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

---

BRIEF OF *AMICUS CURIAE* SAUK-SUIATTLE INDIAN TRIBE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JACK WARREN FIANDER,
General Counsel
SAUK-SUIATTLE INDIAN TRIBE
5318 Chief Brown Lane
Darrington, WA 98241
(360) 436-0139
(509) 969-4436
towtnuklaw@msn.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Does a United States District Court or a Circuit Court of Appeals possess authority, in the absence of clear and plain expression embodied in an act of Congress, to abrogate all rights guaranteed to an Indian tribe under a ratified treaty, notwithstanding that the United States Department of the Interior as the federal agency with authority to recognize Indian tribes has deemed the tribe to be the successor in interest to the tribe that signed the treaty?

2. May a United States District Court or Court of Appeals, consistent with Article III of the United States Constitution, apply the common law principles of former adjudication such as *res judicata*, issue preclusion, claim preclusion or judicial estoppel, to abrogate the Treaty rights of a tribal nation which are among the Supreme Laws of the Nation according to U.S. Const., Art. VI, Cl. 2—or do equitable doctrines of common law supersede the Constitution?

3. Was it appropriate for the Judicial Branch to depart from the established principle that, as to matters of fact, the judiciary should defer to federal agencies that possess the most experience, in this case the Department of Interior's expertise and experience in Indian Affairs?

4. When a plaintiff lacks the Article III standing at the time an *initial complaint* is filed, can subsequent events cure the defect by filing a supplemental pleading or a new lawsuit? *Certiorari* should be granted to resolve the wide disarray among the Circuit Courts of Appeals that have considered this issue.

PROCEEDING BELOW

The Ninth Circuit erroneously extended a holding in *United States v. Washington* applicable to off-reservation treaty fishing rights through the discretionary common law doctrine of "issue preclusion" to abrogate all of Snoqualmie's Treaty rights, absent Congressional action, in contravention of nearly two centuries of well-settled U.S. Supreme Court precedent.

The opinion of the Ninth Circuit is reported at *Snoqualmie Indian Tribe v. Washington*, 8 F.4th 853 (9th Cir. 2021). The opinion of the District Court for the Western District of Washington is unreported.

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Sauk-Suiattle Indian Tribe is a federally recognized Indian tribe. It does not have a parent corporation, and no publicly held corporation holds stock in the Tribe.

No other party or counsel authored this amicus brief in whole or in part, and no person or entity other than amicus contributed funds toward the preparation of this brief.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii): *Snoqualmie Indian Tribe v. State of Washington*, No. 3:19-cv-06227-RBL (W.D. Wash. Order Mar. 18, 2020), *consolidated appeal docketed*, *Snoqualmie Indian Tribe v. State of Washington*, No. 20-35346 and *Samish Indian Nation v. State of Washington*, No. 20-35353, *decision issued* Aug. 6, 2021, 9th Cir., 8 F.4th 853, *rehearing denied* Nov. 12, 2021.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PROCEEDING BELOW	ii
CORPORATE DISCLOSURE STATEMENT	ii
STATEMENT OF RELATED PROCEEDINGS....	iii
INTRODUCTION	1
INTEREST OF *AMICUS CURIAE*	2
FACTUAL BACKGROUND	2
SUMMARY OF ARGUMENT	3
STATEMENT OF THE CASE..............................	4
REASONS FOR GRANTING THE PETITION.....	9
1. The Ninth Circuit's Decision Conflicts With The Precedent Of This Court............	10
a. The Ninth Circuit Radically Departed From This Court's Precedent When It Abrogated All Of Snoqualmie's Treaty Rights Absent Congressional Action.....	10
2. The Ninth Circuit Radically Departed From This Court's Precedent Regarding Principles Of Former Adjudication When It Applied The Common Law Doctrines Of Issue Or Claim Preclusion To Bar Appellant's Treaty Hunting Rights Litigation	12

TABLE OF CONTENTS—Continued

Page

3. The Supreme Court, In The Exercise Of Its Supervisory Authority Over The District And Circuit Courts Should Accept *Certiorari* Review For The Purpose Of Correcting The Ninth Circuit's Erroneous Melding Of The Common Law Principle Of Issue Preclusion With The Article III Requirements Of Standing. The Circuit Courts Of Appeals Have Differed On This Issue 18
4. The Questions Presented Are Of Exceptional Importance 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California, 530 U.S. 392 (2000)................13

Baker v. Carr, 369 U.S. 186 (1962)............................19

Frank v. Alaska, 604 P. 2d 1068 (Alaska 1979)..........25

Greene v. Babbitt, 64 F.3d 1266 (1995).......................13

Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955)...16

Linda R. S. v. Richard D., 410 U.S. 614 (1973)..........19

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).........10, 11

Loving v. Virginia, 381 U.S. 1 (1967)...........................8

Lucky Brand Dungrees, Inc. v. Marcel Fashions Group, No. 18-1086 (May 14, 2020).................15, 16

Menominee Tribe v. United States, 391 U.S. 404 (1968)...11

Mink v. Suthers, 482 F.3d 1244 (10th Cir. 2007)........23

Montana v. United States, 440 U.S. 147 (1979).........14

Northstar Fin. Advisors, Inc. v. Schwab Invs., 779 F.3d 1036 (9th Cir. 2015).................................22

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)...12

Rockwell Int'l Corp. v. United States, 549 U.S. 457 (2007)..22

Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987)...8

TABLE OF AUTHORITIES—Continued

Page

Scahill v. District of Columbia, 909 F.3d 1177 (2018) 23

Skokomish Indian Tribe v. Forsman, 738 Fed. Appx. 406 (9th Cir. 2018) 13

Skokomish Indian Tribe v. Goldmark, 994 F.Supp.2d 1168 (W.D. Wash. 2014) 13

Snoqualmie Tribe of Indians v. United States, 178 Ct. Cl. 570, 372 F.2d 951 (1967) 5, 6

State v. Miller, 102 Wn. 2d 678 (1984) 26

Tracie Park v. Forest Service, 205 F.3d 1034 (8th Cir. 2000) 23

United States ex rel. Gadbois v. PharMerica Corp., 809 F.3d 1 (1st Cir. 2015) 22, 23

United States v. Antelope, 430 U.S. 641 (1977) 15

United States v. Broncheau, 597 F.2d 1260 (9th Cir. 1979) 15

United States v. Choctaw Nation, 179 U.S. 494 (1900) 25

United States v. Dion, 476 U.S. 734 (1986) 11

United States v. Oregon, 29 F.3d 481 (9th Cir. 1994) 13

United States v. Torres, 733 F.2d 449 (7th Cir. 1984) 15

United States v. Washington, 476 F.Supp. 1101 (W.D. Wash. 1979) ("*Washington II*") ....*passim*

TABLE OF AUTHORITIES—Continued

Page

United States v. Washington, 593 F.3d 790 (9th Cir. 2010) ("*Washington IV*")....21

United States v. Winans, 198 U.S. 371 (1905)......25, 26

Warth v. Seldin, 422 U.S. 490 (1975)....19, 20

Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 433 U.S. 658 (1979)....11

Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016)....16

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. II....3, 9

U.S. Const. Art. III....*passim*

U.S. Const. Am. X....18

STATUTES

28 U.S.C. §1345....19

28 U.S.C. §1362....20

OTHER AUTHORITY

1854 Annual Report of the Commissioner of Indian Affairs....4, 5

Constitution and Bylaws of the Puyallup Tribe........15

TABLE OF AUTHORITIES—Continued

Page

Final Determination To Acknowledge the Snoqualmie Tribal Organization, 62 Fed. Reg. 45864-02, 45865 (Aug. 29, 1997) 8

James Madison, *Vices of the Political System of the United States* 17

K.D. Tollefson, *The Political Survival of Landless Puget Sound Indians*, 16 American Indian Quarterly, No. 2 (Spring, 1992) 7

R. Skowron, *Whether Events After the Filing of an Initial Complaint May Cure an Article III Standing Defect: The D.C. Circuit's Approach,* 61 Boston College L. Rev., Vol. 61, article 19 (April 28, 2020) 22

Restatement (Second) of Judgments §28 (1982) 15

Wright & Miller §4407 16

INTRODUCTION

The Ninth Circuit's decision below is irreconcilable with precedent of this Court governing Indian Treaty rights and the limitations imposed by the Constitution on the authority of the Judiciary vis-a-vis Indian affairs. The Supreme Court has consistently required an *Act of Congress* to abrogate Indian Treaty rights. The Ninth Circuit departed from established caselaw by holding that discretionary *common law* doctrines like issue preclusion—not Congressional action—may be applied to abrogate rights reserved in a Treaty.

The Ninth Circuit's decision presents federal questions of exceptional importance in that the vast majority of tribal nations are situated within the western United States and the Ninth Circuit has drastically departed from and relaxed the stringent test for Treaty abrogation.

Grant of *certiorari* is necessary to reconcile differing decisions among the Circuit Courts of Appeals regarding Standing under Article III.

INTEREST OF *AMICUS CURIAE*[1]

Amicus is the Sauk-Suiattle Indian Tribe. Petitioner is the Snoqualmie Tribe.

As a result of their shared culture, both being situated in the crests of the Cascade Mountains, numerous members of *amicus* and petitioner are eligible for enrollment in the other's tribe. Being parties to the same Treaty and their shared histories of similarly situated cultural values and geographical locations, *amicus curiae* feels compelled to support our extended family tribe.

FACTUAL BACKGROUND

The Executive branch negotiated the Treaty of Point Elliott with Snoqualmie in 1855, and Congress ratified the Treaty in 1859. Since then, the Executive has repeatedly confirmed Snoqualmie's status as a federally recognized tribal nation and Treaty signatory. Congress has never abrogated the rights reserved by the Snoqualmie in the Point Elliott Treaty.

Amicus Curiae is a signatory to the same Treaty. *Amicus* and petitioner have a shared culture. Both are situated in the Cascade Mountains. According to anthropological reports, both tribes were skilled land hunters, a major portion of whose diet was based upon the hunting of wildlife.

[1] All parties have been timely notified.

Neither tribe was officially recognized by the United States government as a tribe in 1974 and 1978, yet *amicus curiae* was held to *possess* Treaty fishing rights while appellant was *not*.

SUMMARY OF ARGUMENT

1. The precedents of this Court have uniformly confirmed that only Congress, acting pursuant to its Article II authority, possesses the power to abrogate Indian Treaty rights and that the Judiciary in the exercise of its Article III authority may only *interpret* the treaties of tribal nations. The judiciary must remain within its authority under Article III of the United States Constitution. By judicially abrogating petitioner Snoqualmie's Treaty hunting right, the district and appellate court strayed into the lane of another branch of government.

2. The equitable principles of issue preclusion or claim preclusion should not have been applied by the courts below to foreclose appellant's litigation. The matters formerly adjudicated in the litigation relied on by the district and circuit courts did not involve "the same issues or claims" as were involved in the litigation appeal.

3. The denial of intervention in the penultimate case relied upon by the Ninth Circuit was de jure a denial based upon standing. The Circuit Courts of

Appeals differ as to the standards for curing a standing defect based upon subsequent events.

STATEMENT OF THE CASE

The Snoqualmie hunted in their traditional territory since time immemorial. Situated in the Snoqualmie Valley near the crest of a mountain range that extended from Canada to what is now northern California, the Snoqualmie maintained kinship ties to tribes situated on both the eastern and western sides of what would later be named the Cascade Mountains. As stated in the 1854 Annual Report of the Commissioner of Indian Affairs:

> [U]pon the main branch of the [Sin-a-ho-mish] river is another band, not under the same rule, the Sno-qual-moos, amounting to about two hundred souls. Their chief, Pat-ka-nam, has rather an evil celebrity among the whites, and two of his brothers have been hung for their misdeeds. This band are especially connected with the Yakamas, or, as they are called on the sound, Klickatats.

Their identity as a distinct tribal entity and their continuous relationship with the federal government is well-settled:

> Documentary sources have clearly and consistently identified a body of Snoqualmie Indians living in the general vicinity of the

> Snoqualmie River Valley of western Washington from at least 1844 . . . Federal identification has continued unbroken to the present time.

See 1854 Annual Report cited *infra*. Like *amicus curiae* Sauk-Suiattle Indian Tribe, whose territory was also situated deep in the Cascade Mountains, the Snoqualmie people were "land hunters" who "were rated as one of the better hunting tribes" and who "wandered and roamed through the Cascade Mountains hunting." *Snoqualmie Tribe of Indians v. United States*, 178 Ct. Cl. 570, 590, 372 F.2d 951, 962 (1967). They "relied on hunting for a large part of their subsistence." Annual Report of the Commissioner of Indian Affairs (1854), p. 246. In this regard, the culture of the Snoqualmie is strikingly similar to that of *amicus curiae*.

On January 22, 1855, Snoqualmie Chief Pat-ka-nam signed the Treaty along with fourteen signers who were identified as representatives of Snoqualmie. In return for cession of their ancestral lands, Snoqualmie reserved the right of hunting and gathering roots and berries on open and unclaimed lands, in common with citizens of Washington Territory. In the 1950s, in the midst of another of the United States' ever-changing Indian policies known as the "Termination Era," Snoqualmie along with over 100 other tribes, lost its status as a federally-recognized tribe.

In the 1970s, while considered unrecognized and landless, Snoqualmie sought to intervene in *United States v. Washington* to exercise the off-reservation fishing rights it reserved in the Treaty. *United States v. Washington*, 476 F.Supp. 1101 (W.D. Wash. 1979) ("*Washington II*"). Applying its own criteria that exceeds the judiciary limit to determine "treaty status" for fishing rights, the district court denied Snoqualmie Treaty fishing rights because, in its view, the Snoqualmie had "intermarried with non-Indians," "took up the habits of non-Indian life [living] as citizens of the State of Washington in non-Indian communities," and because Snoqualmie was then considered unrecognized and landless. *Id.* at 1103, 1108–09. The district court made no effort to reconcile the fact that Snoqualmie lost its recognized status and that the Snoqualmie people were forced to live among non-Indians because the United States failed to set aside a reservation for the Snoqualmie as promised in the Treaty. *Id*.

Notwithstanding that in *Snoqualmie Tribe of Indians v. United States*, the United States Court of Claims recognized the Snoqualmie Tribe of Indians as an *existing organization* and has the "exclusive privilege" of presenting the Snoqualmie claim and representing the present-day Snoqualmie descendants and that the Court of Claims ultimately awarded compensation to the Snoqualmie Tribe. *Snoqualmie Tribe of Indians v. United States*, 178 Ct. Cl. 570, 582, 372 F.2d 951, 957–58 (1967). In 1979 the district court in *Washington II* ruled that Snoqualmie Tribe is *not* an entity

descended from tribal entities that were signatory to the Treaty of Point Elliott.[2]

On appeal in this case, the Ninth Circuit disagreed with the district court's reasoning, but nonetheless affirmed the outcome of *Washington II*. Although the Snoqualmie were "descended from treaty tribes," the Ninth Circuit reasoned that the district court's decision was not clearly erroneous because Snoqualmie had "intermarried with non-Indians and many [were] of mixed blood" and "ha[d] not settled in distinctively Indian residential areas," the evidence supported the district court's finding of insufficient political and cultural cohesion to allow Snoqualmie to exercise Treaty fishing rights. 641 F.2d 1368, 1373–74 (9th Cir. 1981).

The Circuit's reasoning should be relegated to this nation's distant, and less enlightened, past. Abrogating Snoqualmie's Treaty rights because its members "intermarried with non-Indians" or settled in residential areas not set aside exclusively for Indians is far too reminiscent of the rationales justifying punishing

---

[2] The ruling was based in part on a misapplication of the Charles E. Roblin enrollment data. Roblin was assigned to collect a list of claims by thousands of Indians in western Washington who had not received federal benefits derived from the 19th century treaties. Roblin wrote in his report that "the Snoqualmie were living under true Indian conditions. . . . a considerable number of full-blood Snoqualmie Indians . . . around Tolt, Falls City, and the towns in that district" were living in "Indian settlements" because "they preferred to stay in their ancient habitat." *See*, K.D. Tollefson, *The Political Survival of Landless Puget Sound Indian*, 16 American Indian Quarterly, No. 2 (Spring, 1992), pp. 213–235, Published by: University of Nebraska Press.

African Americans for marrying white people that this Court disavowed in *Loving v. Virginia*, 381 U.S. 1 (1967). Furthermore, thirty five years ago, this Court recognized the arbitrary nature of racial categories as invented social constructions and stated that "[c]lear-cut [racial] categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significant. It has been found that differences between individuals of the same race are often greater than the differences between the 'average' individuals of different races." *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987).

After the decision in *Washington II*, the United States, through proceedings before the United States Department of the Interior, formally recognized Snoqualmie in 1997. The Assistant Secretary of the U.S. Department of Interior confirmed Snoqualmie's status as a Treaty signatory and federally recognized tribe, with requisite political and cultural cohesion dating back to 1855 when Snoqualmie signed the Treaty. *See* Final Determination To Acknowledge the Snoqualmie Tribal Organization, 62 Fed. Reg. 45864-02, 45865 (Aug. 29, 1997).

In 2020, the Executive Branch again affirmed Snoqualmie's status as a Treaty signatory when it issued a decision taking a portion of Snoqualmie's ancestral homelands into trust status. Interior relied on its 1997 determination that Snoqualmie had maintained continuity from the time it signed the Treaty in 1855 to the present. Interior confirmed that:

> Snoqualmie [was] a party to the Treaty[.]

And that the Treaty "remains in effect" as to Snoqualmie, and acknowledged the United States' ongoing trust responsibility to Snoqualmie arising from the Treaty.

This case arose in 2019 when Washington State, through the Washington State Department of Fish and Wildlife, informed Snoqualmie by letter that it had determined "the Snoqualmie Tribe does not have off-reservation hunting and fishing rights under the Treaty." Snoqualmie initiated this case in response.

REASONS FOR GRANTING THE PETITION

The judicial abrogation of Snoqualmie's Treaty rights without Congressional action is an unconstitutional expansion of the Judiciary's authority in Indian affairs that conflicts with the precedent of this Court and with the authority of federal courts constrained in Article III. It also ventured into unwarranted, or *ultra vires*, intrusion into a matter confined to the authority of Congress by Article II. By denying Snoqualmie, by judicial fiat, of *all* of the rights it reserved in the Treaty, Snoqualmie now finds itself as a signatory to a Treaty with the United States which has no Treaty rights.

Moreover, the Circuit's denial of recognition of Snoqualmie's rights was premised partly upon so-called binding common law principles of former

adjudication in a case in which it was not even allowed to intervene as a party.

The federal appellate courts have reached differing results regarding whether events subsequent to an original complaint can cure a jurisdictional defect. Unless the Supreme Court accepts *certiorari* to establish a uniform rule, litigants are likely to "forum shop" as to which Circuit to bring a case within.

1. The Ninth Circuit's Decision Conflicts With The Precedent Of This Court.

a. The Ninth Circuit Radically Departed From This Court's Precedent When It Abrogated All Of Snoqualmie's Treaty Rights Absent Congressional Action

The Framers of the Constitution intentionally crafted separation of powers principles governing the United States' relations with Indian tribal nations. The well-settled precedent of this Court has long recognized two fundamental tenants of federal Indian law that control the United States' Treaty relations with Indian tribes: Congress alone has the power to *abrogate* an Indian Treaty; and, the Judiciary only has the power to *interpret* an Indian Treaty.

This Court long ago identified the requisite for abrogation of Indian Treaty rights: Congressional action. In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Court explained that Congress has the power

> to abrogate the provisions of an Indian treaty, through presumably such power will be exercised only when such circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand it, in the interest of the country and the Indians themselves, that it should do so.

Id. at 553. As stated in Snoqualmie's petition, the established precedent of this Court is clear: Indian Treaty rights remain extant unless Congress expressly abrogates those rights, and the Judiciary must preserve Indian Treaty rights unless Congress' intent to the contrary is clear and unambiguous.[3]

This Court has repeatedly affirmed that a right guaranteed by a Treaty to an Indian tribe is abrogated where Congress—and Congress alone—demonstrated a clear and plain intent to abrogate that Treaty right. *See Dion*, 476 U.S. 734.

---

[3] *See Wash. State Commercial Passenger Fishing Vessel Ass'n*, 433 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights"); *see also United States v. Dion*, 476 U.S. 734, 738–39 (1986) ("requir[ing] that Congress' intention to abrogate Indian treaty rights be clear and plain"); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) ("[w]e find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty"). There exists a strong presumption against Treaty abrogation, even going so far as to hold that a Congressional act terminating the United States' trust relationship with an Indian tribe failed to extinguish that tribe's Treaty rights. *Menominee*, 391 U.S. at 412–13.

The Ninth Circuit departed from the precedent of this Court governing the role of the Judiciary and separation of powers in Indian affairs and Indian Treaty rights by erroneously extending a holding in *United States v. Washington* applicable to off-reservation Treaty *fishing* rights under the guise of issue preclusion to abrogate *all* of Snoqualmie's Treaty rights. By failing to look to the Acts of Congress to determine whether Snoqualmie possesses Treaty hunting and gathering rights, the Ninth Circuit impermissibly usurped the role of the Legislative Branch in managing the relationship between the United States and Indian tribes—an unprecedented departure from the central tenants of Indian law that demands this Court's intervention and a clear violation of the doctrine of separation of powers.

2. The Ninth Circuit Radically Departed From This Court's Precedent Regarding Principles Of Former Adjudication When It Applied The Common Law Doctrines Of Issue Or Claim Preclusion To Bar Appellant's Treaty Hunting Rights Litigation.

This Court has consistently reprimanded "the use of offensive collateral estoppel" that "runs counter to [a] strong federal policy." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 355 (1979). The federal policy of the United States government towards Indian nations is founded upon the solemn obligation to adhere by Treaty rights. *That* too is a "strong federal policy." A tribe need not have federal recognition to establish

that they are the beneficiary of a Treaty. *Greene v. Babbitt*, 64 F.3d 1266, 1270 (1995). It is sufficient that a group establish that they have preserved an *organized* tribal structure that it can trace back to the Treaty. *United States v. Oregon*, 29 F.3d 481, 484 (9th Cir. 1994).

United States v. Washington was a civil action brought by the United States to determine the scope and extent of Treaty *fishing* rights. *United States v. Washington*, 384 F.Supp. 312, 330 (W.D. Wash. 1974) ("The ultimate objective of this decision is to determine . . . treaty right fishing."); *see also Washington II*, 641 F.2d at 1370. When this Court has taken up *United States v. Washington* previously, it has never applied the case to anything other than off-reservation Treaty fishing rights. The narrow boundaries on the scope of that case is easily discernible from the Government's 1970 Complaint initiating the case (C-70-9213, docket entry 1).

The general rule of this Court is that issue preclusion attaches only when an issue is "actually litigated" and determined by a valid and final judgment. *Arizona v. California*, 530 U.S. 392, 397 (2000). Unlike the off-reservation *fishing* rights in *United States v. Washington*, the hunting and gathering rights guaranteed by the Stevens Treaties have never been adjudicated. *See*, *e.g.*, *Skokomish Indian Tribe v. Goldmark*, 994 F.Supp.2d 1168, 1174 (W.D. Wash. 2014) (noting that "the scope of the hunting and gathering provision has not been previously litigated in federal court"); *Skokomish Indian Tribe v. Forsman*, 738 Fed. Appx.

406, 408 (9th Cir. 2018) ("No plausible reading of [*Washington I*] or subsequent proceedings and appeals to this Court supports the conclusion that the [*United States v. Washington*] litigation decided anything other than treaty fishing rights.").

This Court has considered two dispositive factors when determining the offensive use of issue preclusion: (1) "whether controlling facts or legal principles have changed significantly since the original judgment, and (2) whether "other special circumstances warrant an exception to the normal rules of preclusion." *Montana v. United States*, 440 U.S. 147, 155 (1979).

As to whether controlling facts or legal principles have changed significantly, at the time the district court in 1979 concluded, based on little information, that Snoqualmie was not a successor to those who signed the Treaty, Snoqualmie had not been given official recognition as an Indian tribe by the U.S. Since then, Snoqualmie—following an extensive federal administrative process—has received federal recognition as the successor in interest to the Snoqualmie who signed the Treaty and that Snoqualmie operated continuously as a distinct tribal identity. It cannot be said that this change of status is not a significant change considering the burdens imposed by the federal acknowledgment process' rigorous research and documentation requirements on tribes and the degree in which the state infringes upon political sovereignty of unrecognized tribes. Additionally, in contemporary society, describing tribal persons who intermarry those

of another race as having lost their tribal identity would certainly be labeled discriminatory and against public policy.[4] Many tribes have no such "blood quantum" requirements for tribal membership but rather base it upon descendancy.[5]

Issue preclusion is just a discretionary, common law doctrine. *See* Restatement (Second) of Judgments §28, cmt. j (1982). This Court held, in *Lucky Brand Dungrees, Inc. v. Marcel Fashions Group*, No. 18-1086 (May 14, 2020), that principles of former adjudication referred to as "defense preclusion"—an aspect of *res judicata* which includes both issue preclusion and claim preclusion—could not prevent a litigant from presenting new evidence in support of its defense if the matter did not share a "common nucleus of operative fact[s]" for preclusion to apply, *citing* the Restatement (Second) of Judgments §24, Comment b, p. 199:

> Put simply, the two suits here were grounded on different conduct, involving different marks, occurring at different times. They thus did not share a "common nucleus of operative facts."

---

[4] Federal recognition or formal enrollment in an Indian tribe "has not been held to be an absolute requirement for federal jurisdiction." *United States v. Antelope*, 430 U.S. 641, 647 n.7 (1977). It is, however, "the common evidentiary means of establishing Indian status, but it is not the only means, nor is it necessarily determinative." *United States v. Torres*, 733 F.2d 449, 455 (7th Cir. 1984); *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), *cert. denied*, 444 U.S. 859 (1979).

[5] *See*, *e.g.*, Constitution and Bylaws of the Puyallup Tribe. https://www.codepublishing.com/WA/PuyallupTribe/#!/PuyallupTribeCN.html.

As stated by this Court, in *Lucky Brand*, "claims to relief may be the same for the purposes of claim preclusion if, among other things, 'a different judgment in the second action would impair or destroy rights or interests established by the judgment entered in the first action.' " *Id.*, *citing* Wright & Miller §4407. This Court went on to state that:

> Not only that, but the complained-of conduct in the 2011 Action occurred after the conclusion of the 2005 Action. Claim preclusion generally "does not bar claims that are predicated on events that postdate the filing of the initial complaint." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016) (slip op., at 12) (internal quotation marks omitted); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 327–328 (1955) (holding that two suits were not "based on the same cause of action," because "[t]he conduct presently complained of was all subsequent to" the prior judgment and it "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case").

Such an analysis perfectly fits the situation petitioner Snoqualmie finds itself it. Its unsuccessful attempt to intervene in a 1970 Treaty *fishing rights* case was denied and, subsequently, 27 years later the United States government recognized petitioner as a tribe and Treaty signatory. Then, 22 years after that, Snoqualmie sought to exercise Treaty *hunting rights* reserved in the Treaty its leaders signed in 1855 and

the State of Washington determined on its own that Snoqualmie lacked Treaty rights and so informed Snoqualmie. This resulted in the need for Snoqualmie to initiate its litigation.

The exercise of hunting rights over 40 years after the previous fishing rights litigation to which it was not even allowed to intervene, and over 30 years after federal recognition, manifestly does not involve a common nucleus of operative facts for *res judicata* purposes—nor could Snoqualmie even have raised the issue of its hunting rights in the Treaty fishing rights litigation because the *scope* of the litigation was confined exclusively to the rights to fish of tribal parties.

One of the primary purposes of the Constitutional Convention was to transfer authority over both Indian affairs and foreign affairs from the states to the federal government as this was the primary failure of the Articles of Confederation. There was a need for centralized authority. Advocates began to argue for a new constitution that would, among other aims, remedy state interference in Indian affairs. *See*, *e.g.*, James Madison, *Vices of the Political System of the United States*, in 9 The Papers of James Madison 345, 348 (Robert A. Rutland & William M.E. Rachal eds. 1975) (enumerating "Encroachments by the States on the federal authority"—the very first of which was "the wars and Treaties of Georgia with the Indians.") That need resulted, among other things, in placing authority over Indian affairs, including ratification or abrogation of treaties, in the hands of Congress per Art. I.

Authority to determine such matters was not reserved to the States. U.S. Const. Am. X. Nor was that authority placed with the judiciary in Article III. Snoqualmie's need to initiate litigation arose from the very mischief that failed the Articles of Confederation—a state declaring itself the arbiter of whether the Snoqualmie possessed Treaty hunting rights—and now, a Judiciary asserting itself in a role which the Constitution expressly conferred upon Congress. The common law principle of issue preclusion cannot be substituted for an act of Congress as a backhanded way of abrogating rights reserved by Treaty.

3. The Supreme Court, In The Exercise Of Its Supervisory Authority Over The District And Circuit Courts Should Accept *Certiorari* Review For The Purpose Of Correcting The Ninth Circuit's Erroneous Melding Of The Common Law Principle Of Issue Preclusion With The Article III Requirements Of Standing. The Circuit Courts Of Appeals Have Differed On This Issue.

Standing to sue, or *locus standi*, is the requirement that a person who brings a suit be a proper party to request adjudication of the particular issue involved. The threshold question in every federal case is to determine the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether a prospective plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction

and justify exercise of the court's remedial powers. *Warth v. Seldin*, 422 U.S. 490 (1975), *citing Baker v. Carr*, 369 U.S. 186 (1962).

In *Warth v. Seldin*, "various organizations and individuals" brought suit in 1972 in the United States District Court for the Western District of New York against the town of Penfield alleging that the town's zoning ordinance was discriminatory. In the 1979 case relied upon by the district and circuit court here as *res judicata*, the Snoqualmie Tribe sought intervention in the United States District Court for the Western District of Washington in a lawsuit against the State of Washington in which the United States and tribes who had previously been allowed to intervene alleged that Washington State took enforcement action violative of Treaty fishing rights.

Although certain plaintiffs in *Warth* were members of ethnic or racial minority groups and home building companies, standing to maintain the suit was denied. The Court noted that:

> Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute . . . No such statute is applicable here.

Id., *citing Linda R. S. v. Richard D.*, 410 U.S. 614 (1973). The U.S. complaint in 1970 *was* pursuant to a statute conferring jurisdiction, 28 U.S.C. §1345. Similarly, when the tribes themselves named in the

complaint moved to intervene, their participation was premised upon a statute, 28 U.S.C. §1362:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band *with a governing body duly recognized by the Secretary of the Interior*, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1362 (emphasis added). Just as standing was the basis for denial of intervention in *Warth*, in 1978 the US district court denied intervention to Snoqualmie:

> 4. Only tribes *recognized as Indian political bodies by the United States* may possess and exercise the tribal fishing rights secured and protected by the treaties of the United States.

476 F.Supp. 1111 (emphasis added). However, the district court also concluded that:

> 6. None of the Intervenor entities, Duwamish, Samish, Snohomish, Snoqualmie, and Steilacoom Tribes herein, is *at this time* a treaty tribe in the political sense within the meaning of Final Decision No. I and the related Orders of the Court in this case.
>
> 7. None of the Intervenor entities, Duwamish, Samish, Snohomish, Snoqualmie, and Steilacoom Tribes herein, *presently* holds for itself or its members fishing rights secured by any of the Stevens treaties identified in Final Decision No. 1 in this case.

Id. (emphasis added). On appeal, the Ninth Circuit openly admitted that:

> The district court's statement that federal nonrecognition is decisive, together with its listing of other purported considerations, *makes it difficult for us to determine the precise basis for the court's holding* that the tribes may not exercise treaty rights.

641 F.2d 1368 (9th Cir. 1981) (emphasis added). In 2010, the Ninth Circuit in a separate appeal held that "newly recognized tribes" *may* present a claim of Treaty rights not yet adjudicated by introducing its factual evidence anew. *United States v. Washington*, 593 F.3d 790, 801 (9th Cir. 2010) (*en banc*) ("*Washington IV*"). That *en banc* Court's 2010 ruling essentially removed the bar of issue preclusion altogether for newly recognized tribes seeking to litigate Treaty rights not yet adjudicated such as Snoqualmie.

From all this the only reasonable conclusion is that, although it may have been "difficult to determine the precise basis for Honorable Judge Boldt's 1979 decision," the 1979 denial of intervention by Snoqualmie in the case he presided over was based upon Snoqualmie's lack of standing at that present time.

The current case poses an elementary but constitutionally salient question regarding standing: When a plaintiff lacks the Article III standing at the time of an *initial complaint* is filed, can subsequent events cure the defect by filing a supplemental pleading or a new lawsuit? Although the nation's highest court is yet

to rule on this issue, an increasing number of the federal appellate courts have begun applying different procedural remedies through which events subsequent to filing the original complaint can cure a jurisdictional defect.[6]

For example, the Ninth Circuit held in *Northstar Fin. Advisors, Inc. v. Schwab Invs.*, that the district court was correct in allowing the plaintiff to file a supplemented complaint to cure the lack of standing in the original complaint. The court reasoned that although the Federal Rules of Civil Procedure Rule 15(d) is phrased in terms of "correcting a deficient statement of claim or a defense," the rule is applicable to curing other jurisdictional defects, including defects of standing. *Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 779 F.3d 1036 1044 (9th Cir. 2015). The Ninth Circuit relied in part to this Court's ruling that "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, federal courts generally look to the amended complaint to determine jurisdiction." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 460 (2007).

The First Circuit also ruled in *United States ex rel. Gadbois v. PharMerica Corp*. that "critical [subsequent] developments occurred [in the case] during the pendency of that appeal" are important factors in

---

[6] R. Skowron, *Whether Events After the Filing of an Initial Complaint May Cure an Article III Standing Defect: The D.C. Circuit's Approach*, 61 Boston College L. Rev., Vol. 61, article 19 (April 28, 2020). https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3863&context=bclr.

allowing the plaintiff to cure the standing defect and alleviating "difficulties of commencing a new action." *United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 6 (1st Cir. 2015). The court also agreed with the Ninth Circuit's interpretation of Rule 15(d) as an appropriate mechanism for pleading "newly arising facts necessary to demonstrate standing." *Id*. at 5.

In contrast, the Seventh, Eighth and Tenth Circuits do not apply Rule 15(d) as broadly as the First and Ninth Circuits do and hold that the only way a plaintiff can cure a standing defect existing at the filing of an initial complaint is by filing a new lawsuit, which, the D.C. Circuit and the First Circuit have criticized as "the unnecessary hassle" and exposing a plaintiff to "the vagaries of filing a new action." *Scahill v. District of Columbia*, 439 U.S. App. D.C. 69, 76, 909 F.3d 1177, 1184 (2018); *PharMerica Corp.*, 809 F.3d 1, 6 (1st Cir. 2015). For instance, in *Mink v. Suthers*, the Tenth Circuit determined that standing is determined when the complaint is first filed, "not to subsequent events." *Mink v. Suthers*, 482 F.3d 1244, 1253–54 (10th Cir. 2007). In *Park v. Forest Service of U.S.*, the Eighth Circuit also declared that "it is not enough for [the plaintiff] to attempt to satisfy the requirements of standing as the case progresses." *Tracie Park v. Forest Serv. of the United States*, 205 F.3d 1034, 1038 (8th Cir. 2000).

The split approaches of circuit courts in curing the standing defect urgently necessitates this Court to establish firm guidance on curing the constitutional standing defect to ensure that constitutional rights to

bring a claim and redress injury are not just empty promises but actually be enforced in the court of law. The 1979 district court decision denying Snoqualmie intervention that was so heavily relied upon by the district and circuit court in this appeal was clearly premised upon the district court's *sub silentio* conclusion that Snoqualmie at that time lacked standing. *Certiorari* should be granted to resolve this disagreement among the Circuit courts of appeals as to whether subsequent events such as Snoqualmie's recognition as a Treaty signatory, confirmation of a reservation and federal recognition cure a prior lack of standing.

4. The Questions Presented Are Of Exceptional Importance

a. The constitutional role of the Judiciary, Legislative and Executive Branches in the administration of Indian affairs is a federal question of exceptional importance, particularly in matters involving Indian Treaty rights. The Ninth Circuit's judicial overreach ignores fundamental separation of powers principles. The Ninth Circuit's nullification of all Snoqualmie's reserved Treaty rights through the discretionary common law doctrine of issue preclusion cannot be reconciled with the proper role of the Judiciary in our system of government.

To leave the Ninth Circuit's judicial abrogation of all Snoqualmie's Treaty rights unchecked "would be practically to recognize an authority in the courts . . . to determine question of mere policy in the treatment

of the Indians which it is the function alone of the legislative branch of the Government to determine." *United States v. Choctaw Nation*, 179 U.S. 494, 535 (1900).

The Court should maintain the course it long ago charted for the Judiciary based on the Constitution and separation of powers regarding Indian affairs by rejecting the Ninth Circuit's attempt to amend and refuse to carry out the intent of Snoqualmie and United States as set forth in the Treaty.

It is therefore imperative this Court exercise its authority to ensure that the standard of Congressional action remains the only condition that justifies abrogation of Indian Treaty rights.

b. Finally, although the Treaties in the Pacific Northwest are perhaps unique in their reservations of off-reservation usufructuary rights, the issue of who, and how, rights reserved in Indian treaties may be abrogated is of exceptional importance to the 500+ Tribal nations in this country. As stated in *United States v. Winans*, 198 U.S. 371 (1905), the rights reserved in solemn treaties in the Pacific Northwest:

> were not much less necessary to the existence of the Indians than the atmosphere they breathed.

198 U.S. at 381. The right to harvest game is central to tribal nations, not only for nutritional purposes but for ceremonial purposes as well. *See*, *e.g.*, *Frank v. Alaska*, 604 P. 2d 1068 (Alaska 1979) (harvest of Moose by

Alaskan Native for ceremonial purposes protected by First Amendment); *State v. Miller*, 102 Wn. 2d 678 (1984) ("Petitioners also claimed that they were guaranteed the right to take this one elk for a religious ceremony under the free exercise clause.").

Treaty rights are property rights. *Winans*, *supra* at 381. The Snoqualmie, by signing the Treaty of Point Elliott, reserved this usufructuary property right to hunt on open and unclaimed lands in perpetuity. The State of Washington and the judicial branch, without Congressional involvement extinguished this right based upon archaic notions regarding the loss of tribal identity and common law principles of issue preclusion which ought not to be used to abrogate a Treaty which is a Supreme Law of this nation in a case arising under changed circumstances over 40 years later involving rights which could not even have been asserted in that former litigation.

That is why this case is of exceptional importance.

CONCLUSION

The Court should not allow the Ninth Circuit's ruling to stand. This Court should therefore grant *certiorari* to correct the course of Ninth Circuit's decision, and to restore to the Treaty hunting and gathering rights to Snoqualmie people reserved.

For the foregoing reasons, a writ of *certiorari* should issue.

Respectfully submitted,

JACK WARREN FIANDER,
General Counsel
SAUK-SUIATTLE INDIAN TRIBE
5318 Chief Brown Lane
Darrington, WA 98241
(360) 436-0139
(509) 969-4436
towtnuklaw@msn.com