Nos. 21-1484, 22-51

IN THE

Supreme Court of the United States

STATE OF ARIZONA, ET AL.,
Petitioners,

v.

NAVAJO NATION, ET AL.,
Respondents.

DEPARTMENT OF THE INTERIOR, ET AL.,
Petitioners,

v.

NAVAJO NATION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of
Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* HISTORIANS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in Appendix A are professors at Columbia University, New York University, Princeton University, the University of Washington, and Yale University who teach and research the history of relations between Native nations and the United States. They have an interest in the cohesive and correct development of this Court's Indian-law jurisprudence and the accurate recitation of the history that underlies it. *Amici* therefore file this brief to aid the Court in understanding the history of the trust doctrine.

INTRODUCTION AND SUMMARY OF ARGUMENT

The main question presented in these consolidated cases requires the Court to consider the history of the Indian trust relationship, which this Court has recognized as "a sovereign function subject to the plenary authority of Congress." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011). In petitioners' telling, the Navajo Nation seeks sweeping and unprecedented judicial intervention in a matter traditionally allocated to Executive Branch discretion. The trust doctrine and its history, however, tell a different story. The historical record reveals that Congress and the Executive have bound themselves since the Founding to protect and care for Native nations—including by ensuring they have adequate

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* file this brief as individuals and not on behalf of the institutions with which they are affiliated.

water for their homelands—and that Congress has tasked the Judiciary with holding the Executive accountable through suits like this one.

"[T]he Government's dealings with Indians" have been "long dominated" by the "general trust relationship between the United States and the Indian people." *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206, 225 (1983). Via the hundreds of tribal treaties that exchanged millions of acres of Native land for legal obligations of protection and care, the United States created the trust doctrine and "charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). Courts frequently invoke the trust obligation as a "limit[]" on "executive power." *Cohen's Handbook of Federal Indian Law* § 5.04[1] (Nell Jessup Newton ed., 2012) [hereinafter *Cohen*]. Yet it has long been more: The political branches have constructed the trust doctrine to guide and motivate them in their dealings with Native nations. That has been so throughout this Nation's history and remains so today.

The trust doctrine predates even the Founding. Treaties with Native nations were among the first negotiated and ratified under the Articles of Confederation. Those treaties guaranteed by law affirmative federal protection and care. They also provided mechanisms that allowed Native nations to ensure enforcement of those provisions, such as by sending a Native deputy to Congress to call forth the "justice of the United States." Treaty with the Cherokee, art. XII, 1785, 7 Stat. 18. Founding-era leaders, native and non-native alike, read the United

States' foundational documents against the backdrop of these treaties as supreme law. The trust doctrine thus informed the very structure of both the Articles of Confederation and the Constitution that was soon to come.

Despite these developments, the status of federal power over Indian affairs under the Articles was not without controversy. The Articles reserved to the states their "legislative right[s] … within [their] own limits." ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4. A minority of states asserted aggressive interpretations of this clause and encroached on Native nations' rights and lands. This dispute risked wars the United States could not afford, and it partly motivated the adoption of the Constitution.

Naturally, then, Indian affairs was a key issue at the Constitutional Convention. Concerned about whether the United States would uphold its own treaty law against self-interested states, Native nations sent deputies to the Constitutional Convention, where Indian affairs was a key issue. The visit proved pivotal to convincing the Framers to constitutionalize this early relationship. To do so, the Framers ensured that both existing and future treaties would be "the supreme Law of the Land," U.S. CONST. art. VI, cl. 2, and would be enforced by Congress under its enumerated powers, including its power to make all necessary and proper laws, *id.* art. I, § 8, cl. 18.

After ratification and throughout the nineteenth century, the Executive and Legislative Branches continued to bind themselves through treaties that exchanged lands and other tribal concessions for pledges

of federal protection and care—among countless other obligations. The political branches, in turn, acted to fulfill these treaty obligations through legislation and regulation. They did so not out of guilt or moral obligation but because they viewed it as legally mandated. It reflected the framing generation's original intent to constitutionalize the trust doctrine. Further, historical principles of treaty interpretation—applicable to *all* treaties, tribal and nontribal—mandated a good-faith approach to treaties.

True, in 1871 Congress purported to end treatymaking with Native nations, finally yielding to the House's long-expressed desire for greater involvement in Indian affairs. Treaties already ratified, however, remained in effect. Moreover, even as relations with Native nations became increasingly governed by statute, those statutes often took the form of "treaty substitutes"—that is, bilateral agreements with Indian tribes negotiated by the Executive and then ratified by both chambers of Congress. Notably, *Winters v. United States*, 207 U.S. 564 (1908), involved such a treaty substitute.

Across a range of contexts, the political branches have continued to hold faithful to their obligations under the trust doctrine and have further strengthened those commitments throughout the twentieth century and into the twenty-first. In statutes, regulations, orders, reports, memoranda, statements, and remarks, Congress and the Executive have repeatedly codified the trust doctrine into law and cited it as the reason for their actions. Importantly, the trust doctrine was not crafted simply to call forth judicial solicitude and limit

malfeasance by Congress and the Executive. Rather, the history of the trust doctrine highlights that its primary function has been to motivate Congress and the Executive to make laws—including laws by treaty—to protect and care for Native peoples by supporting sovereignty and upholding obligations required by treaties and treaty substitutes.

The trust doctrine and its history compel three conclusions directly relevant to this case.

First, the trust doctrine plays a central role in interpreting treaties and treaty substitutes with Native nations. This is true not only because of the "Indian canon" of treaty construction—but because the trust doctrine, codified into the Constitution, motivated the actions of Congress and the President and informed the negotiations and intent of the sovereign parties. The United States represented to Indians that it negotiated treaties and agreements in good faith and that it was *compelled* to do so because of its commitment to the trust doctrine. Native nations, moreover, understood the United States to negotiate in good faith because that background understanding applied to *all* treaty negotiations. This context is essential to understanding the federal and tribal intent behind tribal treaties and treaty substitutes—sovereign intents that this Court has recognized are central to interpreting all treaties, tribal or otherwise.

Second, *Winters* is a straightforward application of these interpretation principles to water rights. Lands in the West were often arid but, as in *Winters*, Native nations possessed relevant water rights before cession by virtue of possession and sovereign power. The

United States and Native nations knew that the arid lands they were reserving could not serve as tribal homelands without permanent access to adequate water. The Native nations, therefore, intended to retain their water rights to the extent necessary to establish a sovereign homeland on those lands. The United States' good-faith promises of permanent reservations—again, an intention motivated by the trust doctrine—were understood to guarantee the retained rights necessary to preserve Native nations as nations—that is, across generations to come. *Winters* recognized this. The logic of *Winters* and the trust doctrine further compels a simple corollary: that Native nations—which at the time could not even bring their own water-rights suits—understood that the United States would act to vindicate these treaty rights.

Third, Congress intended for robust judicial enforcement of treaty obligations. Initially, Congress alone monitored compliance with treaty obligations. Over time, however, Congress tasked the courts to support its enforcement responsibilities. It first did so in the monetary context. But as time went on, Congress recognized that further judicial support was needed to ensure executive compliance. This culminated in 1972 when Congress, after considering the impact on Indian tribes, amended § 702 of the Administrative Procedure Act to waive federal sovereign immunity for injunctive suits, clearing the way for cases precisely like the one here.

The historical record thus confirms that the Navajo Nation properly seeks to enforce the United States'

obligation to secure the Nation's water rights. *Amici* urge this Court to affirm the Ninth Circuit's judgment.

ARGUMENT

I. THE TRUST DOCTRINE AND ITS HISTORY ARE CENTRAL TO FEDERAL INDIAN LAW.

A. The Trust Doctrine Arose Under the Articles of Confederation and Was Codified into the Constitution.

1. The trust doctrine arose from the relationship between Native nations and the United States that existed under the Articles of Confederation. Governance of Indian affairs under the Articles was heavily contested. The Articles divided authority over Indian affairs between the federal and state governments, authorizing Congress to "regulat[e] the trade and manag[e] all affairs with the Indians" but reserving to the states their "legislative right[s] … within [their] own limits." ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4. "Together, these provisions led to battles between national and state governments over who could oversee relations with various Tribes." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2506 (2022) (Gorsuch, J., dissenting).

The nationalists turned to treaties to assert the national government's superior role in Indian affairs. Treaties were arguably the supreme law of the land except as to those subjects for which the Articles of Confederation expressly reserved state authority. *See* David M. Golove, *Treaty-Making and the Nation: The*

Historical Foundations of the Nationalist Conception of the Treaty Power, 98 MICH. L. REV. 1075, 1107–09 (2000); ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1. The Treaty of Paris, for example, set the borders of the United States and provided a vital backdrop for all founding documents. Treaty of Paris, art. II, 1783, 8 Stat. 80. Treaties, therefore, were an ideal mechanism for resolving the Articles' ambiguity in favor of national power.

Representatives of the United States negotiated treaties with Native nations that reflected broad views of federal power—provisions that foreshadowed language drafted into the Constitution. In 1785, the Treaty of Hopewell placed plenary power over Native nations in Congress, providing, for instance, that "the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper." Treaty with the Cherokee, art. IX; *see, e.g.*, Treaty with the Choctaw, art. VIII, 1786, 7 Stat. 21 (same); Treaty with the Chickasaw, art. VIII, 1786, 7 Stat. 24 (same). The United States also demanded massive cessions in the form of thousands and thousands of acres of land from each Native nation. *See, e.g.*, Treaty with the Cherokee, art. IV; Treaty with the Choctaw, art. III; Treaty with the Chickasaw, art. III. Further, having struggled financially following the Revolution, the fledgling United States desperately needed to avoid further wars with Native nations—wars it was likely to lose. *See* David M. Golove & Daniel J. Hulsebosch, *A*

Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition, 85 N.Y.U. L. REV. 932, 991–92 (2010). Thus, the United States' early treaties with Native nations secured peace, the national government's status as the supreme sovereign over Indian relations, and exclusive allegiance between Native nations and the United States and "no other sovereign whatsoever." *E.g.*, Treaty with the Choctaw, art. II.

Though these concessions were substantial, Native nations demanded and received equally significant promises in return. To start, Native nations shared the nationalists' interest in establishing a federal-tribal relationship: Colonial governments had frequently invaded Native lands, and the new states continued to aggressively pursue Indian lands and raid Indian settlements. *See Cohen* § 1.02[1]; Mary Sarah Bilder, *Without Doors: Native Nations and the Convention*, 89 FORDHAM L. REV. 1707, 1707–08 (2021). Further, the same treaty articles authorizing Congress to manage affairs with Indians provided that Congress would do so only "[f]or the benefit and comfort of the Indians." *E.g.*, Treaty with the Cherokee, art. IX. Similarly, the provisions in which Native nations agreed to align solely with the United States and no other sovereign also guaranteed Native nations the "protection" of the United States. *E.g.*, *id.* art. III. These treaties also included essential mechanisms of enforcement for their provisions. The Treaty of Hopewell provided that the Indians would "have the right to send a deputy of their

choice, whenever they think fit, to Congress," so they could "have full confidence in the justice of the United States, respecting their interests." *Id.* art. XII.

What emerged was the beginning of the trust doctrine. The national government would receive millions of acres of Native lands, secure the allegiance of Native nations, and exercise broad powers over Indian affairs. But it would exercise its broad powers for the benefit of Indians, and Native nations would have mechanisms for ensuring that the United States fulfilled its end of the bargain. This arrangement was quickly embedded into the national government. The national government viewed treaties as forming the backdrop against which to read founding documents, and it began to interpret the Articles against that backdrop. *See* Ordinance for the Regulation of Indian Affairs, *in* 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 490, 491 (John C. Fitzpatrick ed., 1934) (crafting federal departments and appointing federal agents to each region); Bilder, *supra*, at 1714–15. This culminated in the Northwest Ordinance of 1787, in which "Congress announced its vision of Indian policy." *Cohen* § 1.02[3]. Reaffirming the pledges it had made via treaty, Congress declared that "[t]he utmost good faith shall always be observed towards the Indians." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52 (reproducing the Northwest Ordinance of 1787 enacted by the Continental Congress); Bilder, *supra*, at 1742–45.

2. Despite these developments, the status of federal power under the Articles of Confederation, as informed

by early treaties, was not without controversy. Southern states protested Congress's assertions of federal power—Georgia and North Carolina most fervently—calling them encroachments on the states' "legislative rights" reserved under the Articles of Confederation. Bilder, *supra*, at 1707–08. Further, the Articles extended federal power only to Indians "not members of any of the States," ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4, so Georgia and North Carolina seized on this language to argue that Native peoples within their physical boundaries were "members" of their states. Letter from Benjamin Hawkins to Thomas Jefferson (June 14, 1786), *in* 9 THE PAPERS OF THOMAS JEFFERSON: 1 NOVEMBER 1785 TO 22 JUNE 1786, at 641 (Julian P. Boyd ed., 1954). These states were in the minority, but they were committed to their theory of constitutionalism and created continued controversy.[2] Indeed, encroachments on Native treaties and lands perpetuated under this theory of constitutionalism nearly drove the United States to war, as Native nations in the northwest united into a confederacy, and Native nations in the south considered doing so as well. Bilder, *supra*, at 1726–27, 1745–47.

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[2] *See, e.g.*, Letter from Benjamin Hawkins to Thomas Jefferson (June 14, 1786), *in* 9 THE PAPERS OF THOMAS JEFFERSON: 1 NOVEMBER 1785 TO 22 JUNE 1786, at 640–41 (Julian P. Boyd ed., 1954); North Carolina Protests Against the Treaties of Hopewell (Jan. 6, 1787), *in* 18 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789: REVOLUTION AND CONFEDERATION, at 442 (Alden T. Vaughan & Colin G. Calloway eds., 1994).

The dispute over Indian affairs was so important and proved so intractable that it partly motivated the adoption of the Constitution. The Articles' limits on congressional power in this area, Madison explained, were "obscure and contradictory." THE FEDERALIST NO. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961). Aggressive interpretation of those limits, Madison feared, would "destroy the authority of Congress altogether." Letter from James Madison to James Monroe (Nov. 27, 1784), *in* 8 THE PAPERS OF JAMES MADISON 156, 156 (Robert A. Rutland et al. eds., 1973). It was evident that the compromise struck by the Articles of Confederation was "unworkable." *Castro-Huerta*, 142 S. Ct. at 2506 (Gorsuch, J., dissenting).

Naturally, then, "[w]hen the framers convened to draft a new Constitution, this problem was among those they sought to resolve." *Id.* It was well known that Indian affairs would be a key issue at the Convention. So much so that the Cherokee, Choctaw, and Chickasaw Nations sent deputies to the convention to ensure that the trust doctrine established under the Articles of Confederation would be codified into the new Constitution—by securing national power over Indian affairs; the explicit supremacy of federal law, including treaties; an enforcement mechanism for breaches of treaty provisions; and a federal policy of "purchase" rather than "conquest" toward Native nation lands. Bilder, *supra*, at 1707–08. Nationalists, of course, also advocated for these positions. The deputies from the Native nations, though, proved especially persuasive, as

seen most clearly in the Committee and Secretary Reports published following the deputies' visit. *See, e.g.*, 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 477–80 (Roscoe R. Hill ed., 1936) (report of Committee on Indian Affairs); 34 *id.* at 124–25 (report of Secretary at War on Indian affairs). That visit—and the increasing concerns about the rise of confederacies of Native nations—pushed the Framers to choose the path of voluntary purchase of Native lands over war. Bilder, *supra*, at 1745–49.

The nationalists and the Native nations' deputies thus succeeded in codifying the trust doctrine into the Constitution. The Constitution granted the federal government "broad general powers" over Indian affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004). Key among those powers was the authority to negotiate treaties with Indian tribes. U.S. CONST. art. II, § 2, cl. 2. The Constitution contained no reservation of state authority over Indian affairs or subjects governed by treaty, rendering the treaty power (and other Indian-affairs powers) "very property unfettered" from the prior "limitations in the Articles of Confederation." THE FEDERALIST NO. 42, at 268 (James Madison). Moreover, the Constitution expressly provided that treaties would constitute "the supreme Law of the Land," U.S. CONST. art. VI, cl. 2, and it empowered Congress to make laws to enforce treaties through a range of powers, including those conferred by the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and the Necessary and Proper Clause, *id.* cl. 18. Indeed, recognizing the scope of these powers,

the Framers deleted as "superfluous" an explicit reference to the power to enforce treaties from a draft of the Necessary and Proper Clause. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 481 n.111 (2d ed. 1996).

The Framers therefore recommitted the United States to the principles and promises ensconced in existing treaties—national protection of Native peoples in exchange for massive land cessions, ongoing peace, and exclusive allegiance. The Supremacy Clause applied not just to treaties that would be negotiated going forward, but also to treaties already "*made[]* under the Authority of the United States." U.S. CONST. art. VI, cl. 2 (emphasis added). So, even as the Constitution abandoned the failures of the past, it brought along the trust doctrine as part of the foundation for the federal Indian policy of the newly reformed United States.

B. During the Treaty Era, the United States Was Guided by and Built upon the Trust Doctrine.

Under the new Constitution, the trust doctrine was central to Indian affairs. It guided and motivated the actions of federal officials. In turn, it grew more robust as those actions solidified and expanded the doctrine.

This was most evident in treaties. Treaties with Native nations were pervasive during the first hundred years of the United States' history. Indeed, the majority of *all* treaties formed by the United States during this period were with Native nations. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*,

132 HARV. L. REV. 1787, 1831–32 (2019). These treaties served as the primary vehicle for mediating the relationship between the United States and Native nations. *See Lara*, 541 U.S. at 200–01; FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 44–49 (1962).

These treaties followed in the footsteps of those made under the Articles of Confederation, promising Native nations the protection of the United States in exchange for massive land cessions, ongoing peace, and exclusive allegiance. *E.g.*, Treaty with the Wyandot, art. V, 1795, 7 Stat. 49; Treaty with the Sauk and Foxes, art. I, 1804, 7 Stat. 84; Treaty with the Florida Tribes of Indians, art. III, 1823, 7 Stat. 224. They also went further. Federal officials extended the United States' trust obligation by promising Native nations "care,"[3] encompassing "every assistance in [the United States'] power."[4] Indeed, this was reflected not just in broad promises but in countless specific pledges to assist and provide for Native nations and their members in areas

[3] Treaty with the Osage, art. X, 1865, 14 Stat. 687; *accord, e.g.*, Treaty with the Shawnee, art. XIV, 1854, 10 Stat. 1053; Treaty with the Kickapoo, art. IX, 1819, 7 Stat. 200.

[4] Treaty with the Osage, art. I, 1808, 7 Stat. 107; *accord, e.g.*, Treaty with the Creeks, art. I, 1833, 7 Stat. 417; Treaty with the Menominee, First Stipulation, 1831, 7 Stat. 342.

such as education,[5] health care,[6] and the care of Native children.[7]

As the political branches negotiated, interpreted, and administered these treaties, they strove to "act with justice and correctness towards [Indians], … with perfect good faith." Treaty with the Ottawa, art. III, 1816, 7 Stat. 146; *see also, e.g.*, Treaty with the Creeks, art. XIII, 1790, 7 Stat. 35 (promising to carry the treaty "into full execution, with all good faith and sincerity"); Treaty with the Comanche, art. X, 1846, 9 Stat. 844 (same). They did so not out of guilt or moral obligation, but because they viewed it as legally mandated.

That legal obligation reflected the framing generation's original intent to constitutionalize the trust doctrine. As discussed, at the time of the Founding, the rise of a confederacy of Native nations in the north and visits from delegates sent by Native nations impressed on the Framers that they faced "a choice: treaties under which white settlement would be based on purchase or an Indian war." Bilder, *supra*, at 1745. The Framers chose the former as the "cornerstone of federal Indian policy," *id.* at 1749, and that path could be pursued only

[5] *See* Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 950 (1999) (noting that 110 treaties provided for Indian education).

[6] *E.g.*, Treaty with the Tribes of Middle Oregon, art. IV, 1855, 12 Stat. 963; Treaty with the Nez Perces, art. V, 1863, 14 Stat. 647.

[7] *E.g.*, Treaty with the Stockbridge and Munsee, art. III, 1856, 11 Stat. 663; Treaty with the Ottawa, etc., art. VI, 1836, 7 Stat. 491.

through a constitutional structure that promised good faith.

Historical principles of treaty interpretation—applicable to all treaties, tribal and nontribal alike—also mandated interpretation of treaty provisions broadly and as negotiated in "good faith." *See, e.g.*, *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Tucker v. Alexandroff*, 183 U.S. 424, 437, 466–67 (1902). Nineteenth- and twentieth-century courts construed *all* treaties "to secure equality and reciprocity between [the parties]." *Jordan*, 278 U.S. at 127. Doing so, this Court recognized, was necessary "to avoid war and secure a lasting and perpetual peace." *Tucker*, 183 U.S. at 437. Moreover, at the heart of this doctrine was preservation of the constitutional separation of powers: The power to declare war remained with Congress alone. U.S. CONST. art. I, § 8, cl. 11. So, to avoid provoking war unilaterally, and also to respect the Executive Branch's role in negotiating and administering treaties, this Court understood that it must interpret treaty provisions broadly and in good faith. *See United States v. Schooner Peggy*, 5 U.S. (1 Cranch.) 103, 109 (1801); *see also Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933) (giving weight to the "construction of a treaty by the political department of the government").

Thus, over the course of the nineteenth century, the trust doctrine grew into a robust set of principles at the center of the federal-tribal relationship—and, importantly, at the core of treatymaking practice. *See Cohen* § 5.04[3][a]; *see also, e.g.*, H.R. REP. NO. 23-474,

at 2 (1834) (describing proposed bills as for the "protection" of Native nations and recognizing the obligation and "power" of protection as arising from treaties and land cessions).

C. The Trust Doctrine Continued to Guide Federal Action into the Twentieth Century and Up to Today.

In 1871, Congress "purported to prohibit entering into treaties with the 'Indian nation[s] or tribe[s].'" *Lara*, 541 U.S. at 218 (Thomas, J., concurring in the judgment) (quoting 16 Stat. 566, codified at 25 U.S.C. § 71). The trust doctrine, however, continued as the bedrock of federal Indian policy and remains so today.

Indeed, the "end" of treatymaking made no difference for the trust doctrine because it was not understood to be a significant change to the United States' relationship with Native nations. Debates over the House's role in treaty making and foreign affairs had raged since the Founding. *See* Jack N. Rakove, *Solving a Constitutional Puzzle*, *in* 1 PERSPECTIVES IN AMERICAN HISTORY 233, 246–48 (Bernard Bailyn et al. eds., 1984). Thus, when Congress passed an appropriations rider purporting to end treatymaking with Native nations, it was understood as "a political rather than a policy initiative"—the result of the Senate yielding to the House's desire for greater involvement in Indian affairs. *Cohen* § 1.03[9]; *see also Antoine v. Washington*, 420 U.S. 194, 201–02 (1975). "Congress had to develop new procedural methods of dealing with Indians, but practically, little changed." *Cohen* § 1.03[9].

The new procedural methods differed only in form, not in function. Collaborative lawmaking continued with the practice of "treaty substitutes"—other forms of lawmaking that function essentially as treaties. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 63–67 (1987).[8] Existing treaties, meanwhile, stayed in effect. *See* 25 U.S.C. § 71.

The same principles that applied to treaties applied to these new treaty substitutes. The trust doctrine continued to serve as the North Star when negotiating these agreements. *See, e.g.*, *N. Pac. Ry. Co. v. Wismer*, 246 U.S. 283, 288–89 (1918) (explaining that the government "ma[de] and ratif[ied] and in good faith carr[ied] out" an agreement setting aside the reservation, and refusing to "subordinate the realities of the situation to mere form"); *Butler & Vale v. United States*, 43 Ct. Cl. 497, 502 (1908) (noting that when the Colville Indians entered into an 1891 agreement to cede half their reservation, they did so "with an implicit trust in the good faith of the United States Government" (quoting agreement)). This Court, in turn, interprets and enforces treaty substitutes as identical to formal treaties with Native nations. *E.g.*, *Antoine*, 420 U.S. at 201–02 (holding that agreements ratified by bicameral

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[8] This development paralleled the trend in foreign affairs. *See* Blackhawk, *supra*, at 1815 (charting the similarities between trends in federal Indian law and "twentieth-century international lawmaking … made largely by ex ante congressional-executive agreements").

legislation are indistinguishable from treaties); *cf.* *Weinberger v. Rossi*, 456 U.S. 25, 30–31 (1982) ("Congress has not been consistent in distinguishing between Art. II treaties and other forms of international agreements."). Indeed, *Winters* was a treaty-substitute case interpreting an 1888 agreement ratified by the Senate and the House. *See* 207 U.S. at 575; *infra* 26–29 (discussing *Winters*).

True, after 1871, sources of law other than agreements with tribes became more prominent in Indian affairs. But there, too, the political branches adhered to, strengthened, and broadened the trust doctrine.

Start with Congress. Over the past century, Congress has often pointed to the "robust and protective trust doctrine" as motivation for oversight, investigation, and legislation. *Cohen* § 5.04[3][a]. As Senate Committee on Indian Affairs then-Chairman Daniel Akaka explained, "All branches of the Government, the Congress, Administration, and the courts acknowledge the uniqueness of the Federal trust relationship." *Fulfilling the Federal Trust Responsibility: The Foundation of the Government-to-Government Relationship: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 1 (2012). True to Senator Akaka's word, "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government." *Cohen* § 5.04[3][a]. Appendix B compiles many such examples.

The Executive Branch, too, has reinforced the federal government's robust commitment to the trust doctrine. Almost every modern president has taken administrative actions "invok[ing] the trust relationship as a basis for regulations implementing federal statutes" and has released policy statements to "reaffirm the trust relationship." *Cohen* § 5.04[3][a]. In his Special Message on Indian Affairs, for example, President Nixon affirmed the "special relationship between Indians and the Federal government" as a result of "solemn obligations which have been entered into by the United States Government ... [which] continues to carry immense moral and legal force." Special Message on Indian Affairs, 1 PUB. PAPERS 1970, 564–66 (July 8, 1970). He added that to "terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American." *Id.* Many similar examples are compiled in Appendix C.

Administrations also established formal policies that bind executive action to further the trust doctrine. *See, e.g.*, 25 C.F.R. § 225.1(a) (reiterating that the Secretary of the Interior "continues to have a trust obligation to ensure that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any minerals agreement"); 25 C.F.R. §§ 291.8(a)(5), 291.11(b)(5) (requiring the Secretary of the Interior to consider whether class III gaming proposals are "consistent with the trust obligations of the United States to the Indian tribe"). Other administrative documents have defined the Indian trust responsibility

in sweeping terms. The Commissioner of the United States Bureau of Reclamation under President Clinton, for instance, signed a policy document stating that "[t]he United States has a trust responsibility to protect and maintain [Indian] trust assets and rights [which] requires that the United States, as trustee, deals with the trust assets in the same manner a prudent person would deal with his own assets." Bureau of Reclamation, Indian Trust Asset Policy and NEPA Implementing Procedures 4 (Aug. 31, 1994); *see also, e.g.*, Memorandum from Solicitor of the Interior Leo M. Krulitz to Assistant Attorney General James W. Moorman 2 (Nov. 21, 1978) (discussing the "legally enforceable trust obligation owed by the United States Government to American Indian tribes" originating in "the course of dealings between the government and the Indians [as] reflected in the treaties, agreements, and statutes pertaining to Indians").

Thus, despite the "end" of treatymaking, the trust doctrine has grown in importance in the modern era. Today, it continues to stand as "one of the cornerstones of Indian law." *Cohen* § 5.04[3][a].

II. THE NAVAJO NATION'S SUIT PROPERLY SEEKS TO ENFORCE FEDERAL TREATY OBLIGATIONS RECOGNIZED BY *WINTERS*.

The trust doctrine and its history compel three conclusions directly relevant to this case. First, treaties with Native nations should be interpreted based on the intent of the sovereign parties to the treaties—and this

intent must include the trust doctrine. Second, *Winters* is an example of this principle, and *Winters'* logic demonstrates that the United States agreed not just to reserve tribal water rights, but to secure and enforce those rights. Third, to ensure compliance with the trust doctrine, Congress has provided for robust judicial enforcement of treaties and treaty substitutes, including through injunctive relief for failure to enforce *Winters* rights.

A. The History of the Trust Doctrine Informs the Interpretation of Tribal Treaties.

As its history demonstrates, the trust doctrine has long motivated and guided the political branches' interactions and intentions with respect to Native nations. As a consequence, the trust doctrine is essential to interpreting the intent of the sovereign parties to tribal treaties and treaty substitutes.

Treaties—all treaties—are interpreted to give effect to the intent and understanding of the sovereign parties. As this Court has long held, a treaty is simply "a contract, though between nations." *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014) (citing precedents). "Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent." *Id.* Treaty text must be understood in "the context in which the written words [were] used." *Air France v. Saks*, 470 U.S. 392, 397 (1985). Further, courts must "give the specific words of the treaty a meaning consistent with the shared expectations of the

contracting parties." *Id.* at 399. Courts thus disregard interpretations that "would run counter to the [treaty's] purpose" and are "most reluctant to adopt an interpretation" that clashes with a treaty's goals. *Abbott v. Abbott*, 560 U.S. 1, 20–21 (2010); *see, e.g.*, *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Cal.*, 482 U.S. 522, 535 n.19 (1987) (construing the Hague Convention in light of its "language, history, and purposes"); *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 544–45, 551 (1991) (interpreting the Warsaw Convention by considering the signatories' intent).

Likewise, treaties and treaty substitutes with Native nations must be interpreted in light of the trust doctrine. As *amici* detailed above in Part I, the trust doctrine has motivated the United States in formulating federal Indian policy since even before the ratification of the Constitution. The Framers codified the powers and promise of protection for Native nations into the document. *Supra* 13–14. At every point, the United States has been mandated to act in good faith and in the best interests of Native nations as their protector. *Supra* 16–18. That, in other words, is the intent of the United States underlying every tribal treaty and treaty substitute.

To be sure, the federal government did not always live up to its word and meet its trust obligations. Despite the trust doctrine, the United States too often negotiated treaties in bad faith with Native nations. *See* Donna L. Akers, *Decolonizing the Master Narrative:*

Treaties and Other American Myths, 29 WICAZO SA REV. 58, 67–73 (2014) (discussing the range of tactics used by treaty commissioners who acted in bad faith).

That history, however, does not alter the central role of the trust doctrine in the interpretation of tribal treaties and treaty substitutes. Rather, this Court has refused to assume bad faith on the part of treaty negotiators and thereby sanction violations of the trust doctrine. *See Seminole Nation*, 316 U.S. at 296–97. Moreover, even when federal officials operated in bad faith, *Native nations* believed federal officials to be operating in *good faith* and formed treaty agreements based on that belief—both because federal officials told them so, *supra* 16, and because *all* treaties, tribal or not, were understood to be negotiated in good faith, *supra* 17. That understanding is essential to determining *Native nations'* intent toward the agreements to which they consented.

General principles of treaty interpretation alone should thus guide this Court to interpret treaties with Native nations to take account of the intent of the sovereign parties—intentions that are necessarily inflected by the trust doctrine. Even beyond those general principles, this Court, from the beginning, has distilled similar principles into a rule known as the Indian canon of treaty construction. As Justice M'Lean famously explained in *Worcester v. Georgia*, 31 U.S. 515 (1832), courts must consider "[h]ow the words of the treaty were understood by [the Native nation], rather than their critical meaning," and those words "should

never be construed to their prejudice." *Id.* at 582 (concurring opinion); *see also* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) (tracing the history and origin of the Indian-law canons of construction); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 152 n.206 (2010) (noting the "powerful argument[] … that the canon can be understood as an outgrowth of the sovereign-to-sovereign, structural relationship between Indian nations and the United States" (quotation marks omitted)). For these reasons, tribal treaties and treaty substitutes must be interpreted broadly in favor of Native nations, with a focus on how Native nations—which had long fought for the trust doctrine and lobbied to codify it into treaties and into the Constitution itself—understood the treaty rights and obligations they secured.

B. *Winters* Applied These Principles to Water Rights, and the United States Is Obligated to Enforce Such Rights.

Winters illustrates the application of these general principles of treaty (and treaty-substitute) interpretation. Those principles, in turn, support the Navajo Nation's reading of its treaty rights here.

In *Winters*, the Court assessed the water rights of the Indians living on the Fort Belknap Indian Reservation in the Milk River, a stream that formed the

northern boundary of the reservation. 207 U.S. at 575–77. No treaty or other agreement expressly addressed rights to the Milk River. *See id.* But the Native nations had negotiated an agreement securing to them the reservation as an area "set apart '… as and for a permanent home and abiding place.'" *Id.* at 565 (statement by Justice McKenna) (quoting reservation agreement).

To construe the meaning of the agreement, the Court looked to the parties' intent, which the Court discerned from the negotiating context. The reservation, the Court noted, "was a part of a very much larger tract" that had belonged to the Indians, and that had been well suited to their prior way of life. *Id.* at 576. In that larger tract, the Indians had possessed not just "the lands" but "the waters[]—command of all their beneficial use, whether kept for hunting and grazing roving herds of stock or turned to agriculture." *Id.* (quotation marks omitted). The section of that land that would be set aside for the Indians as their reservation, by contrast, was "arid, and, without irrigation, … practically valueless." *Id.* All knew that the tract could serve as a permanent homeland only if the Indians retained "the waters which made it valuable or adequate." *Id.* So it was plain the Native nations had not intended to relinquish their right to those waters. Just the opposite, they intended to retain rights necessary to preserve their existence as nations—that is, across generations to come. *See id.*

The Court considered the appellants' counterarguments, but it rejected them based on the

trust doctrine. It refused the invitation to read bad faith into the agreement by presuming the government's negotiators had intended to "deceive[]" the Indians. *Id.* Even if that were true, the Court would not accept an inference that would "impair or defeat" the agreement. *Id.* at 577. Nor would the Court accept that the Indians bore the burden of foreseeing and eliminating ambiguity. "On account of their relations to the government," they could rest assured that the agreement would be construed to achieve "the declared purpose of themselves and the government"—a tract that could serve as a permanent homeland. *Id.*

In *Winters*, the government voluntarily brought the suit, so the *Winters* Court had no occasion to consider whether the agreement *required* the government to do so. *See id.* at 576. The principles that *Winters* applied, however, compel that conclusion. At the time when most tribal reservations were set aside, Native nations could not bring suits, like *Winters* suits, that could have been brought by the United States as their trustee. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 472–73 (1976) (explaining that Native nations lacked the capacity to sue, absent Congress's express authorization); Act of Oct. 10, 1966, Pub. L. No. 89-635, § 1, 80 Stat. 880, 880 (codified at 28 U.S.C. § 1362) (providing such authorization in 1966); *see also infra* 31. Thus, it was a legal necessity that the United States bring suit to vindicate tribal water rights. Given that context, agreements setting aside tribal homelands were necessarily intended to obligate the

United States to secure and enforce *Winters* rights. Any other reading defeats "the declared purpose of [Native nations] and the government." *Winters*, 207 U.S. at 577.

C. To Fulfill the Trust Doctrine, Congress Has Provided for Robust Judicial Enforcement of Treaties and Treaty Substitutes, Including Through Injunctive Relief for Failure to Enforce *Winters* Rights.

From the start, Congress has recognized that treaty obligations mean little without enforcement. Thus, to fulfill *its* trust responsibility—including its constitutional responsibility and power to enforce treaties—Congress has provided Native nations with remedies when the United States breaches its treaties.

At first, Congress itself bore sole responsibility for providing Native nations a remedy when the Executive did not fulfill the United States' obligations. As detailed in Part I, the Framers and early Congresses received ambassadors from Native nations, allowed Native nations to send deputies to the Constitutional Convention, and promised in the Treaty of Hopewell the right to send a deputy to Congress. *Supra* 9–13.

Over time, Congress increasingly tasked the federal courts with treaty enforcement as well. The Constitution had contemplated this role by extending "[t]he judicial Power … to all Cases … arising under … Treaties made, or which shall be made." U.S. CONST. art. III, § 2. Congress, however, was slow to authorize jurisdiction for suits by Native nations. First, it

authorized Native nations to bring monetary claims. Even there, Congress was initially hesitant to involve the courts. It statutorily barred claims by Native nations for damages against the United States in the Court of Claims, permitting them only after a Native nation successfully petitioned Congress for a special jurisdictional bill. *See Mitchell II*, 463 U.S. at 214. By the middle of the twentieth century, though, Congress recognized that the need for special jurisdictional statutes was preventing the United States from fulfilling its trust obligations to tribes. *See id.* at 214–15. In 1946, Congress enacted the Indian Tucker Act, granting the Court of Claims general jurisdiction to hear tribal monetary claims. 28 U.S.C. § 1505. In doing so, Congress sought to ensure that the United States would meet "the obligations that the Federal government assumed" and stop "denying access to the courts when … fiduciary duties have been violated." *Mitchell II*, 463 U.S. at 214–15 (first quoting 92 CONG. REC. 5312 (1946) (statement of Rep. Jackson); and then quoting H.R. REP. NO. 79-1466, at 5 (1945)).

The Indian Tucker Act, however, did not allow adjudication of all treaty violations. If tribal claims against parties who were *not* the United States amounted to less than $10,000, federal courts lacked jurisdiction. 28 U.S.C. § 1331(a) (1964 ed.); *see Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 783–84 (1991). For example, when a Montana agency allowed oil drilling adjacent to Assiniboine and Sioux land, the tribes were barred from seeking a

remedy in federal court, as they could not show $10,000 worth of damage. *Yoder v. Assiniboine & Sioux Tribes of Fort Peck Indian Reservation*, 339 F.2d 360, 361–64 (9th Cir. 1964). In this case, and in similar cases, the United States could have sued on the tribes' behalf. *See* 28 U.S.C. § 1345; H.R. REP. NO. 89-2040, at 2 (1966). When the United States failed to bring such claims, though, the tribes lacked any enforcement mechanism (other than petitioning Congress to enact a new statute).

As a remedy, in 1966 Congress granted federal courts general jurisdiction over "all civil actions, brought by any Indian tribe ..., wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362. As this Court has explained, Congress passed § 1362 to "open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." *Moe*, 425 U.S. at 472; *see also* H.R. REP. NO. 89-2040, at 2–3 ("[Section 1362] provides the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys.").

Even with this grant of jurisdiction, however, a key obstacle to enforcement of the United States' obligations remained. Namely, sovereign immunity prevented Native nations from bringing nonmonetary suits for breach of treaty and trust obligations against the United States. *E.g.*, *Nat'l Indian Youth Council v. Bruce*, 485 F.2d 97, 99 (10th Cir. 1973); *Skokomish Indian Tribe v.*

France, 269 F.2d 555, 559–60 (9th Cir. 1959); *see also* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1515 n.206 ("Until Congress removed the defense of sovereign immunity as a bar to judicial review in 1976, it was unclear whether tribes could bring actions against federal agencies for injunctive or declaratory relief."). This was critical because, when the United States failed to fulfill its duties, damages were often an insufficient remedy.

Again, Congress acted to ensure that the United States' obligations would be fulfilled. In 1976, it amended the Administrative Procedure Act to permit suits against the United States "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." Act of Oct. 21, 1976, Pub. L. No. 94-574, § 702, 90 Stat. 2721, 2721.

The legislative history shows that part of the motivation for this amendment was fulfilling the United States' responsibilities to Indian tribes. The Senate and House Judiciary Committee Reports both cited cases arising from tribal claims as evidence that the legislation was necessary and proper. *See* S. REP. NO. 94-996, at 10 n.33 (1976); H.R. REP. NO. 94-1656, at 10 n.33 (1976). Moreover, both reports identified the Department of the Interior, in particular, as an agency that would be subject to suits after the amendment. *See* S. REP. NO. 94-996 at 4; H.R. REP. NO. 94-1656 at 5. In the years

immediately following the amendment, tribes brought numerous suits pursuant to the waiver to enforce the trust obligations of the United States. *E.g.*, *Eric v. Sec'y of U.S. Dep't of Hous. & Urb. Dev.*, 464 F. Supp. 44 (D. Alaska 1978); *Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255 (N.D. Cal. 1981); *Vigil v. Andrus*, 667 F.2d 931 (10th Cir. 1982); *Assiniboine & Sioux Tribes of Fort Peck Indian Rsrv. v. Bd. of Oil & Gas Conservation of State of Montana*, 792 F.2d 782, 792–93 (9th Cir. 1986). Indeed, that waiver allowed the Navajo Nation's suit here. Arizona Pet. App. 16.

As the foregoing shows, the Executive Branch's invocation of separation of powers in this case, *e.g.*, U.S. Br. 30, lacks any historical basis. Though Congress once reserved to itself the task of ensuring that the Executive Branch fulfilled the United States' treaty obligations, today Congress has primarily tasked the courts with that responsibility. Where, as here, the United States and Native nations entered treaty obligations and intended for the United States to secure them, a suit to compel the United States to fulfill that duty is properly brought.

CONCLUSION

The Ninth Circuit's judgment should be affirmed.

Respectfully submitted,

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APPENDICES

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Karl Jacoby
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APPENDIX B: CONGRESSIONAL STATUTES REAFFIRMING THE TRUST RELATIONSHIP

Act of June 18, 1934, ch. 576, 48 Stat. 984

Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049

Act of Aug. 15, 1953, ch. 505, 67 Stat. 588

Act of Aug. 9, 1955, ch. 615, 69 Stat. 539

Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437

Act of Aug. 2, 1983, Pub. L. No. 98-64, 97 Stat. 365

Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971)

American Indian Agricultural Resource Management Act, Pub. L. No. 103-177, 107 Stat. 2011 (1993)

American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1773

American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239

America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, 132 Stat. 3765

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181

Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999, Pub. L. No. 106-163, 113 Stat. 1778

Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348

Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020)

Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015)

Federal Oil and Gas Royalty Management Act of 1982, Pub. L. No. 97-451, 96 Stat. 2447 (1983)

Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651

Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101-602, 104 Stat. 3059

Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448

Improving Head Start for School Readiness Act of 2007, Pub. L. No. 110-134, 121 Stat. 1363

Indian Arts and Crafts Amendments Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258

Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069

Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77

Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988)

Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976)

Indian Land Consolidation Act, Pub. L. No. 97-459, 96 Stat. 2515 (1983)

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APPENDIX C: STATEMENTS OF EXECUTIVE POLICY REAFFIRMING THE TRUST RELATIONSHIP

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