No. _____

In the Supreme Court of the United States

SNOQUALMIE INDIAN TRIBE, a federally recognized Indian tribe on its own behalf and as *parens patriae* on behalf of its members,

Applicant,

v.

STATE OF WASHINGTON; and GOVERNOR JAY INSLEE and DEPARTMENT OF FISH AND WILDLIFE DIRECTOR KELLY SUSEWIND, in their official capacities,

Respondent.

APPLICATION TO EXTEND THE TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Elena Kagan, Associate Justice and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

APPLICATION FOR AN EXTENSION OF TIME

Pursuant to Rule 13.5 of the Rules of this Court, Applicant Snoqualmie Indian Tribe ("Applicant" or "Snoqualmie") respectfully requests that the time to file a petition for a writ of certiorari in this case be extended for thirty days, to and including March 12, 2022. The Ninth Circuit denied Applicant's petition for rehearing *en banc* on November 12, 2021. Appendix ("App.") 30–31. Without an extension of time, the petition would be due on February 10, 2022. Applicant files this application more than ten days before that date. S. Ct. R. 13.5. This Court will have jurisdiction pursuant to 28 U.S.C. § 1254(1).

BACKGROUND

In 1855, Snoqualmie agreed by Treaty to cede its vast ancestral homelands in what is now western Washington State in exchange for the United States' promise that Snoqualmie would maintain its most sacred rights and lifeways. Among these rights, Snoqualmie reserved its ability to hunt and gather as Snoqualmie has done since time immemorial. Unfortunately, the United States' treaty promises to Snoqualmie were not all kept. Despite the promise to provide Snoqualmie a reservation, the United States failed to set one aside. As a direct result, Snoqualmie lost its status as a federally recognized tribe due to its lack of a land base and now stands poised to lose the Treaty rights it reserved as well.

In the 1970s, while considered unrecognized and landless, Snoqualmie sought to intervene in *United States v. Washington* to exercise its off-reservation Treaty fishing rights. *See United States v. Washington,* 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd in part,* 641 F.2d 1368 (9th Cir. 1981) ("*Washington II").* Applying its own unique criteria to determine "treaty status" for fishing rights, the district court denied Snoqualmie treaty fishing rights because, in its view, the Snoqualmie had "intermarried with non-Indians" and "took up the habits of non-Indian life, [living] as citizens of the State of Washington in non-Indian communities," and because Snoqualmie was unrecognized and landless. *Id.* at 1103, 1108–09.

On appeal, the Ninth Circuit disagreed with the district court's reasoning, but nonetheless affirmed the outcome of *Washington II* because, in its view, although the Snoqualmie were "descended from treaty tribes," the unrecognized and landless Snoqualmie had "intermarried with non-Indians and many [were] of mixed blood" and "ha[d] not settled in distinctively Indian residential areas." 641 F.2d at 1373–74. The Ninth Circuit ultimately determined that evidence supported the district court's finding of insufficient political and cultural cohesion to allow Snoqualmie to exercise treaty fishing rights.

Nearly two decades later in 1997, the United States, through the U.S. Department of Interior Assistant Secretary–Indian Affairs ("Interior"), formally recognized Snoqualmie. Interior unequivocally concluded Snoqualmie's status as a Treaty signatory and federally recognized tribe, with political and cultural cohesion.

See Final Determination To Acknowledge the Snoqualmie Tribal Organization, 62 Fed. Reg. 45864-02, 45865 (Aug. 29, 1997).

In 2019, Washington State informed Snoqualmie that the State believes "the Snoqualmie Tribe does not have off-reservation hunting and fishing rights under the Treaty" based on *Washington II*. Snoqualmie filed this case in response based, in part, on the exception to issue preclusion set forth in *United States v. Washington*, 593 F.3d 790, 800 (9th Cir. 2010) (en banc) ("*Washington IV*"). The district court dismissed Snoqualmie's complaint based on issue preclusion without first determining whether it possessed jurisdiction over the case, finding that the ruling in *Washington II* foreclosing Snoqualmie's treaty fishing rights also precluded its claim to treaty hunting and gathering rights and that *Washington IV* provided no exception to issue preclusion.

The same day the district court dismissed Snoqualmie's case, Interior issued a fee-to-trust decision that: (1) confirms the Treaty "remains in effect" as to Snoqualmie and acknowledges the United States' ongoing trust responsibility to Snoqualmie arising from the Treaty; (2) distinguishes and limits *Washington II* to fishing rights; and (3) lends additional credence to the 1997 federal recognition decision to affirm Snoqualmie's continuity from Treaty times to the present. App. 32–74.

Ignoring the United States' actions, a panel of the Ninth Circuit affirmed the district court's dismissal on issue preclusion grounds. The panel believed the decision in *Washington II* regarding Snoqualmie's Treaty fishing rights precludes a finding that Snoqualmie has *any* reserved Treaty rights, including hunting and gathering

rights. *Id*. at 20–23. The panel further concluded that *Washington IV* did not create an exception to issue preclusion. *Id*. at 23–26. The Ninth Circuit denied Applicant's petition for rehearing *en banc* on November 12, 2021. *Id*. at 30–31.

REASONS FOR GRANTING AN EXTENSION OF TIME

The time to file a petition for a writ of certiorari should be extended for thirty days for the following reasons:

1. Since the Ninth Circuit denied Applicant's petition for *en banc* review, Applicant has been considering whether to seek this Court's review and the Tribal government only recently decided to petition for certiorari. Moreover, Applicant only recently retained the undersigned counsel of record. Additional time is therefore necessary to prepare a petition.

2. No prejudice would arise from the requested extension. If the petition were granted, the Court would hear oral argument in this case in the October 2022 Term regardless of whether an extension is allowed.

3. There is a reasonable prospect the Court will grant the petition and reverse the Ninth Circuit. The Ninth Circuit's decision judicially nullifies the reserved Indian treaty rights of a treaty signatory tribe through application of the discretionary doctrine of issue preclusion, and is otherwise irreconcilable with precedent from other courts of appeals and this Court. This case also involves a question of exceptional importance: whether courts can nullify an Indian treaty absent congressional action. Although Congress has not abrogated Applicant's treaty rights and the Executive Branch recognizes Applicant as a treaty signatory, the Ninth

Circuit's decision strips a treaty signatory of its reserved treaty rights and undermines the administrative determination recognizing Snoqualmie. This departs from long-standing precedent governing the role of the judiciary and separation of powers in Indian affairs, particularly Indian treaty rights. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *United States v. Dion*, 476 U.S. 734, 738-39 (1986).

The Ninth Circuit has effectively rewritten Snoqualmie's treaty by adopting an interpretation contrary to its promises, as well as this Court's precedent and that of the other circuits. *See Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011 (2019) ("language of the treaty should be understood as bearing the meaning" that the tribe "understood it to have" at the time the treaty was executed") (opinion of Breyer, J.); *see also id.* at 1016 (opinion of Gorsuch, J.) ("We are charged with adopting the interpretation most consistent with the treaty's original meaning."); *Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449, 457, 460 (7th Cir. 1998) (observing that courts cannot, under the "guise" of interpretation, "rewrite" treaties "so as to make them mean something they obviously were not intended to mean.").

Further, the Ninth Circuit erred in affirming the district court's decision to dismiss Appellant's claims based on issue preclusion without first determining its own jurisdiction. "[A] court's subject-matter jurisdiction defines its power to hear cases." *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 560 (2017). Accordingly, a district court must ordinarily determine whether it has jurisdiction at the outset—

before it decides any other legal issues. This Court recognized a narrow exception in *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007). *Sinochem* permits a district court to grant a forum non conveniens motion before addressing its own subject-matter jurisdiction. The Ninth Circuit extended *Sinochem* from forum non conveniens—which is a *non-merits* holding that results in a dismissal *without* prejudice—to issue preclusion, which results in a *merits* holding and a dismissal *with* prejudice. The Ninth Circuit's ruling was error and should be reversed.

CONCLUSION

For these reasons, the time to file a petition for a writ of certiorari should be extended thirty days to and including March 12, 2022.

Respectfully submitted.

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