



February 17, 2025

Submitted via Regulations.gov

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle Northeast
Washington, D.C. 20544

**Re: Proposed Amendments to Federal Rules of Appellate Procedure**

Dear Judge Bates:

The Native American Rights Fund, the National Congress of American Indians, and the Northern Plains Indian Law Center write to provide comment on the proposed revisions to the Federal Rules of Appellate Procedure. We offer no opinion on the proposed amendments to Rule 29 suggested by the Advisory Committee on Appellate Rules. Instead, we write to request that federally recognized Indian tribes be added to the list of entities exempt from the leave of court requirement for Amici Curiae in Rule 29. This change is of particular importance considering the proposed changes to Rule 29 which would require leave of court to file an Amicus Brief and add greater disclosure requirements.

Rule 29 recognizes the United States' and the individual States' unique interests in participating as amici curiae out of respect for their inherent sovereignty and their exercise of governmental authority, and distinguishes them from what the Advisory Committee on Appellate Rules calls "non-governmental amicus briefs."[1] But Rule 29 omits one group of domestic sovereigns from its ambit: Indian tribes. Adding Indian tribes to the list of government entities that Rule 29 exempts from its leave-of-court requirement is reasonable and necessary because cases defining the contours of tribal governmental authority and rights frequently do not include tribes as parties, leaving amicus briefing as the only avenue for those

[1] Prelim. Draft of Proposed Amendments to Federal Rules at 25, https://www.uscourts.gov/file/78921/download (hereinafter "Preliminary Draft").

tribes' participation. These cases often implicate foundational constitutional law principles as well, and tribes should be fully heard as part of the Circuit Courts' consideration of those issues.

In 2023, the U.S. Supreme Court added Indian tribes to the list of governmental entities in Supreme Court Rule 37, which governs amici curiae participation. The Federal Rules of Appellate Procedure should be revised to align with Indian tribes' recognition at the Supreme Court level and regular participation in cases at the Circuit Court level.

## 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.).[2] Tribes possess inherent governmental authority, including the

[2] *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"). "Tribal sovereignty does not derive from the United States. Federal law acknowledges that tribal powers stem, not from acts of Congress, but are inherent sovereign powers that have never been extinguished. This sovereignty predates the formation of the United States and persists unless diminished by federal law." Cohen's Handbook of Federal Indian Law § 1.01 (2024).

authority to criminalize conduct,[3] levy taxes, [4] and adjudicate disputes,[5] and they possess sovereign immunity.[6] This inherent power makes them similarly situated with other governmental entities currently listed in Rule 29. As sovereigns, tribes are imbued with greater authority than cities, counties, or towns, which exercise only the authority delegated by states.[7] Unlike cities and towns, tribes have an interest in advocating for their sovereign powers and advancing their unique interests and the interests of tribal members.

Including Indian tribes in Rule 29's list of sovereign entities that do not need leave of the court to file is consistent with how other branches of government treat tribes. Congress has long recognized that tribes have inherent authority on par with states.[8] *See* Indian Civil Rights Act, 25 U.S.C. § 1301(2) (2020) ("'[P]owers of self-

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[3] *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"); *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").

[4] *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.").

[5] *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.").

[6] *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)).

[7] *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.").

[8] 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,

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 29 should also respect the similar status of states and tribes.

## II. Indian Tribes Must Often Participate as Amici to Protect Their Rights.

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.

For example, *Hooper v. City of Tulsa*, 71 F.4th 1270 (10th Cir. 2023) directly implicated the Cherokee, Muscogee (Creek), Chickasaw, Quapaw, Seminole and Choctaw Nations. None of the tribes, however, were parties to the suit—in fact, because of the nature of the action, a dispute over an individual's traffic ticket, they *could not* be parties to the suit.[9] Instead, the Tribes participated as amici. There are

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like states, 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.* Under several federal environmental laws, tribes are treated as states for purposes of implementing and managing certain environmental programs and functions. United States Environmental Protection Agency, Tribes Approved for Treatment as a State, https://www.epa.gov/tribal/tribes-approved-treatment-state-tas (last visited Jan. 27, 2025); *see also* Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7245 (Feb. 12, 1998).

[9] *See also Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017) *aff'd sub nom Sharp v. Murphy*, 591 U.S. 977 (2020) (Muscogee (Creek) Nation participation as amicus curiae); *United States v. Cooley*, 919 F.3d 1135 (9th Cir. 2019), *vacated and*

countless examples of such cases dating back to the founding era. *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.[10] No tribe, however, was a party in either case.

Cases implicating tribal interests present themselves in a variety of ways—often without tribes as a party. Circuit Courts are regularly asked to decide cases involving inherent tribal authority. *See, e.g.*, *Plains Com. Bank v. Long Family Land and Cattle Co.*, 491 F.3d 878 (8th Cir. 2007) (analyzing tribal court civil jurisdiction to hear discrimination claim); *Strate v. A-1 Contractors*, 76 F.3d 930 (8th Cir. 1996) (analyzing tribal civil jurisdiction over nonmembers). In these cases, tribes participated as amici curiae at the Circuit and Supreme Court levels to voice their concerns and advocate for their interests.

The United States' participation in these types of cases cannot always adequately represent tribal interests, especially as the positions of the United States and tribes are not always aligned. *See 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).[11]

Courts also regularly adjudicate tribes' treaty rights without tribes as a party. *See United States v. Dion*, 762 F.2d 674 (8th Cir. 1985), *rev'd in part*, 476 U.S. 734 (1986) (assessing hunting rights under 1858 treaty signed by the United States and by representatives of the Yankton Tribe). In treaty rights cases, the United States can participate as an amicus without leave of the Court, as can individual States (which are not parties to the treaties at issue). Yet under Rule 29 both at present and as proposed, Indian tribes that are sovereign signatories to these treaties, and that might not be allowed to participate as parties, must request and may be denied leave of court to participate as amici. Rule 29 should be updated to remedy this asymmetry.

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*remanded*, 593 U.S. 345 (2021) (Crow Tribe of Indians participated as amicus curiae); *United States v. Lara*, 324 F.3d 635 (2003) *rev'd*, 541 U.S. 193 (2004) (eighteen American Indian Tribes participated as amici curiae).

[10] *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).

[11] *See also* 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 4659224 at *6; Brief for the United States as Amicus Curiae Supporting Respondent, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 1478583.

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

Changing Rule 29 to better facilitate tribal participation will allow tribes to provide important information and context to the Circuit Courts. This is particularly important in cases implicating foundational constitutional law principles, which often come up in the context of federal Indian law.[12]

For example, *Brackeen v. Haaland* addressed constitutional questions related to the bounds of congressional authority and anti-commandeering. 994 F.3d 249 (5th Cir. 2021), *aff'd in part, vacated in part, rev'd in part*, 599 U.S 255 (2023). *Winters v. United States* continues to define water rights across the West. 148 F. 684 (9th Cir. 1906), *aff'd* 207 U.S. 564 (1908) (adjudicating Indian reservation water rights without any tribe as a party). Federal Indian law cases contribute to our understanding of Congress' commerce powers,[13] administrative law,[14] and the Citizenship Clause.[15] Amending Rule 29 to provide greater access to tribal amici ensures the Circuit Courts have access to relevant information when they consider these types of foundational constitutional cases.

## IV. Indian Tribes Have Diverse Sovereign and Business Interests Affected by Litigation in Every Circuit.

Revising Rule 29 to include Indian tribes would also standardize how tribes participate as amici in cases across all Federal Circuit Courts. There are 574 federally recognized Indian tribes spread across the United States who live, own land, and do business in almost every Circuit Court region.[16] As discussed above,

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

[13] *Brackeen v. Haaland*, 994 F.3d at 300 (analyzing Indian Commerce Clause); *United States v. Lara*, 541 U.S. 193 (2004) (same).

[14] *Morton v. Ruiz*, 462 F.2d 818 (9th Cir. 1972), *aff'd*, 415 U.S. 199 (1974) (analyzing authority of Bureau of Indian affairs to implement and interpret Social Security Act).

[15] *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.

[16] Bureau of Indian Affairs, U.S. Sovereign Nations: Land Areas of Federally-Recognized Tribes, https://bia-geospatial-internal.geoplatform.gov/indianlands/ (last visited Feb. 11, 2025).

Indian tribes regularly participate in cases addressing their jurisdiction, treaty rights, and other sovereign interests. Tribes also participate in cases concerning state administrative law,[17] environmental regulation,[18] federal land use,[19] and myriad other issues that affect tribal governments, tribal citizens, and tribal businesses. In this respect, Indian tribes are again exercising their governmental authority similarly to how the federal government and states participate as amici. Tribes should be afforded the same treatment under Rule 29 as their fellow sovereigns.

## V. Allowing Indian Tribes to Participate as Amicus Curiae Without Leave of Court Would Not Create Undue Recusal Problems for the Courts of Appeals.

The Advisory Committee proposes eliminating the consent option and requiring leave of court to file amicus briefs in part because of a concern that "unconstrained filing of amicus briefs in the courts of appeals would produce recusal issues."[20] Rule 29 both at present and as proposed permits the courts of appeals to "prohibit the filing of or . . . strike an amicus brief that would result in a judge's disqualification"—at least with respect to non-governmental and tribal amicus briefs. [21] But Rule 29 gives the United States and the individual States an unqualified right to file amicus briefs without leave of court.[22] Presumably, such briefs might occasionally present recusal issues. Allowing Indian tribes to file amicus briefs without leave of court would, likewise, occasionally present recusal issues. But Indian tribes participate in federal appellate litigation far less frequently than either the States or the Federal Government, and consequently allowing for tribal amicus filing without leave of court would have little (if any) effect on recusals. Moreover, because amicus briefing is often the only avenue for Indian tribes to participate in cases that directly affect their unique sovereign interests, the equities favor including tribes among those sovereign governments with an unqualified right to file amicus briefs.

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[17] *HCI Distribution v. Hilgers*, 110 F. 4th 1062 (8th Cir. 2024) (Thirteen Indian Tribes submitted amicus brief).

[18] *Center for Biological Diversity v. Regan*, 734 F. Supp. 3d (D.C. Cir. 2024) (amicus brief filed by Miccosukee Tribe of Indians of Florida).

[19] *Apache Stronghold v. United States*, 101 F. 4th 1036 (9th Cir. 2024) (amicus brief filed by Tohono O'odham Nation, Tonto Apache Tribe, and San Juan Southern Paiute).

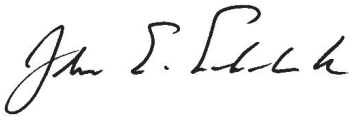
[20] Preliminary Draft at 26.

[21] Fed. R. App. P. 29(a)(2); Preliminary Draft at 29.

[22] *Id.*

For the aforementioned reasons, we respectfully request Rule 29 be revised to remove the leave of court requirement for tribal amici.

Sincerely,



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