No. 21-1248

In The Supreme Court of the United States

SNOQUALMIE INDIAN TRIBE,

Petitioner,

v.

STATE OF WASHINGTON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Snoqualmie Indian Tribe should be precluded from litigating to protect its hunting and gathering rights under the Treaty of Point Elliott even though those claims have neither been previously litigated nor expressly extinguished by Congressional action.

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INTEREST OF AMICI CURIAE[1]

Amici are law professors who teach, research, and write about Federal Indian Law and Public Policy. A complete list of amici's names, titles, and affiliations is set forth in the appendix to this brief. Amici have no personal interest in the outcome of this case, but a professional interest in the field of Indian law. Amici present this brief to provide analysis regarding the important issues of preclusion and Indian reserved treaty rights raised in this case, and to highlight a simple solution available to the Court that avoids potentially thorny questions of civil procedure while respecting the rights of Indian treaty signatories.

SUMMARY OF ARGUMENT

The doctrine of issue preclusion should not be applied against the Snoqualmie Indian Tribe's ("Snoqualmie's") hunting and gathering reserved treaty rights. It is morally unacceptable and legally inappropriate that the paramount legal protections for a sovereign Indian tribe's reserved treaty rights be nullified by anything but the clearest act of Congress—never on the basis of application of a discretionary common law doctrine. This Court should follow the careful path laid

[1] Pursuant to Supreme Court Rule 37, amici curiae state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amici curiae and its counsel made any monetary contribution toward the preparation and submission of this brief. Counsel of record for all parties gave their written consent to and have been timely notified of the filing of this brief.

down by Judge Canby in *United States v. Washington*, 593 F.3d 790 (9th Cir. 2010) (en banc) ("*Washington IV*") that struck a balance between the principles of issue preclusion and the needs of newly-recognized tribes like Snoqualmie to have hunting and gathering treaty rights adjudicated in the first instance.

ARGUMENT

I. THE COURT ALREADY HAS AN ELEGANT SOLUTION AT HAND TO BALANCE ISSUE PRECLUSION AND TREATY RIGHTS.

Snoqualmie should not be precluded from litigating hunting and gathering rights under the Treaty of Point Elliott because those claims have not been previously litigated nor expressly extinguished by Congressional action.

In *Washington IV*, the en banc Ninth Circuit addressed the Samish Tribe's claim to fishing rights under the Treaty of Point Elliot. The Samish Tribe had previously litigated this same issue in *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979) ("*Washington II*"), *aff'd*, 641 F.2d 1368 (9th Cir. 1981). The Samish Tribe argued that, though this issue had been litigated in *Washington II*, the tribe had since received federal recognition, and was entitled to reopen this issue under Federal Rule of Civil Procedure 60(b). *Id*. at 793. The Ninth Circuit held that the Samish Tribe could not reopen the fishing rights issue under FRCP 60(b), but held that:

> Nothing we have said precludes a newly recognized tribe from attempting to intervene in *United States v. Washington* or other treaty rights litigation to present a claim of treaty rights not yet adjudicated. Such a tribe will have to proceed, however, by introducing its factual evidence anew; it cannot rely on a preclusive effect arising from the mere fact of recognition.

593 F.3d at 800. The Ninth Circuit's reasoning avoided foreclosing two newly-recognized tribes from being able to litigate rights that had not already been adjudicated, while simultaneously preventing those tribes from simply relying on their new federal recognition to establish their treaty-tribe status. *Washington IV* provides a narrow exception applicable only to Snoqualmie and Samish to separately establish their other unadjudicated treaty rights outside of *U.S. v. Washington*.

In this case, that is what Snoqualmie is doing. Snoqualmie did not try to reopen the issue of fishing rights, which was already litigated in *Washington II*. Instead, it seeks to affirm its never-before-adjudicated hunting and gathering rights under the Treaty of Point Elliott.

This conforms to the reasoning the en banc Ninth Circuit used in *Washington IV*, that a newly federally recognized tribe could "present a claim of treaty rights not yet adjudicated." Nothing was said specifically in that opinion about the Tribe's treaty-reserved hunting and gathering rights claims. *Washington IV*

simply affirmed the district court's finding that Snoqualmie, though descended from a treaty-signatory tribe, *see id.* at 1370, had not "maintained an organized tribal structure" and thus was not entitled to exercise fishing rights under the Treaty. *Id.* at 1374. That finding may hold true for the Tribe's fishing rights, but not necessarily for Snoqualmie's treaty-reserved hunting and gathering rights. A new trial could permit Snoqualmie to introduce evidence to demonstrate that the tribal members had "maintained an organized tribal structure" of governance and stewardship over hunting and gathering resources, sustained by continued observance of Snoqualmie tribal law, custom, and tradition.

In fact, the aggressive enforcement of Washington State's fishing laws and regulations in violation of the Tribe's treaty rights over time, *see United States v. Washington*, 384 F. Supp. 312 (W.D. Wash, 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), and the fixed geographical locales and manner of fishing exercised by the Tribe at "usual and accustomed [fishing] grounds and stations," *id.* at 356, clearly facilitated the hostile surveillance and prosecution of Washington State's laws and regulations respecting fishing. It is not at all surprising that *Washington II* held that Snoqualmie was unable to "maintain an organized tribal structure" made up of tribal law, customs, and traditions to govern the harvesting of fish. Washington State's actions over time worked to assure that Snoqualmie's long-maintained and ancient structure of tribal regulation derived from Snoqualmie law, custom, and tradition would be

impossible to maintain over time. It was regulated and prosecuted out of existence.

However, the issue of whether Snoqualmie continued to exercise treaty-reserved hunting and gathering rights in the forest and throughout their traditional lands, where hostile state surveillance and aggressive enforcement and prosecution could not be as effective or comprehensive in destroying the "organized tribal structure" of Snoqualmie laws, custom, and tradition was not at issue in *Washington II*. Judge Boldt's famous decision, in fact, recognized this structure of tribal law, custom, and tradition with respect to hunting and gathering in his decision: "Throughout the rest of the year individual families dispersed in various directions to join families from other winter villages in fishing, clam digging, hunting, gathering roots and berries, and agricultural pursuits. People moved about to resource areas where they had use patterns based on kinship or marriage." 384 F. Supp. at 351.

The claim that Snoqualmie members had in fact maintained a continuous "organized tribal structure" with respect to hunting and gathering rights under the Treaty according to Snoqualmie tribal custom, law and tradition maintained over time has not yet been adjudicated. Furthermore, it is respectfully submitted that *Washington II* was decided more than 40 years ago. The Court's use of the term "maintained an organized tribal structure" as a test for tribal treaty claims should be viewed today as reflecting a misinformed, potentially culturally biased, and negatively stereotyped standard for adjudicating Indian reserved

treaty rights, particularly in light of contemporary understandings of "Traditional Ecological Knowledge" reflected in tribal law, custom, and tradition. Given a much broader and deeper understanding of what Western environmental scientists now recognize as Traditional Ecological Knowledge (TEK), Snoqualmie today would be able to offer evidence at trial that would show the continued existence of Snoqualmie hunting and gathering practices in a much different, more culturally sensitive, and scientifically verifiable manner that would permit a finding of an "organized tribal structure" being maintained by Snoqualmie over time with respect to regulating tribal hunting and gathering rights.[2]

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[2] *See* Annie Sneed, *What Conservation Efforts Can Learn from Indigenous Communities: A Major U.N.-backed Report Says that Nature on Indigenous Peoples' Lands is Degrading Less Quickly than in Other Areas*, SCIENTIFIC AMERICAN (May 29, 2019), located at https://www.scientificamerican.com/article/what-conservation-efforts-can-learn-from-indigenous-communities/ (last visited Apr. 5, 2022) (discussing the differences in the biodiversity levels found on indigenous lands throughout the world compared to western conservation efforts and explaining how indigenous communities have a closer connection based on historical patterns of ecosystem management that allows them to adapt to changes in the environment and make better decisions as to how to manage the land); Jim Robbins, *Native Knowledge: What Ecologists Are Learning from Indigenous People,* YALE ENVIRONMENT 369 (Apr. 26, 2018), https://E360.Yale.Edu/Features /Native (last visited Apr. 5, 2022) (discussing how scientists around the world are turning to the knowledge of indigenous peoples gained from their historical stewardship practices of land and resources continued over time despite the disruptions of colonization and dispossession).

Here, this Court need not weigh into arguments about the scope of issue preclusion when confronted with reserved treaty rights. The en banc Ninth Circuit has already provided this Court with an elegant and narrow solution that avoids construing the discretionary doctrine of issue preclusion while still allowing Snoqualmie to realize the benefits of the Treaty promises the United States made to Snoqualmie. This Court should grant the Petition to adopt the exclusion to issue preclusion acknowledged by the en banc Ninth Court twelve years ago that permits a newly recognized treaty signatory like Snoqualmie to assert claims for "other" treaty rights "not yet adjudicated." 593 F.3d at 800.

A newly federally recognized tribe should not be precluded from presenting a claim of treaty rights not yet adjudicated. The gravity of this dynamic, and the sensitivity and restraint courts should show when limiting Indian treaty rights, must be seriously considered when the legal question at hand impacts a Tribe's treaty rights *in perpetuity*. This case imperils the opportunity for Snoqualmie to ever have its day in court on the treaty hunting and gathering rights its ancestors made unimaginable sacrifices to reserve. Fairness dictates that this Court carve out an avenue for tribes to affirm any rights that have not been previously litigated following federal recognition, as the en banc Ninth Circuit did before, and as Snoqualmie seeks to do in this case.

II. THE NINTH CIRCUIT'S DECISION ENDANGERS THE RIGHTS OF TRIBES ACROSS THE COUNTRY.

In this case, the rights Snoqualmie seeks to affirm exist within the same treaty as a right that was previously litigated. This fact pattern is not unique to Snoqualmie. In every treaty entered into with tribal nations, the United States made various treaty promises and the tribes reserved to themselves various rights. Litigating a dispute arising as to one of those treaty rights should not preclude future adjudication as to other rights reserved or promises made within the same treaty. If the Ninth Circuit's decision is not overturned, the dangerous precedent may be used to prevent tribes from litigating other rights in treaties that have not been litigated before simply because the treaty itself was at issue or because the tribe previously had to adjudicate whether it held "treaty status."

The "treaty status" test is entirely judge-made; it is not based on any Congressional act or Executive policy. A finding that a tribe has maintained an organized tribal structure is one of two elements needed to establish treaty-tribe status. The other element is that the tribe is "descended from a treaty signatory," which the Ninth Circuit held the Snoqualmie Tribe met in *Washington II*.

Because the element that a tribe maintained an organized tribal structure is not specific to any treaty,

unlike the other element for treaty-tribe status, this finding, if held to have been previously adjudicated, would have sweeping preclusive effect. It would be the equivalent of utilizing a dated and substantively repudiated precedent like *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138 (1896), on issue preclusion grounds to settle a modern question of civil rights.

The rights treaties reserve and protect were often secured at a catastrophic human and economic cost to the Tribal Nations involved. It would be the height of injustice for the United States to continue to enjoy the unlimited benefit of a treaty while denying the most basic exercise of the reserved rights protected within to the impacted Tribal Nation. It is morally unacceptable and legally inappropriate that these paramount legal protections for a sovereign Indian tribe's reserved treaty rights be nullified by anything but the clearest act of Congress—never on the basis of application of a discretionary common law doctrine.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Petitioner's brief, the Court should grant the petition.

Further, given the importance of this case in determining the ability of Snoqualmie as a newly federally recognized tribe to exercise its treaty-based reserved hunting and gathering rights, this Court

should ask the United States Solicitor General for her views on the case.

Respectfully submitted,

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