No. _____

In the
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Petition for Writ of Certiorari to the District Court of Wyoming, Sheridan County

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.

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PETITION FOR WRIT OF CERTIORARI

This case presents an important question of federal law that has divided the lower courts and affects the livelihoods of thousands of Native Americans. In 1868, the United States and the Crow Tribe of Indians entered into a treaty pursuant to which the Tribe ceded to the federal government the majority of its aboriginal territory but retained a portion for the establishment of the Crow Reservation. To ensure that the Tribe could continue to engage in subsistence hunting on the ceded lands, the treaty provided that the Tribe "shall have the right to hunt on the unoccupied lands of the United States." For well over a century, Crow Tribe members have relied on that binding language to hunt on off-reservation lands, including in the Bighorn National Forest, which is adjacent to the Crow Reservation and was established in 1897 from lands that the Tribe ceded to the United States.

Petitioner Clayvin Herrera is a member of the Crow Tribe. In January 2014, Petitioner and other Tribe members went hunting on the Crow Reservation, which is located in southern Montana and shares Montana's southern border with Wyoming. After spotting a small herd of elk, the group pursued the animals, eventually crossing from the Reservation into the Bighorn National Forest, which is located in northern Wyoming and shares Wyoming's northern border with Montana. The group shot and killed three elk in that federal forest, and carried the meat back to the Reservation to help feed their families and other members of the Tribe over the winter.

Notwithstanding the federal treaty rights reserved to Petitioner and the Crow Tribe, the state of Wyoming convicted Petitioner of two crimes under Wyoming law for unlawfully hunting elk in the Bighorn National Forest. A Wyoming trial court prohibited Petitioner from asserting the treaty right as a bar to prosecution, and a Wyoming appellate court affirmed. Both courts relied exclusively on a 1995 Tenth Circuit decision that concluded that the Tribe's treaty-protected hunting rights were categorically abrogated by Wyoming's 1890 admission to the Union or, alternatively, by the 1897 establishment of the Bighorn National Forest, which ostensibly rendered those lands no longer "unoccupied." The Wyoming Supreme Court denied review.

The judgment below cannot stand. Nothing has abrogated the Tribe's off-reservation hunting rights reserved under the 1868 Treaty. Wyoming's statehood did not terminate the Crow Tribe's rights, because this Court held after the Tenth Circuit's decision that Indian "[t]reaty rights are not impliedly terminated upon statehood." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207 (1999). And as the Ninth Circuit and multiple state supreme courts have held, the establishment of a national forest does not render that land "occupied" so as to abrogate Indian treaties reserving similar rights. Indeed, the federal statute authorizing the creation of federal forests expressly *prohibited* abrogation of Indian treaties. And the 1897 proclamation establishing the Bighorn National Forest precluded "entry or settlement" on the land, which is the very opposite of rendering that land "occupied."

The decision below and the Tenth Circuit decision upon which it relied are both profoundly wrong and in conflict with this Court's precedent and the decisions of numerous other lower courts. Certiorari is thus warranted—and imperative. The answer to the question presented—whether the 1868 Treaty has been abrogated—will determine whether Crow Tribe members, and all other Native Americans subject to treaties with similar language, can exercise long-established rights integral to their identity and well-being. And as this very case makes clear, members of the Tribe, including Petitioner, depend upon their treaty-protected hunting rights to feed their families to this day. If the Tribe's federal treaty rights are to be the "supreme Law of the Land" no more, U.S. Const. art. VI, cl. 2, and a state can criminally prosecute and convict a Tribe member for engaging in what the plain language of the treaty expressly protects, all based on reasoning that other courts have repudiated, then at least this Court should be the one to make that determination. In all events, the need for this Court's review is plain.

OPINIONS BELOW

The order of the Wyoming Supreme Court denying review is unreported but reproduced at App.1-2. The opinion of the Wyoming District Court is unreported but reproduced at App.3-35. The opinion of the Wyoming Circuit Court is unreported but reproduced at App.36-43.

JURISDICTION

The Wyoming District Court entered judgment on April 25, 2017. Petitioner filed a timely petition for review with the Wyoming Supreme Court, which was

denied on June 6, 2017. On August 9, 2017, Justice Sotomayor extended the time for filing this petition to and including October 5, 2017. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Supremacy Clause, U.S. Const. art. VI, cl. 2; Article IV of the Treaty with the Crow Indians, May 7, 1868, 15 Stat. 649; the Act to Repeal Timber-Culture Laws, §§10, 24, 26 Stat. 1095 (1891) ("Forest Reserve Act"); and President Cleveland's proclamation establishing the Bighorn National Forest, Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897), are reproduced at App.44-48.

STATEMENT OF THE CASE

A. Background

1. In the nineteenth century, the territory controlled by the Crow Tribe of Indians was vast, stretching across tens of millions of acres and including large parts of what are now the states of Montana and Wyoming. *See Montana v. United States*, 450 U.S. 544, 547-48 (1981). That situation changed in 1868, when the U.S. government and the Tribe signed a treaty, which was ratified by the Senate and signed by President Andrew Johnson. *See* Treaty with the Crow Indians, May 7, 1868, 15 Stat. 649 ("1868 Treaty"). Under the 1868 Treaty, the United States created the Crow Indian Reservation in present-day southern Montana from roughly 8 million acres of the Tribe's land, and the Tribe ceded the remainder of its aboriginal territory to the United States in exchange for payments, goods, and federal protection of its members and remaining lands. *Id.*

art. IV-XII, 15 Stat. at 650-52; *see also Montana*, 450 U.S. at 547-48.

The 1868 Treaty also guaranteed certain hunting rights for the Tribe beyond the boundaries of the Reservation. Specifically, Article IV of the treaty provided that the Tribe "shall have the right to hunt on the unoccupied lands of the United States" that the Tribe had ceded—including lands in present-day Wyoming—"so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV, 15 Stat. at 650. Those hunting rights were central to the Tribe's ability to provide for itself, and the agreement's reference to "unoccupied lands" accommodated the interests of non-Indian settlers who were expected to eventually arrive and settle on portions of the Tribe's ceded lands. *See* R.249-51.[1]

Over the next half-century, Congress ratified a number of other agreements that further diminished the Crow Reservation. But in those agreements, Congress made clear that the rights reserved by the Tribe under the 1868 Treaty remained in effect, except as specifically modified. *See, e.g.*, Appropriations Act of Mar. 3, 1891, 26 Stat. 989, 1042 (providing that "all existing provisions of the treaty of May seventh Anno Domini eighteen hundred and sixty-eight … shall continue in force"); *accord* Act of Apr. 27, 1904, art. VII, 33 Stat. 352, 355 ("The existing provisions of all former treaties with the Crow tribe of Indians not inconsistent with the provisions of this agreement, are

[1] "R." refers to the record on appeal before the Wyoming District Court.

hereby continued in force and effect."). None of those agreements altered the rights of Tribe members to hunt on the lands that the Tribe had ceded in 1868.

2. In 1890, the Wyoming Territory became the state of Wyoming. *See* Wyoming Statehood Act, 26 Stat. 222 (1890). At that time, the federal government made a number of land grants to the new state. *See, e.g.*, *id.* §§4, 6, 8-11, 26 Stat. at 222-24. As was common practice with many new states in the American West, however, the federal government never ceded title to wide swaths of other land in Wyoming. *See id.* §12, 26 Stat. at 224 ("That the State of Wyoming shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act."); *see also* Wyo. Const. art. XXI, §26 ("The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof.").[2] Among the lands that remained federally owned after Wyoming's statehood were the lands that the Tribe had ceded in the 1868 Treaty.

3. In 1891, Congress enacted a statute—commonly known as the "Forest Reserve Act"—that gave the President the power to establish forest preserves from federal lands in the public domain. Act to Repeal Timber-Culture Laws, §24, 26 Stat. 1095, 1103 (1891) ("Forest Reserve Act"). That statute included express anti-abrogation language, providing that "nothing in this act shall change, repeal, or

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[2] The federal government continues to own 48.4% of all land in Wyoming. *See* Carol Hardy Vincent et al., Cong. Research Serv., *Federal Land Ownership: Overview and Data* 9 (2017).

modify any agreements or treaties made with any Indian tribes for the disposal of their lands." *Id.* §10, 26 Stat. at 1099. Thus, under the Forest Reserve Act, when a President establishes a national forest from federal lands that were previously ceded by an Indian tribe, the tribe and its members retain the rights reserved by any earlier treaty that remains good law.

In 1897, pursuant to the 1891 statute, President Grover Cleveland issued a proclamation establishing the Big Horn (now Bighorn) National Forest from federal land in northern Wyoming—*i.e.*, the area constituting the Tribe's aboriginal hunting grounds, which the Tribe had ceded to the federal government in 1868. Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897). The proclamation explicitly "reserved from entry or settlement" that land, *id.* at 909, and made clear that all persons were prohibited from occupying the land from that moment forward: "Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation," *id.* at 910. The Bighorn National Forest has remained a federal forest ever since. *See, e.g.*, 16 U.S.C. §475.

4. Between 1868 and 1995, members of the Crow Tribe continuously hunted in the Bighorn National Forest, almost entirely free of state interference.[3] R.251. In 1995, however, the Tenth Circuit upset those longstanding expectations in *Crow Tribe of*

[3] In the early 1970s, Wyoming attempted to prosecute a member of the Crow Tribe for killing a deer in the Bighorn National Forest. After the U.S. Department of Interior's Field Solicitor intervened on the defendant's behalf, the state court dismissed the charges. R.251.

Indians v. Repsis, 73 F.3d 982, 992 (10th Cir. 1995). In *Repsis*, the Tenth Circuit—relying on this Court's decision in *Ward v. Race Horse*, 163 U.S. 504 (1896)—held that the "Tribe's right to hunt reserved in" the 1868 Treaty was "repealed by the act admitting Wyoming into the Union." *Id.* at 992 (citing *Race Horse*, 163 U.S. at 514); *see also id.* at 994 (concluding that Tribe's right to hunt "was repealed with Wyoming's admission into the Union"). The Tenth Circuit also concluded, in a brief "alternative basis for affirmance," that the treaty rights were abrogated by the establishment of the Bighorn National Forest, which "resulted in the 'occupation' of the land." *Id.* at 993.

Four years later, however, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), this Court held that the principal theory on which *Repsis* (and *Race Horse*) rested—abrogation upon admission to the Union under the so-called "equal footing" doctrine—was no longer good law. *See id.* at 204-07. The Court also rejected the reasoning of *Race Horse* as "too broad to be useful." *Id.* at 206-07. Finally, it held that rights preserved in Indian treaties continue in force until the occurrence of an event "clearly contemplated" by the treaty, and that "[t]reaty rights are not impliedly terminated upon statehood." *Id.*

After concluding that *Mille Lacs* had repudiated the Tenth Circuit's *Repsis* decision, the Crow Tribal Legislature unanimously passed a joint resolution that marked a return to the pre-*Repsis* scope of the Tribe's off-reservation hunting rights under the 1868 Treaty. R.251-52.

B. Petitioner's Prosecution, the Pre-trial Proceedings, and Petitioner's Trial

1. Petitioner Clayvin Herrera is an enrolled member of the Crow Tribe who lives in St. Xavier, Montana, on the Crow Reservation. In January 2014, Petitioner and other members of the Tribe went hunting on the Reservation in Montana, hoping to obtain meat to feed their families and other Tribe members in the dead of winter. R.838. The group spotted a small herd of elk on the Reservation and, while pursuing the herd, crossed the state line into the Bighorn National Forest in Wyoming. The group shot and killed three elk and quartered, packed, and carried them back to the Reservation to feed Tribe members.[4]

After learning about the January 2014 elk hunt, and notwithstanding the 1868 Treaty, Wyoming authorities traveled to the Reservation in Montana to cite Petitioner for two criminal misdemeanors under Wyoming law—one for taking an antlered big game animal during a closed-hunting season, and the other for being an accessory to the same. Wyo. Stat. §§23-3-102(d), 23-6-205.[5]

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[4] Herrera used the elk to feed his three young daughters elk spaghetti and elk "Hamburger Helper" throughout the winter. The three elk were a small part of the large herd that the trial court recognized "migrate[s] in the Big Horn Mountains between the [Bighorn National Forest] and the Crow Reservation." App.42.

[5] It is undisputed that the federal government allows year-round treaty hunting in the national forests, and that January is not a closed season for elk hunting under the Crow Tribe's fish-and-game laws. R.125; R.591.

2. After pleading not guilty and waiving his right to a speedy trial, Petitioner moved to dismiss the charges against him, arguing that the 1868 Treaty allowed him to hunt in the Bighorn National Forest, thereby rendering him immune from criminal prosecution. The state of Wyoming opposed the motion, contending as relevant here that the hunting rights guaranteed under the 1868 Treaty were abrogated either by Wyoming's 1890 statehood or by the 1897 establishment of the Bighorn National Forest.

In October 2015, the Wyoming Circuit Court denied Petitioner's motion to dismiss. The court declared itself "bound by" the Tenth Circuit's holding in *Repsis* that "Crow Tribe members do not have off-reservation treaty hunting rights anywhere within the state of Wyoming." App.38. The court added that this Court's *Mille Lacs* decision "had no effect on the *Repsis* decision." App.39. The trial court thus denied Petitioner immunity as a matter of law without even conducting a hearing, and precluded Petitioner from even mentioning at trial his federal treaty right to hunt elk in the Bighorn National Forest. App.43.

Petitioner filed an interlocutory appeal to the Wyoming District Court.[6] On April 5, 2016, the

[6] The Wyoming District Courts are the trial courts of general jurisdiction in the state, but they also serve as the appellate courts to the Circuit Courts, which have jurisdiction over all misdemeanor cases. Review of District Court decisions may only be had in the Wyoming Supreme Court. Wyoming does not have an intermediate appellate court system. *See, e.g.*, *About The District Courts*, Wyo. Judicial Branch, http://bit.ly/2xd73ik (last visited Oct. 3, 2017).

district court dismissed the appeal for lack of jurisdiction, holding that the order was not appealable under the collateral order doctrine. Petitioner then asked the Wyoming Supreme Court for review of that decision and a stay of his criminal trial (scheduled for April 27). After the Wyoming Supreme Court failed to act, Petitioner sought an emergency stay of his trial from Justice Sotomayor. *See* No. 15A1105. On April 26, the Wyoming Supreme Court and Justice Sotomayor nearly concurrently denied his requests for a stay. The Wyoming Supreme Court did not act on Petitioner's petition for review of his immunity appeal before the trial date.[7]

A jury trial was held over three days. With Petitioner unable even to mention the 1868 Treaty, the verdict came swiftly; he was convicted on both charges. App.9. Petitioner was fined $8,000, received a one-year suspended jail sentence, and had his hunting privileges suspended for three years. *Id.*

C. The Wyoming District Court's Decision

Following his conviction, Petitioner again appealed to the Wyoming District Court, again arguing that the hunting rights guaranteed by the 1868 Treaty afforded him immunity from criminal prosecution. Following briefing, the court *sua sponte* requested supplemental briefing on the question whether principles of collateral estoppel bound Petitioner, a member of the Crow Tribe, to the 1995 *Repsis* decision, in which the Crow Tribe was a party.

The district court affirmed. Recognizing the "issue in this case" as "the continued validity of the off-

[7] That petition was ultimately denied on May 10, 2016.

reservation treaty hunting right," App.13, the court concluded that, as a matter of collateral estoppel, Petitioner was bound by *Repsis*, App.31. The court acknowledged that federal law controlled the collateral estoppel question, and that under that federal law, collateral estoppel does not apply when there has been an "intervening change in the applicable legal context." App.19 (quoting Restatement (Second) of Judgments §28 (1982)). The court nevertheless held that the intervening *Mille Lacs* decision had not fatally undercut *Repsis*. It conceded that *Mille Lacs* repudiated the vast majority of the reasoning in the 1896 *Race Horse* decision on which *Repsis* was "largely based." App.21. But it concluded that *Repsis* still controlled because *Mille Lacs* purportedly left undisturbed an "alternative holding" announced in *Race Horse* and mentioned in *Repsis*—*viz.*, that treaty rights may be abrogated if they are only "temporary and precarious" rights. App.22-24. Accordingly, the district court concluded that Petitioner could not "relitigate the validity of the off-reservation treaty hunting right that was previously held to be invalid in the *Repsis* case." App.31.

The district court also announced an "alternative" holding "[e]ven if collateral estoppel did not apply." App.31. Its "alternative" analysis, however, simply repeated its earlier reasoning that *Mille Lacs* did not fatally undercut *Race Horse* or *Repsis*. Rather, the district court believed, *Mille Lacs* reaffirmed that courts must "look at the language in the treaty to determine whether it was intended to be perpetual." App.34. According to the district court, *Race Horse* conducted that analysis and "concluded that the rights

granted in the treaty [at issue there] were temporary in nature, and they were not intended to survive … statehood." App.32. "Similarly," the court continued, the *Repsis* court "found that 'the Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union,'" and "alternatively held that the treaty rights were no longer valid, because 'the creation of the Big Horn National Forest resulted in the "occupation" of the land.'" App.33. The "analysis and conclusions of the *Repsis* case," the district court concluded, were "appropriate," App.34; accordingly, it was "proper" for the trial court to have prohibited Petitioner from asserting the 1868 Treaty as a bar to his prosecution. *Id.*

Petitioner timely filed a petition for writ of review with the Wyoming Supreme Court, which was denied without explanation in a one-page order. App.1-2.

REASONS FOR GRANTING THE PETITION

A Wyoming state court has upheld Petitioner's criminal conviction by declaring Native American rights enshrined in a 149-year-old federal treaty extinct. The decision below ignores this Court's precedents, badly misconstrues the Tribe's 1868 Treaty, and creates a clear split with federal and state courts, all while imperiling the ability of Tribe members to provide for their families as they—and other Native Americans, pursuant to similar treaties—have done for over a century. Only this Court can correct this injustice, resolve the unsettled case law, and reaffirm the federal treaty-based rights that the Tribe and other Native Americans have long enjoyed.

Nothing has abrogated the Tribe's treaty right to hunt on "unoccupied" federal lands, including in the Bighorn National Forest where Petitioner was engaged in subsistence hunting. The court below relied on the Tenth Circuit's *Repsis* decision, which invoked this Court's *Race Horse* decision to conclude that the rights preserved in the 1868 Treaty were abrogated by Wyoming's admission to the Union in 1890 and by the 1897 establishment of the Bighorn National Forest. But this Court's superseding decision in *Mille Lacs* rejected *Race Horse*'s reasoning and conclusively held that "[t]reaty rights are not impliedly terminated upon statehood." 526 U.S. at 207. And President Cleveland's proclamation establishing the Bighorn National Forest—issued pursuant to a federal statute expressly disclaiming the abrogation of treaties with Native Americans—explicitly *prohibited* "entry or settlement" in that land, thus foreclosing the oxymoronic proposition that creation of the national forest rendered the land "occupied" within the meaning of the 1868 Treaty. Unsurprisingly, there is no evidence that either of the parties to the 1868 Treaty had that understanding of the relevant language, and much evidence to the contrary.

The profoundly incorrect decision below has only added to the split that *Repsis* created with other federal courts of appeals and state high courts, rendering the need for this Court's review even more clear. Contrary to the Tenth Circuit and the decision below, the Ninth Circuit has squarely rejected the notion that the Forest Reserve Act that led to the establishment of the Bighorn National Forest gave the President the power to extinguish Indian treaty

rights. Moreover, multiple state high courts interpreting materially indistinguishable provisions in other Indian treaties have concluded that *Race Horse* (upon which *Repsis* relied) is no longer good law and that national forests are not occupied land.

This case therefore cries out for this Court's review, and this is an ideal vehicle to resolve the exceptionally important federal question it presents. The relevant facts are undisputed, and the issue was exhaustively argued and addressed at multiple stages of the state proceedings. Though the decision below rejected Petitioner's claim by invoking *Repsis* and collateral estoppel, that presents no bar to review, since under well-established federal-law principles, a "change in the applicable legal context" precludes application of the doctrine. *Bobby v. Bies*, 556 U.S. 825, 834 (2009). *Mille Lacs* undoubtedly changed the applicable legal context, but regardless, whether it did so *vel non* is part and parcel of the question presented on the merits. Because the Court's answer to the question presented will also answer whether there was a change in the applicable legal context that defeats collateral estoppel, the latter doctrine poses no obstacle to certiorari.

In short, this Court need only answer the clean legal question of whether the 1868 Treaty has been abrogated or not. If the answer to that question is yes, and the Tribe's federal treaty rights persist notwithstanding Wyoming's admission to the Union and the creation of the Bighorn National Forest, the judgment below must be reversed, regardless of collateral estoppel principles. But if the answer to that question is no, and Petitioner and other Tribe

members—to say nothing of other Native Americans subject to similar treaties—really can be criminally prosecuted for attempting to provide for their families despite a century-old treaty indicating otherwise, they are entitled to have this Court, not a state court, render that extraordinary judgment. In either case, the Court's intervention is warranted.

I. The Decision Below Is Profoundly Wrong.

The Crow Tribe's 1868 Treaty with the United States provides that the Tribe "shall" have the continuing "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV, 15 Stat. at 650. The Wyoming District Court nonetheless concluded that Petitioner and other members of the Tribe have *no* right whatsoever to hunt in the Bighorn National Forest. The court reached that categorical result after relying exclusively on the Tenth Circuit's *Repsis* decision, which concluded, first, that Wyoming's 1890 admission to the Union abrogated the Tribe's right to hunt on unoccupied federal lands in Wyoming, *see* 73 F.3d at 992-93; and, alternatively, that the Bighorn National Forest ceased to be "unoccupied" when President Cleveland proclaimed it a national forest in 1897, thereby abrogating the Tribe's hunting rights, *id.* at 993. Each of these grounds is profoundly wrong, as is, consequently, the district court's decision relying on *Repsis*.

A. Wyoming's Admission to the Union Did Not Abrogate the Crow Tribe's Treaty Rights.

Petitioner need not belabor the point that Wyoming's admission to the Union in 1890 did not extinguish his right under the 1868 Treaty to hunt in the Bighorn National Forest. Under this Court's precedents, the notion that statehood impliedly abrogates Indian treaty rights—the first basis for the *Repsis* decision—is no longer good law.

In 1896, this Court in *Race Horse* examined a provision of the 1869 treaty between the Bannock Tribe of Indians and the United States, which reserved for members of that Tribe "the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts," 163 U.S. at 507—*i.e.*, a provision worded identically to Article IV of the Crow Tribe's 1868 Treaty. The Court concluded that Wyoming's admission to the Union in 1890 abrogated the Bannock's right to hunt upon unoccupied federal lands under the so-called the "equal footing" doctrine, the principle that new states "are endowed with powers and attributes equal in scope to those enjoyed by the states already admitted," including the right to regulate hunting within their borders. *Id.* at 514-15. In applying that doctrine, the Court determined that the Bannock's hunting right and Wyoming's right to regulate hunting were in "irreconcilable" conflict, and thus concluded that the Bannock's hunting right had been impliedly abrogated by Wyoming's subsequent statehood. *Id.* at 514. The Court also noted that the

Bannock treaty had reserved only a "temporary and precarious" right to hunt on federal lands that was not "intended" to survive statehood. *Id.* at 515.

Just over a century later, in 1999, this Court thoroughly repudiated *Race Horse*. In *Mille Lacs*, the Mille Lacs Band of Chippewa Indians brought suit against the state of Minnesota seeking a declaration that they retained hunting rights under an 1837 federal treaty between several Chippewa Bands of Indians and the federal government. 526 U.S. at 185. That treaty preserved for the Chippewa the "privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" by those Indians to the United States. *Id.* at 177. Relying on *Race Horse*, Minnesota contended that its admission to the Union in 1858 terminated those Indian treaty rights. *Id.* at 202-03.

The Court resoundingly rejected that argument, declaring that "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." *Id.* at 205. More broadly, the Court held, Indian "[t]reaty rights are not impliedly terminated upon statehood." *Id.* at 207. The Court explained that *Race Horse* had incorrectly reached the opposite conclusion by relying on the "false premise" that treaty-protected hunting rights "conflict[] irreconcilably with state regulation of natural resources." *Id.* at 204. To the contrary, the Court explained, those two interests are entirely reconcilable: States may regulate treaty-protected hunters, but only when doing so is necessary as a "conservation" measure, as the Court had concluded in several decisions in the decades following *Race Horse*.

Id. at 204-05 (citing *Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), and *Antoine v. Washington*, 420 U.S. 194, 207-08 (1975)).

Having disposed of the "equal footing" doctrine of *Race Horse* as a basis for abrogating treaties with Native Americans, the Court then addressed the dissent's objection that *Race Horse* established a rule that certain "temporary and precarious" treaty rights "are not intended to survive statehood." *Id.* at 206. The Court rejected this argument, too, holding that "the 'temporary and precarious' language in *Race Horse* is too broad to be useful." *Id.* As the Court noted, "any right created by operation of federal law could be described as 'temporary and precarious,' because Congress could eliminate the right whenever it wished." *Id.* at 207. In short, "the line suggested by *Race Horse* is simply too broad to be useful as a guide to whether treaty rights were intended to survive statehood." *Id.* Instead, the Court observed, the "focus" must be on those conditions or events (if any) that the parties themselves intended to serve as "fixed termination point[s]" abrogating treaty rights. *Id.* at 207. Using *Race Horse* as an example, the Court explained that the treaty there "'clearly contemplated'" that "the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States." *Id.* (quoting *Race Horse*, 163 U.S. at 509). But "there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood." *Id.*

Mille Lacs squarely forecloses the proposition that Wyoming's admission to the Union terminated the

Crow Tribe's treaty-protected right to hunt on unoccupied federal lands, including in the Bighorn National Forest. And it just as squarely abrogates the principal ground relied upon by the *Repsis* decision (the only decision invoked by the district court here). *Repsis* unambiguously held that "[t]he Tribe's right to hunt reserved in the [1868 Treaty] was repealed by the act admitting Wyoming into the Union." 73 F.3d at 992. Indeed, for good measure, it declared *Race Horse* "compelling, well-reasoned, and persuasive," and it cited *Race Horse* for the proposition that the hunting right preserved in the 1868 Treaty was a "temporary right" that was "repealed with Wyoming's admission into the Union." *Id.* at 994. *Mille Lacs* rejects that reasoning across the board, from the notion that statehood abrogates treaty hunting rights to the "too broad" construct of "temporary" rights. 526 U.S. at 206; *see also id.* at 219 (Rehnquist, C.J., dissenting) (stating that "the Court … effectively overrules *Race Horse*"); *State v. Buchanan*, 978 P.2d 1070, 1083 (Wash. 1999) ("[T]he United States Supreme Court effectively overruled *Race Horse* in *Minnesota v. Mille Lacs*.").

Furthermore, because the relevant language of the 1868 Treaty is identical to that of the treaty addressed in *Race Horse* and re-examined in *Mille Lacs*, the *Mille Lacs* decision also confirms what the parties to the 1868 Treaty "'clearly contemplated'" as conditions for preservation of the Tribe's hunting rights. 526 U.S. at 207. Specifically, the parties "contemplated that the rights would continue only so long as [1] the hunting grounds remained unoccupied and [2] owned by the United States." *Id.* The conditions also included that "[3] game may be found

thereon, and … [4] peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV, 15 Stat. at 650. These are the four conditions relevant to assessing the Tribe's continued hunting rights—not Wyoming's statehood *vel non*. And each of those conditions remains fulfilled to this day.

B. The Establishment of the Bighorn National Forest Did Not Abrogate the Crow Tribe's Treaty Rights.

Repsis and the decision below provided only one other basis for categorically abrogating the Tribe's treaty right to hunt in the Bighorn National Forest: Those formerly unoccupied federal lands became "occupied" simply by virtue of being declared a national forest in 1897. App.22. As *Repsis* put it, because the land comprising the Bighorn National Forest was "no longer available for settlement," creation of the forest "resulted in the 'occupation' of the land." 73 F.3d at 993. That reasoning "sounds absurd, because it is." *Sekhar v. United States*, 133 S. Ct. 2720, 2727 (2013).

President Cleveland's 1897 proclamation establishing the Bighorn National Forest expressly "reserved from entry or settlement" the land comprising the forest, and warned "all persons not to make settlement upon" the land. Proclamation No. 30, 29 Stat. at 909-10.[8] By barring "entry or settlement"

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[8] The *Repsis* court stated that "Congress created" the Bighorn National Forest "in 1887." That assertion is wildly inaccurate and emblematic of the court's haphazard approach to this issue. In *1891*, Congress enacted the Forest Reserve Act, which gave the President the power to establish national forests. Pursuant

on the land constituting the new national forest, the proclamation accomplished just the opposite of "occupation." No ordinary English speaker would understand a *prohibition* on the entry or settlement of vast, empty, and undisturbed land to mean that the land suddenly became "occupied."

Plain English aside, Indian treaties are interpreted "to give effect to the terms as the *Indians themselves* would have understood them." *Mille Lacs*, 526 U.S. at 196. The record in this case demonstrates that like "other Western Indians," the Crow Tribe understood "unoccupied lands of the United States" in the 1868 Treaty to mean "land undeveloped by white settlers." R.250. In other words, the "'clearly contemplated event'" terminating the Tribe's hunting rights, *Mille Lacs*, 526 U.S. at 207, was actual, physical settlement of its aboriginal hunting grounds—not a sort of metaphysical "occupation" by non-settlement. There is certainly "no evidence" that the Tribe "understood [the] fine legal distinctions" that the *Repsis* court purported to draw, and which the court below validated. *Id.* at 206. In any event, even if the phrase "unoccupied lands of the United States" were somehow ambiguous, the ambiguity must be resolved *in favor* of the Crow Tribe—not against it. *See id.* at 200 (explaining that that "Indian treaties are to be interpreted liberally in favor of the Indians," and "ambiguities are to be resolved in their favor").

Finally, President Cleveland's proclamation establishing the Bighorn National Forest could not

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to that statute, in *1897*, President Cleveland established the Bighorn National Forest via proclamation.

have abrogated the Tribe's hunting rights under the 1868 Treaty because the President lacked the authority to do so. The President's "power, if any, to issue" the proclamation must have stemmed "either from an act of Congress or from the Constitution itself." *Id.* at 188-89 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). When President Cleveland established the Bighorn National Forest in 1897, he did so pursuant to a single act of Congress: the Forest Reserve Act. *See* Proclamation No. 30, 29 Stat. at 909. That statute delegated authority to the President "to set apart and reserve" the "public land[s]" in "any State or Territory" so long as those lands were "bearing forests." Forest Reserve Act, §24, 26 Stat. at 1103. But in enacting that statute, Congress made crystal clear its intent regarding Indian treaty rights: "[N]othing in this act shall change, repeal, or modify any … treaties made with any Indian tribes for the disposal of their lands." *Id.* §10, 26 Stat. at 1099.

Congress thus explicitly *barred* the President from abrogating Indian treaty rights in establishing national forests. Moreover, Congress' prohibitive language was the opposite of the "clear and plain" intent that is required before it (or anyone else) may abrogate Indian treaties. *United States v. Dion*, 476 U.S. 734, 738 (1986). Accordingly, even if President Cleveland had sought to render the Crow Tribe's aboriginal hunting grounds "occupied" via his proclamation, he lacked the legal authority to abrogate the Tribe's treaty rights in the process. *See Mille Lacs*, 526 U.S. at 189-90 (concluding that Removal Act did not authorize presidential order terminating Chippewa hunting rights).

But there is no need to ascribe such motives to President Cleveland or his proclamation. As a matter of ordinary English and common sense, prohibiting "entry or settlement" on land does not cause that land to become "occupied." And there is no evidence that the Crow Tribe—or anyone—thought otherwise when the 1868 Treaty was ratified or when the Bighorn National Forest was established.

II. Courts Are Divided Over Whether Indian Treaty Rights Apply On Federal Lands Later Proclaimed National Forests.

In light of the errors in *Repsis* and the decision below relying upon it, it is unsurprising that those two cases are on the wrong side of a split of authority that only this Court can resolve. To begin with, the decision below rejected the proposition that *Mille Lacs* "'effectively overrule[d] *Race Horse*.'" App.24 n.6 (quoting 526 U.S. at 219 (Rehnquist, C.J., dissenting)). Other courts, however, have correctly recognized that this Court "effectively overruled *Race Horse* in … *Mille Lacs*." *Buchanan*, 978 P.2d at 1083.

Furthermore, in contrast to *Repsis* and the decision below, other federal courts of appeals and state supreme courts have concluded that the Forest Reserve Act cannot be invoked to abrogate Indian treaty rights and that national forests remain "unoccupied" federal lands. In *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983), for example, the Ninth Circuit addressed an 1898 treaty in which the Shoshone-Bannock Tribes ceded lands in Idaho to the United States but reserved the rights "to cut timber for their own use, … to pasture their livestock on said public lands, and to hunt thereon and to fish in the

streams thereof." *Id.* at 714. In 1907, pursuant to the Forest Reserve Act, President Theodore Roosevelt issued a proclamation declaring those lands the Port Neuf Forest Reserve (later known as the Caribou National Forest). *Id.* Decades later, non-Indian plaintiffs argued that the rights in the 1898 treaty had "been extinguished by" Roosevelt's "executive action." *Id.* at 715. Specifically, they argued that the Forest Reserve Act, having "empower[ed] the President to withdraw public lands from settlement," also "gave him the power to *extinguish* Indian treaty rights in those lands." *Id.* at 717 (emphasis added).

In contrast to the Tenth Circuit in *Repsis* and the decision below, the Ninth Circuit squarely "reject[ed] that reading of the [Forest Reserve] Act." *Id.* The plaintiffs had not identified "any congressional enactment which purports to abrogate the Tribes' treaty rights," nor "any post-[treaty] delegation by Congress to the President of authority to abrogate Indian treaty rights without congressional consent." *Id.* at 718; *see also Kimball v. Callahan*, 493 F.2d 564, 570 (9th Cir. 1974) (holding that treaty-preserved hunting, trapping, and fishing rights apply on "land now constituting United States national forest land").

Numerous state courts of last resort have also concluded that national forestland is unoccupied, open, and unclaimed within the meaning of various Indian treaties. In *State v. Tinno*, 497 P.2d 1386 (Idaho 1972), the Supreme Court of Idaho considered an 1868 Treaty between the United States and the Eastern Band Shoshone and Bannock Tribes, which preserved fishing rights on the "unoccupied lands of the United States." *Id.* at 1389-90. The defendant, a

member of the Shoshone-Bannock Tribes, had been prosecuted by Idaho for fishing in the Challis National Forest. *Id.* at 1391. In addressing whether those lands fit within the scope of the treaty, the court concluded that "[a] plain reading of the treaty provision would lead to the conclusion that there is no serious geographical question presented." *Id.*; *see also State v. Arthur*, 261 P.2d 135, 141 (Idaho 1953) (concluding that "the National Forest Reserve upon which the game in question was killed was 'open and unclaimed land'").

Likewise, in *State v. Stasso*, 563 P.2d 562 (Mont. 1977), the Montana Supreme Court addressed whether an 1885 treaty between the United States and the Confederated Salish and Kootenai Indian Tribes guaranteed "present day members of the … Tribes … a right to hunt … on 'open and unclaimed lands.'" *Id.* at 563. In particular, the court considered "whether Forest Service land may be included within the meaning of 'open and unclaimed lands.'" *Id.* The court answered that question in the affirmative: "[T]he National Forest lands involved herein are open and unclaimed lands." *Id.* at 565.

Finally, in *Buchanan*, the Supreme Court of Washington also concluded that "open and unclaimed" lands include national forestland. *See* 978 P.2d at 1081 (citing *State v. Miller*, 689 P.2d 81, 82 n.2 (Wash. 1984) (en banc)). Indeed, that court specifically noted that it had aligned itself with the Idaho and Montana supreme courts in reaching that conclusion. *See id.* (explaining that national forestland is "open and unclaimed" land, "consistent with those [holdings] of other jurisdictions").

These decisions leave no doubt that courts in Idaho, Montana, Washington, or indeed anywhere in the Ninth Circuit would reject the proposition that the 1868 Treaty was abrogated because the relevant land was rendered "occupied" by either the Forest Reserve Act or the creation of the Bighorn National Forest. In the Tenth Circuit, however, precisely the opposite is true: President Cleveland's proclamation establishing the Bighorn National Forest rendered the land "occupied" and abrogated the 1868 Treaty. That the two circuits with the vast majority of national forestland disagree on this issue is reason enough to grant certiorari.[9] But when a Wyoming court employs the Tenth Circuit's analysis to permit the criminal conviction of a Native American for engaging in treaty-protected conduct, certiorari is not just warranted but imperative.

III. The Question Presented is Exceptionally Important, And There Are No Vehicle Issues.

Whether the Crow Tribe retains critical rights preserved by the 1868 Treaty is an issue of paramount importance meriting this Court's review. Indeed, the issue is little different from the issue this Court reviewed in *Mille Lacs*, a case addressing whether the Chippewa retained their hunting rights under an 1837 treaty with the United States. *See* 526 U.S. at 185; *see also United States v. Winans*, 198 U.S. 371, 381 (1905)

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[9] There are 188,330,377 acres of national forestland in the country, 162,316,168 of which—86%—are in the states comprising the Ninth and Tenth Circuits. *See* U.S. Forest Serv., Land Areas Report, Tables 1 & 4 (Sept. 30, 2016), http://bit.ly/2xM8W4r.

(describing such rights as "not much less necessary to the existence of the Indians than the atmosphere they breathe[]").[10] The significance of the question in this case is as manifest as it was in *Mille Lacs* or, a century earlier, in *Winans*: Its answer will determine not only whether the Crow Tribe can exercise rights it understandably thought preserved pursuant to binding agreement with the federal government, but also—and on a far more concrete level—whether the Tribe's members can engage in subsistence hunting foundational to their identity and well-being.

Furthermore, a number of other treaties between Indian tribes and the United States preserve Indian rights using language identical or materially identical to that in the 1868 Treaty. *See*, *e.g.*, Treaty Between the United States & the Navajo Tribe of Indians, art. IX, Aug. 12, 1868, 15 Stat. 667, 670 (preserving "the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase"); Treaty with the Eastern Band Shoshone and Bannock, art. IV, July 3, 1868, 15 Stat. 673, 674-75 (preserving "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts"); Treaty with the Nez Perces, art. III, June 11, 1855, 12 Stat. 957, 958 (preserving "the privilege of hunting,

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[10] In its petition for certiorari in *Mille Lacs*, the state of Minnesota prominently cited *Repsis* as conflicting with the Eighth Circuit decision this Court ultimately affirmed. *See* Pet. for Writ of Cert. 11-13, 15, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (No. 97-1337).

gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land"); Treaty of Hell Gate (Confederated Salish and Kootenai Tribes), art. III, July 16, 1885, 12 Stat. 975, 976 (preserving "the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land"); Treaty Between the United States and the Dwamish, Suquamish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, art. V, Jan. 22, 1855, 12 Stat. 927, 928 (preserving "the privilege of hunting and gathering roots and berries on open and unclaimed lands"). Accordingly, the issue here affects every other Indian tribe that reserved similar treaty rights.

All that said, the broader implications of this case for the Crow Tribe or Native Americans generally should not obscure the fact that the answer to the question presented will literally affect whether Petitioner will be able to provide for his family. Not only does the decision below forever strip Petitioner of his federally enshrined right to hunt in the Bighorn National Forest, Petitioner's sentence suspends *all* of his hunting privileges in the state of Wyoming for three years. That is no trifling concern. As this very case makes clear, whether Petitioner's family has food on the table during unforgiving Montana winters depends on his ability to exercise the off-reservation hunting rights long ago granted to his tribe. But instead of upholding those rights, the decision below upheld Petitioner's criminal conviction and sentence, all based on reasoning that has been soundly rejected.

The Court should not tolerate that result. And there are no obstacles to the Court's granting certiorari here. The only issue that the court below addressed, and that is before this Court, is the pure "question[] of law" whether the 1868 Treaty has been abrogated, either by Wyoming's admission to the Union or by the establishment of the Bighorn National Forest. App.9. That issue was thoroughly briefed in the proceedings below, and other federal courts of appeals and state supreme courts—to say nothing of this Court in *Mille Lacs*—have thoroughly addressed the effects, if any, of state enabling acts and the creation of national forests on Native American treaty rights. Further percolation, therefore, is unnecessary.

The collateral estoppel issue the court below introduced *sua sponte* also presents no obstacle to the Court's review.[11] As the court acknowledged, federal law governs this issue because the *Repsis* decision exclusively relied upon by the court is a "federal-court judgment" in a "federal-question case[]." *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008); App.12. And under well-established federal law, as this Court has repeatedly held, a prior judgment lacks preclusive effect when there has been an intervening "'change in [the] applicable legal context.'" *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (alteration in original) (quoting Restatement (Second) of Judgments §28 (1980)); *see*

[11] Although the court below used the term "collateral estoppel," this Court has repeatedly observed that the term "issue preclusion" is preferable. *See Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 n.1 (2016); *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). This petition nevertheless uses the term "collateral estoppel" to remain consistent with the decision below.

also Limbach v. Hooven & Allison Co., 466 U.S. 353, 362 (1984); *Montana v. United States*, 440 U.S. 147, 161 (1979); *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 606 (1948).

That principle ends the matter here. There can be no serious dispute that *Mille Lacs* constituted a "change in [the] applicable legal context" that monumentally, if not fatally, undercut the controlling legal principles applied in *Repsis*. As the *Mille Lacs* dissent repeatedly remarked, *see* 526 U.S. at 219 & n.3, 220—without objection by the majority—the Court "effectively overrule[d]" *Race Horse*, the decision that *Repsis* deemed "compelling, well-reasoned, and persuasive" and upon which it principally relied in declaring the Tribe's hunting rights abrogated, 73 F.3d at 994.

Refusing to accept what both the *Mille Lacs* majority and dissent understood, the court below contended that *Mille Lacs* did *not* overrule *Race Horse*. Conceding that *Mille Lacs* "clearly rejected" the "equal footing" doctrine that *Repsis* "largely" relied upon, the court nevertheless believed that *Mille Lacs* only "arguably narrowed the 'temporary and precarious' doctrine." App.24 n.6. That is misguided on many levels. First, *Repsis* itself did not rely on any "temporary and precarious" doctrine to abrogate the 1868 Treaty; it squarely held that the Tribe's hunting rights were "repealed by the act admitting Wyoming into the Union," 73 F.3d at 992—the very proposition that even the court below conceded was overruled by *Mille Lacs*. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) (noting that issue preclusion requires issue to have been

"determined by a valid and final judgment, and the determination is essential to the judgment").[12] Second, to the extent there ever was a "temporary and precarious" doctrine, *Mille Lacs* did not preserve it; the Court deemed it "too broad to be useful." 526 U.S. 207. That is why the dissent accused the majority of overruling the *Race Horse* decision *in toto*, not in part. Third, even if *Mille Lacs* only "narrowed" the "temporary and precarious" doctrine, that still constitutes a "change in [the] applicable legal context" triggering an exception to collateral estoppel. *Bobby*, 556 U.S. at 834.

Regardless, the Court's answer to the question presented will also answer whether there was a change in the "applicable legal context" that defeats collateral estoppel. If the Court were to hold on the merits that *Mille Lacs* fatally undercut *Repsis*, then *Repsis* would no longer have any collateral-estoppel effect.

In the end, not only does collateral estoppel pose no barrier to review; the superbly wrong application of that doctrine below only underscores why this Court

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[12] Because a determination must have been "essential to the judgment," the *Repsis* court's self-styled "alternative basis" for abrogation—the establishment of the Bighorn National Forest—does not collaterally estop further litigation of that issue. *See, e.g.*, *Bobby*, 556 U.S. at 835 ("A determination ranks as necessary or essential only when the final outcome hinges on it."); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 910 (6th Cir. 2001) (holding that "where … one ground for the decision is clearly primary and the other only secondary, the secondary ground is not necessary to the outcome for the purposes of issue preclusion"). Indeed, the court below did not remotely suggest otherwise.

must intervene. It simply cannot be the law that the treaty rights of thousands of Crow Tribe members, now and in the future, are forever held hostage to legal reasoning that would be merely bemusing if their livelihoods were not at stake. And it cannot be the case that an individual can be criminally convicted, fined, and barred from subsistence hunting for his family based on decisions that are contrary to this Court's precedents, out of step with other courts, and fundamentally unjust. At a minimum, if a treaty between Native Americans and the federal government really can be abrogated by a state's admission to the Union or the establishment of a national forest, Petitioner, his Tribe, and all Native Americans deserve to have this Court render that extraordinary judgment. In all events, certiorari is warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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