Matthew Campbell, Colo. No. 40808*
Jason Searle, Colo. No. 57042*
Allison Neswood, Colo. No. 49846*
Malia Gesuale, Colo. No. 59452*
NATIVE AMERICAN RIGHTS FUND
250 Arapahoe Avenue
Boulder, CO 80302
(t): (303) 447-8760
mcampbell@narf.org
searle@narf.org
neswood@narf.org
gesuale@narf.org

Counsel for the Havasupai Tribe and the Hopi Tribe

Denton Robinson, AZ No. 24764
DR LAW PLLC
1930 E. Brown Road, Suite 103
Mesa, AZ 85203
(t): (480) 500-6656
denten@drlawfirm.com

Counsel for the Havasupai Tribe

Paul Spruhan, N.M. No. 12513
Sage G. Metoxen, AZ No. 030707
Tamara Hilmi Sakijha, N.Y. No. 5844204**
Navajo Nation Department of Justice
2521 Old BIA Building P.O. Box 2010
Window Rock, AZ 86515
(t): (927) 871-6210
paspruhan@nndoj.org
smetoxen@nndoj.org
tsakijha@nndoj.org

Counsel for the Navajo Nation

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Arizona State Legislature *et al.*,

Plaintiffs,

v.

Joseph R. Biden, Jr., *et al.*,

Defendants.

Chris Heaton,

Plaintiff,

v.

Joseph R. Biden, *et al.*,

Defendants.

Case No. 3:24-cv-8026-PHX-SMM
consolidated with Case No. 3:24-cv-8027

TRIBAL NATIONS' REPLY IN SUPPORT OF THEIR MOTION TO INTERVENE FOR LIMITED PURPOSE

I. Introduction

The Havasupai Tribe, Hopi Tribe, and Navajo Nation ("Tribal Nations") are sovereign governments that retain sovereign immunity just as other sovereigns do. That includes the power to waive immunity in some instances and not in others. The Arizona State Legislature ("Legislature"), unlike Chris Heaton, has directly attacked the legality of the Ancestral Footprints Tribal Commission ("Commission"). The Commission was established to provide the Tribal Nations a management role over their ancestral lands and waters as well as bolster their government-to-government relationships with the United States. Because the United States has an overriding interest in defending the entire Proclamation subject to federal law, it cannot adequately represent the Tribal Nations' sovereign interests. As a result, the Legislature's arguments fail.

II. The Tribal Nations have not Waived Their Sovereign Immunity

Contrary to the Legislature's suggestions, Tribal Nations, entitled to sovereign immunity as "separate sovereigns pre-existing the Constitution," *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782, 788 (2014), have retained immunity as to the claims in the Legislature's complaint. Tribal Nations are seeking to intervene in the Legislature's case for the limited purpose of filing a Rule 19 motion to dismiss. Tribal Nations' Mot. to Intervene at 2, ECF No. 13 ("Mot. to Intervene"). This does not constitute a waiver of sovereign immunity. *Maverick Gaming LLC v. United States*, 658 F. Supp. 3d 966, 974 (W.D. Wash. 2023) (tribes may intervene for the limited purpose of asserting sovereign immunity). An explicit waiver is required for each action, and it "may be limited to the issues necessary to decide the action brought by the tribe." *Lewis v. Norton,* 424 F.3d 959, 962 (9th Cir. 2005) (finding a tribe's waiver of sovereign immunity in a separate case with related matters "did not constitute a waiver of the tribe's sovereign immunity in perpetuity"). The scope of a waiver of sovereign immunity depends on the sovereign's actions and statements, including the scope of the dispute put before the court. *Quinault Indian Nation v. Pearson for Est. of Comenout,* 868 F.3d 1093, 1097

(9th Cir. 2017) (determining tribe did not waive sovereign immunity for counterclaims by filing suit); *see Deschutes River All. v. Portland Gen. Elec. Co.,* 1 F.4th 1153, 1159 (9th Cir. 2021) (strong presumption against waiver of tribal sovereign immunity).

Tribal Nations' motion to intervene in *Heaton* likewise does not constitute a waiver or "obviate" an assertion of sovereign immunity in the Legislature's case. Ariz. State Leg. Br. in Opp'n at 4, note 2, EFC No. 42 ("Opp'n"). Tribal Nations filed their motion in *Heaton* before the cases were formally consolidated, *see* Mot. to Intervene; Order Granting Joint Mot. to Consol., ECF No. 31, so the Legislature cannot argue that the Tribal Nations' motion to intervene in *Heaton* somehow constitutes a waiver of sovereign immunity to the consolidated action. Furthermore, a "waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts." *Lewis,* 424 F.3d at 962.

Nor is Tribal Nations' motion for limited intervention inconsistent with their motion to intervene in *Heaton*, as the Legislature suggests. While the Legislature characterizes the two complaints, Opp'n at 3, and the Tribal Nations' motions to intervene in each, *id.* at 4, as having "substantial similarities," it fails to recognize or explain how the cases differ. *See id.* at 3-4. The difference in the cases explains why the Tribal Nations' approach in *Heaton* neither "undercuts[,]" *id.* at 4, their assertion of sovereign immunity nor their status as indispensable parties.

The Legislature has made a targeted attack on the legality of the Tribal Commission and the Antiquities Act, imperiling not only this Commission, but all future possible monuments or commissions. Ariz. State Leg. Compl. at 45, ECF No. 1. ("if the Antiquities Act permits such delegations, it is unconstitutional"). Heaton, by contrast, does not attack the Commission. *Compare id. with* Heaton Compl. at 15-19, *Heaton v. Biden*, No. 3:24-cv-08027 (D. Ariz. Feb. 12, 2024) ECF No. 1. The Tribal Nations have sovereign interests in the Commission and a management role of their ancestral lands and waters, as it represents a particularly valuable attribute of their

sovereignty and their government-to-government relationships with the United States. The Legislature's complaint, if successful, would retroactively "impair a right already granted" through the Commission. *Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affs.,* 932 F.3d 843, 852 (9th Cir. 2019).

The Legislature's direct attack on the Tribal Nations' sovereign interests means that Tribal Nations are proper defendants to represent those interests and thus should have been named as defendants in the complaint. *See Connecticut v. Cahill,* 217 F.3d 93, 101-02 (2nd Cir. 2000) (summarizing *parens patriae* cases and noting that when sovereign interests are involved the state is real party in interest). Combined with the Legislature's failure to name or join Tribal Nations in their suit, the direct attack on the Tribal Nations' sovereign interests gives rise to their motion to intervene for the limited purpose of asserting sovereign immunity.

III. The Tribal Nations are Entitled to Limited Intervention as of Right because they are Inadequately Represented by Existing Parties

The only element of intervention as of right that the Legislature contests is that Tribal Nations are adequately represented by federal defendants.[1] Opp'n at 4-5. The Tribal Nations' interests, however, are not adequately represented.

a. Tribal Nations Assert Sovereign Interests that the United States Cannot Adequately Represent

The Legislature asserts that Tribal Nations do not have any interest in the management of federally owned or controlled land. Opp'n at 9-10. This is not only a questionable assertion given the Legislature's own claims, *see* Ariz. State Leg. Compl.

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[1] The Legislature argues that the potential failure of the Rule 12(b)(7) motion "proves" Tribal Nations "believe" federal defendants adequately represent them. Opp'n at 6-7. If the Legislature were correct, all Rule 12(b)(7) motions to dismiss filed by an absent party would be self-defeating. *See* Fed. R. Civ. P. 12(b)(7); *Diné Citizens*, 932 F.3d at 852 (adequacy of representation inquiry necessary to satisfy Rule 19 requirements). The Legislature provides no citation to any legal authority in support of this suggestion.

at 36 ("the Legislature also has in interest in the management of the Ancestral Footprints Monument")—it also misstates the Tribal Nations' sovereign interests.

First, the Tribal Nations have a sovereign interest in retaining regulatory authority over their historical lands and waters. While this authority is limited by the language of the Proclamation, it does incorporate "tribal expertise and Indigenous Knowledge," Tribal Nations' "guidance and recommendations," and the United States' "meaningful[] engage[ment]" with the Commission on the management of these lands. *See* 88 Fed. Reg. 55340-41. Of particular importance, the Tribal Nations have an interest in managing the waters within the monument as well. That is because the "hydrologic features" of the area are "highly interconnected, with groundwater moving through the Redwall-Muav aquifer in the south and through fractures and linked cave passages. The Havasupai and Hualapai Tribes, as well as the town of Tusayan, Arizona, and other towns in the region, rely on the southern area's groundwater." *Id*. at 55334. The Tribal Nations' role in regulation of these historical lands, including water that will run onto the reservation, is a sovereign interest. *See Connecticut v. Cahill*, 217 F.3d 93, 104 (2d Cir. 2000) (while New York did not have such an interest, court noted that ability "to regulate commercial lobstering in the restricted waters" is a sovereign interest).

Second, as sovereigns, the Tribal Nations hold interests in their government-to-government relationships with the United States via the Commission, its co-management and inter-governmental functions, and the procedural rights it confers to the Commission. These are a legally protected, sovereign interests established by President Biden's Proclamation. 88 Fed. Reg. 55331, 55340 (Aug. 15, 2023); *cf. Confederated Tribes & Bands of Yakama Nation v. Yakima Cnty.*, 963 F.3d 982, 989 (9th Cir. 2020) (noting infringement on jurisdiction is sufficient for standing); *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (deprivation of a procedural right to protect concrete interests establishes standing); *Diné Citizens,* 932 F.3d at 852 (legally

protected interest in procedural claims where the effect of suit would impair a "right already granted."). Tribal Nations hold this role in the Commission in their capacities as sovereigns with government-to-government relationships with the United States, *see* 88 Fed. Reg. 55340, not merely because they are cultural stakeholders or because of their status as "Native Americans." *Compare* Ariz. State Leg. Compl. at 45 *with Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1108–09 (S.D. Cal. 2010) ("The consultation requirement is not an empty formality; rather, it 'must recognize the government-to-government relationship between the Federal Government and Indian tribes.'"); Presidential Memorandum on Uniform Standards for Tribal Consultation (Nov. 30, 2022) https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation/ (underscoring the unique, legally affirmed Nation-to-Nation relationship). Indeed, the Tribal Nations' representatives on the Commission are appointed or elected by their leadership to represent their governments. *See* 88 Fed. Reg. 55340 (Commission consists of elected officers). Pursuant to this right, the Tribal Nations have interests in maintaining their co-management relationships and fulfilling laws they have enacted and appointments they have made to protect their ancestral lands and waters in the Monument.

b. Because the Legislature Threatens the Tribal Nations' Sovereign Interests, *Diné Citizens* and *Klamath* Control

The Legislature suggests that *Diné Citizens* and *Klamath* are not applicable. The Legislature equates Tribal Nations' interest to the federal government's interest in the Monument. Opp'n at 10. As has been explained, however, the Tribal Nations have a unique interest in managing historical lands and waters as well as defending the government-to-government relationship of the Commission. Just because the interests of the Federal Defendants and the Tribal Nations overlap does not mean their interests are one and the same.

In *Diné Citizens*, the Ninth Circuit established that the United States cannot adequately represent tribal interests where the respective Tribal Nations hold sovereign interests in the outcome of the litigation not shared by the United States. *Diné Citizens*, 932 F.3d at 855. There, the Ninth Circuit concluded that because the Federal Defendants have an "overriding interest" in complying with NEPA and the ESA, as opposed to the tribal interest of continued business operations, the United States could not adequately represent the tribal interests. *Id*.

The Legislature points to *Southwest Center for Biological Diversity v. Babbit*, 150 F.3d 1152 (9th Cir. 1991) for support. But in that case, unlike here, there was no explanation of how the tribe's sovereign interests were implicated. *Id*. at 1154. And even if the Tribal Nations and the United States "share an interest in the ultimate outcome of this case for very different reasons," *Klamath Irrigation Dist. v. U.S. Bureau of Rec.*, 48 F.4th 934, 945 (9th Cir. 2022), "a unity of some interests, does not equal a unity of all interests." *Id. Diné Citizens* and *Klamath* control here because, while the Tribal Nations and the Federal Defendants may seek the same outcome, the United States' "overriding interest . . . must be in complying with" the limits of the Antiquities Act and the United States Constitution. *Id.* at 944. The Tribal Nations' primary interest is in protecting their traditional lands and waters, having a regulatory role over those lands and waters, and ensuring the continued fulfillment of the Tribal Commission and its sovereign-to-sovereign functions. That Federal Defendants seek to defend the legality of the Proclamation does not mean that they can adequately represent the Tribal Nations' interests. *See Diné Citizens*, 932 F.3d at 855.

The Legislature raises various cases to argue that a presumption of adequacy arises where proposed intervenors and the existing party "share the same ultimate objective." Opp'n at 5-6. But none of the cases the Legislature cites involved the proposed intervention of separate sovereigns asserting inadequate protection of their sovereign interests. *See e.g., Oakland Bulk & Oversized Terminal v. City of Oakland*,

960 F.3d 603 (9th Cir. 2020 (proposed intervention of an environmental organization); *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003) (proposed intervention of individuals). Thus, the "presumption of adequacy" principle is inapplicable and does not control.

The Tribal Nations' sovereign interests are significantly distinct from the United States' interests. *Klamath* is illustrative as it noted that, while the Federal Defendant and the Tribes shared an interest in the ultimate outcome, Ninth Circuit "precedent underscores that such alignment on the ultimate outcome is insufficient for us to hold that the government is an adequate representative of the tribes." 48 F.4th at 945. *Klamath* recognized that even though the Tribal Nations and the Federal Defendant sought the same "ultimate outcome," the principle that the federal government cannot adequately represent Tribal Nations' sovereign interests controlled. *Id.*[2]

Following *Diné Citizens* and *Klamath*, it is clear that neither the Proclamation's acknowledgement of the Tribal Nations' interests, nor the United States' current commitment to defend the Proclamation, are equivalent to Federal Defendants *sharing* and *adequately representing* Tribal Nations' sovereign interests. *Diné Citizens*, 932 F.3d at 855; *Klamath Irrigation Dist*, 48 F.4th at 945.

c. Under *Diné Citizens* and *Klamath*, Legal Divergence of Interest is Foreseeable and Warrants Intervention Now

Even if Tribal Nations' interests overlap with Federal Defendants' now, *Diné Citizens* affirmed that a plausible, future divergence of interest is enough to warrant immediate limited intervention. The Ninth Circuit explained that although the United States intended to defend their actions as compliant with federal laws, if a district court found that "more analysis" was required, or that the "analyses underlying the approval

[2] Further reflective of this, the Ninth Circuit in *Klamath* never discussed *any* of the cases to which the Legislature cites, *see* Opp'n at 5-6, nor the "presumption of adequacy" principle. This suggests that principle is inapposite when Tribal Nations seek to vindicate their own sovereign interests.

[of the mining activities] was flawed," then "Federal Defendants' interest might diverge from that of [proposed intervenors]." 932 F.3d at 855. The court in *Diné Citizens* described their similar reasoning in *White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir. 2014): "a holding that [the statutes] required something other than what Federal Defendants have interpreted them to require could . . . change Federal Defendants' planned actions[.]" 932 F.3d at 855. As the Ninth Circuit has contemplated, it is possible that this Court could put Federal Defendants' interests at odds with the Tribal Nations such that inadequacy of representation arises. The Tribal Nations merely have to show that the representation "*may* be inadequate." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (citations omitted); *WildEarth Guardians v. Provencio*, No. CV-16-08010-PCT-SMM, 2016 WL 8738252, at *2 (D. Ariz. Aug. 11, 2016).

The Tribal Nations have also offered the "more specific objective evidence" of a potential divergence of interest caused by a change in administration. *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 403 (9th Cir. 2002). The Tribal Nations pointed not to mere "[c]ampaign rhetoric and perceived philosophic differences," *id.*, but rather to concrete actions taken by a past (and potentially future) President against the same sovereign interests held by the Tribal Nations here. The Legislature speculates that a future administration's purported abolishment of the Monument would "moot" the action and resolve the Tribal Nations' concerns on inadequacy of representation. Opp'n at 11. This acknowledgement shows the future divergence, but also fails to recognize that a future administration might purport to diminish but not eliminate the Monument and the Tribal Commission, precisely as former President Trump did in Bears Ears, 82 Fed. Reg. 1139 (Jan 5, 2017), and thus not necessarily mooting the action.

Finally, the Legislature suggests that intervention is "premature" and would be a waste of judicial resources. Opp'n at 11. The opposite is true. The Tribal Nations' motion to intervene is timely as required by Rule 24(a), not premature. Allowing this

case to go forward without the Tribal Nations only to *later* permit intervention and consider and potentially grant their motion to dismiss risks a far greater waste of judicial resources than if the Tribal Nations' motion to dismiss is considered at the outset.

d. The Tribal Nations' Sovereign Interests Exist Regardless of Land Ownership

Sovereign interests do not necessarily start and stop at a sovereign's border or titled land, and the Tribal Nations have an interest in their ancestral lands in spite of the fact that the United States *now* has title. Tribal Nations across the United States hold sovereign interests in the protection of extra-territorial treaty rights and resources. *Deschutes River.*, 1 F.4th at 1163 (this litigation implicates "sovereign interests in self-governance and the preservation of treaty-based fishing rights throughout the Deschutes River Basin."). Congress has also recognized that it has historically denied "American Indians access to sacred sites required in their religions, including cemeteries[.]" American Indian Religious Freedom Act, Pub. L. No. 95–341, 92 Stat 469 (Aug 11, 1978). As a result, Congress passed laws to allow Tribal Nations to exercise their traditional religions, which includes "access to sites." *Id.*; 42 U.S.C. § 1996. The Executive Branch has likewise recognized the important interests Tribal Nations have in federal land. Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 29, 1996) (federal agencies with management over federal lands "shall . . . accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners[.]"). And finally, as acknowledged by the Proclamation, the water in this region is highly interconnected with the Tribal Nations utilizing it on their reservations. 88 Fed. Reg. 55334.

The Tribal Nations here have interests that are not dependent on land ownership. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 601, 607 (1982) (sovereign interests in "the demand for recognition from other sovereigns" and quasi-sovereign interests in "not being discriminatorily denied [their] rightful status within the federal system"); *Miccosukee Tribe of Indians of Florida v. United States*,

680 F. Supp. 2d 1308, 1314-15 (S.D. Fl. 2010) (applying *Snapp* to a Tribal Nation). The Proclamation and its creation of the Commission recognize these interests.

e. The Tribal Nations are not the United States's Clients and do not Control Federal Defendants' Litigation

The Legislature suggests that, via the Commission, the Proclamation grants Tribal Nations "a way to influence Defendants directly—if not the ability to exercise some control over this litigation." Opp'n at 9. Aside from the plain language of the Proclamation itself, history would suggest otherwise. *See Arizona v. Navajo Nation*, 599 U.S. 555, 564 (2023) (Federal Government owes judicially enforceable duties to a tribe "only to the extent it expressly accepts those responsibilities"). The Proclamation in no way suggests the Tribal Nations are a client of the United States or are conferred with any kind of power to steer litigation to defend the Commission. *See* 88 Fed. Reg. 55340-41 (conferring "guidance and recommendation[]" power and disclaiming expansion of Tribal Nations' rights). While Federal Defendants have a solemn trust responsibility to respect the contours of tribal sovereignty for all Tribal Nations, *Bay Mills Indian Cmty.*, 572 U.S. at 800, they have also disclaimed, many times, any duty to assert and secure Tribal Nation interests. *See Navajo Nation*, 599 U.S. at 564; *Gros Ventre Tribe v. United States*, 469 F.3d 801, 812 (9th Cir. 2006); *see also United States v. Sioux Nation of Indians*, 448 U.S. 371, 378 (1980) ("Eventually, however, the Executive Branch of the Government decided to abandon the Nation's treaty obligation to preserve the integrity of the Sioux territory.").

In this case, Federal Defendants do not represent the Tribal Nations, and Tribal Nations do not control their approach to the litigation of this matter.

IV. Permissive Intervention Under Rule 24(b) Would be Proper

The Tribal Nations have demonstrated that they are not adequately represented and are thus entitled to intervene as of right. In the alternative, and because inadequacy of representation is not a Rule 24(b) requirement and the Legislature challenges no

other factors, the Tribal Nations' motion to intervene meets the requirements for permissive intervention. Fed. R. Civ. P. 24(b). The Legislature provides no support for their suggestion that the court should deny intervention based on a premature and unbriefed evaluation of Tribal Nations' motion to dismiss. Opp'n at 12. And contrary to the Legislature's suggestions, *id.* at 13, the Tribal Nations' motion to dismiss asserting sovereign immunity—a quasi-jurisdictional issue—implicates the questions of law and fact the Legislature placed before the court. *Maverick Gaming LLC v. United States*, No. 2:22-cv-05325-DGE 2022 WL 4547082 at *2, ECF No. 84 (W.D. Wash. Sept. 29, 2022) (proposed intervenor's "defense that it is an immune, indispensable party has questions of fact in common with the pending suit"); *Pistor v. Garcia*, 791 F.3d 1104, 1110-11 (9th Cir. 2015) (sovereign immunity is "quasi-jurisdictional").

Because a showing of inadequacy of representation is not required for permissive intervention, *see* Fed. R. Civ. P. 24(b), a grant of permissive intervention would allow the court to consider the issue at the motion to dismiss stage with the benefit of the United States' briefing. *See e.g.* Order Granting Hopi Tribe's Mot. to Intervene at 3, *Navajo Nation v. U.S. Dept. of Interior*, No. 3:11-cv-08205-PCT-DLR, ECF No. 43 (D. Ariz. May 12, 2017); Order Granting Shoalwater Bay Tribe's Mot. for Limited Intervention, *Maverick Gaming*, No. 2:22-cv-05325-DGE 2022 WL 4547082; Federal Defendants' Resp. to Tribal Nations' Mot. to Intervene, ECF No. 40.

V. The Legislature's Proposed Conditions Are Unnecessary in Light of Tribal Nations' Limited Purpose

Because the Tribal Nations seek to intervene for the limited purpose of filing their lodged Rule 12(b)(7) motion to dismiss, the Legislature's proposed conditions on intervention are unnecessary.

For the forgoing reasons, the Tribal Nations respectfully request that the Court grant their Motion to Intervene for Limited Purpose.

RESPECTFULLY SUBMITTED this 29th day of May, 2024.

/s/ *Matthew Campbell*
Matthew Campbell, Colo. No. 40808*
Jason Searle, Colo. No. 57042*
Allison Neswood, Colo. No. 49846*
Malia Gesuale, Colo. No. 59452*
NATIVE AMERICAN RIGHTS FUND
250 Arapahoe Avenue
Boulder, CO 80302
Phone: (303) 447-8760
Fax: (303) 443-7776
mcampbell@narf.org
searle@narf.org
neswood@narf.org
gesuale@narf.org

Counsel for the Havasupai Tribe and Hopi Tribe

Paul Spruhan, N.M. No. 12513
Sage Metoxen, A.Z. No.030707
Tamara Hilmi Sakijha, N.Y. No. 5844204**
Navajo Nation Department of Justice
2521 Old BIA Building P.O. BOX 2010
Window Rock, AZ 86515
(t): (927) 871-6210
(f): (928) 871-6177
paspruhan@nndoj.org
smetoxen@nndoj.org
tsakijha@nndoj.org

Counsel for the Navajo Nation

Denten Robinson, A.Z. No. 24764
DR LAW PLLC
1930 E. Brown Road, Suite 103
Mesa, AZ 85203
O: (480) 500-6656
denten@drlawfirm.com

Counsel for the Havasupai Tribe

* Pro Hac Vice
**Motion for Pro Hac Vice forthcoming