (1942) (analyzing fishing rights under 1859 Treaty between United States and Yakima Tribes of Indians);** *Seufert Bros. Co. v. United States*, 249 U.S. 194, 195 (1919). In treaty rights cases, the United States can participate as an amicus without consent or leave of the Court and is subject to a 9,000 word limit. Yet, even though tribes are the other sovereign signatory to these treaties, they are treated differently under this Court's rules, must request permission to participate as amici, and are subject to a smaller word limit. Rules 33 and 37 should be updated to remedy this asymmetry.

III. Cases Involving Indian Tribes Have Shaped Foundational Constitutional Law Principles.

Changing Rule 37 to better facilitate tribal participation will allow tribes to provide important information and context to the Court. This is particularly important in cases implicating foundational constitutional law principles, which often come up in the context of federal Indian law.[l]

For example, the Court established the principle of judicial review in part through cases like *Fletcher v. Peck* and *Johnson v. M'Intosh*.[m] *United States v. Rogers* begot the inherent powers doctrine.[n] That doctrine was confirmed in *United*

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[l] Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1793 (2019).

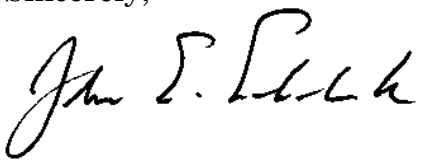
[m] *Fletcher v. Peck*, 10 U.S. (1 Cranch) 87 (1810) (striking down a state statute for the first time); *Johnson*, 21 U.S. (8 Wheat.) at 587–90 (establishing Court as arbiter of land disputes between U.S. government and Native nations).

[n] *United States v. Rogers*, 45 U.S. (4 How.) 567, 571–72 (1846) ("Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the states, Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian[.]"); *see also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories,*

States v. Kagama,[o] and is still in force today.[p] Federal Indian law cases also contribute to our understanding of Congress' commerce powers,[q] administrative law,[r] and the Citizenship Clause.[s] Amending Rule 37 to provide greater access to tribal amici ensures the Court has access to relevant information when it considers these types of foundational constitutional cases.

For the aforementioned reasons, we respectfully request the Clerk of Court remove the consent requirement for tribal amici and add Indian tribe to the list of governmental entities in Rule 37 subject to the 9,000 word limit.

Sincerely,



John E. Echohawk, Executive Director
Native American Rights Fund

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and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 TEX. L. REV. 1, 45–47 (2002).

[o] 118 U.S. 375, 380 (1886) (explaining "this power of congress to organize territorial governments, and make laws for their inhabitants, arises, not so much from the clause in the constitution . . . as from the ownership of the country in which the territories are").

[p] *See Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (discussing "sovereign attributes").

[q] *United States v. Lara*, 541 U.S. 193 (2004) (analyzing Indian Commerce Clause).

[r] *Morton v. Ruiz*, 415 U.S. 199, 231–32 (1974) (analyzing authority of Bureau of Indian affairs to implement and interpret Social Security Act).

[s] *Elk v. Wilkins*, 112 U.S. 94 (1884) (one of two cases interpreting Citizenship Clause); *see also* Brief of Amicus Curiae National Congress of American Indians in Support of Appellees, *Trump v. New York*, 141 S. Ct. 530 (2020), (No. 20-366), 2020 WL 6873531.