No. 17-269

In The
Supreme Court of the United States

STATE OF WASHINGTON,
Petitioner,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the "right of taking fish, at all usual and accustomed grounds and stations *** in common with all citizens," reserved by respondent Indian Tribes in the Stevens Treaties, *e.g.*, Treaty of Medicine Creek, U.S.-Nisqually, art. III, Dec. 26, 1854, 10 Stat. 1133, imposes a duty on petitioner to refrain from building or maintaining culverts that directly block passage of a large number of anadromous fish to and from those grounds and that significantly diminish fish populations available for tribal harvest to that the Tribes cannot sustain a livelihood from their fisheries.

2. Whether the court of appeals correctly declined to apply the doctrines of waiver or laches to bar this suit, which addresses a treaty reserving rights and resources that pre-date the State, the scope of which has been in dispute for more than 100 years.

3. Whether the court of appeals correctly held that the district court did not abuse its discretion in enjoining petitioner to provide fish passage by addressing barrier culverts on a reasonable schedule necessary to ensure that petitioner acts expeditiously to remedy a violation of tribal treaty rights.

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INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation (PLF) is the nation's oldest and largest nonprofit legal foundation that seeks to protect the right of private property and related liberties in courts throughout the country. In executing this mission, PLF and its attorneys have been frequent participants in environmental litigation. PLF seeks to encourage courts to adopt a balanced approach to environmental law, one which avoids interpretations that unreasonably elevate environmental concerns over other important values. To that end, PLF participated as amicus curiae in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* (*Fishing Vessel*), 443 U.S. 658, 661 (1979), arguing that the Stevens Treaties, which are here again at issue, should be interpreted so as to respect the constitutional right of non-Indian fishermen to earn a living. Br. Amicus Curiae of Pac. Legal Found. in Support of Pet'rs State of Washington, *et al.*, at 18-25, *Fishing Vessel*, 443 U.S. 658 (1978) (Nos. 77-983, 78-119, 78-139), 1978 WL 206841.

Directly relevant to the argument advanced in this brief, PLF participated as amicus curiae in *National Association of Home Builders (NAHB) v.*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

Defenders of Wildlife, 551 U.S. 644 (2007). In *NAHB*, the Court held that the Endangered Species Act should not be interpreted as a super-statute which impliedly amends all existing federal obligations to re-orient them toward environmental purposes above all others. *See id.* at 662-64, 666. PLF is interested in this case because the Ninth Circuit's construction of the Stevens Treaties makes the same interpretive errors that PLF opposed in *NAHB* and which the Court there rejected.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1854 and 1855, Isaac Stevens, the United States Superintendent of Indian Affairs and Governor of the Washington Territory, negotiated several treaties with the Indian tribes dwelling around Puget Sound. App. to Pet. Cert. 68a. These eponymous Stevens Treaties set forth the federal government's responsibilities to the Tribes, including the recognition of "[t]he right of taking fish, at all usual and accustomed grounds and stations . . . together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed land." *See* J.A. 788a (Treaty of Medicine Creek).[2]

The Treaties have given rise to more than a century of court battles. In 1905, this Court held that the Treaties forbid non-Indian landowners from keeping Indians out of their traditional fishing places. *United States v. Winans*, 198 U.S. 371 (1905). Over the next several decades, the Court held that the

[2] Identical, or almost identical, language is included in each of the other treaties.

Treaties also forbid the State of Washington from imposing fishing regulations and fees on the Tribes unless necessary for the conservation of fish, and only then in areas outside a reservation. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Dep't of Game of Washington v. Puyallup Tribe*, 414 U.S. 44 (1973). Later, in *Fishing Vessel*, the Court ruled that the Treaties guarantee the right of Indians to take enough fish to satisfy a moderate standard of living, up to 50% of the annual harvest. *Fishing Vessel*, 443 U.S. at 686-87.

With the turn of a new century, the litigation continued unabated. In 2001, the federal government, joined by nearly two dozen Indian tribes, filed a new "sub-proceeding" in the still ongoing *Fishing Vessel* lawsuit. App. to Pet. Cert. 68a-69a. They alleged that the Treaties not only give the Tribes the right to seek up to 50% of the salmon runs, they also preclude non-Indians from taking actions that reduce the overall abundance of salmon to below the treaty-guaranteed amount. *Id.* Because state-owned and maintained road culverts[3] allegedly reduce salmon abundance to the point that the Tribes cannot obtain a moderate living therefrom, the federal government and the

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[3] Culverts are structures that allow streams to pass under roads, and range from simple pipes to "stream-simulation" designs that mimic natural stream conditions. Washington began building these culverts in significant numbers approximately a century ago, following Congressional invitation to participate in federal-aid highway programs. *See* Act of July 11, 1916, ch. 241, 39 Stat. 355; 1917 Wash. Sess. Laws, page no. 260 (codified as amended Wash. Rev. Code § 47.04.050). The federal programs provided the states with specified designs for highway culverts and distributed engineering guidance to state highway departments. David R. Levin, *Federal Aspects of the Interstate Highway Program*, 38 Neb. L. Rev. 377, 393-96 (1959).

Tribes argued that the Treaties require the culverts' removal. *Id.*

The district court agreed, ruling that the culverts must be replaced or suitably enhanced, despite the potential billion-dollar price tag to be paid by Washington (and ultimately the state's taxpayers). *Id.*

The Ninth Circuit affirmed, the panel holding that the culverts violate Washington's obligations to the Tribes under the Treaties' fishing clause. *Id.* at 117a-118a. In so holding, the court rejected arguments regarding estoppel, sovereign immunity, federalism, and cost-benefit analysis. *See id.* Although the court gave lip-service to the desire to avoid construing the Treaties to impose on Washington and its non-Indian communities an "environmental servitude"[4] in favor of Indian interests, the panel decision identifies no logical stopping point to its rationale that would avoid such a servitude. *Id.* at 30a-31a, 41a.

In *NAHB*, this Court rejected an analogous—and equally erroneous—interpretation of the Endangered Species Act, one that would have converted that Act into a super-statute, impliedly amending all federal agency obligations to serve environmental goals above any others. *See NAHB*, 551 U.S. at 662-64, 666. The Court instead adopted a much more balanced interpretation, according to which the relevant

[4] The Ninth Circuit coined the term "environmental servitude" in an earlier proceeding in this case. *See United States v. Washington*, 694 F.2d 1374, 1382 (9th Cir. 1982). The court used it to describe what would happen if the Stevens Treaties were interpreted too broadly—ironically, precisely what the decision below does.

Endangered Species Act obligation would apply only to actions for which an agency has discretion to modify so as to protect species and their habitat. Driven by a markedly different attitude, the Ninth Circuit construed the Stevens Treaties in the strict manner that *NAHB* eschews—to preclude *any* action that would have the effect (regardless of intention) of depressing salmon abundance in a way prejudicial to the Tribes' fishing rights.

Drawing a parallel between *NAHB* and this case, the Court should reject the Ninth Circuit's skewed interpretation and instead adopt a construction of the Treaties that would limit fishing rights liability to those actions *intended* to reduce salmon abundance. This balanced approach, similar to that adopted in *NAHB*, will respect Indian fishing rights. But critically, it also will respect other values, such as the securing to all citizens—Indian and non-Indian alike—safe and efficiently maintained public thoroughfares.

ARGUMENT

I.

In *National Association of Home Builders (NAHB) v. Defenders of Wildlife*, the Court Rejected a "Super-Statute" Interpretation of the Endangered Species Act Because Such an Interpretation Would Have Broadened the Act to an Absurd Reach

In *NAHB*, a coalition of environmental groups challenged the decision of the Environmental Protection Agency to transfer permitting authority to the State of Arizona under the Clean Water Act's National Pollutant Discharge Elimination System, 33

U.S.C. § 1342(b). *NAHB*, 551 U.S. at 649. The groups contested the transfer on the ground that the Endangered Species Act barred EPA from transferring permitting authority without a prior determination of the transfer's anticipated effects on protected species and their habitat. *Id.* The groups relied on the Act's Section 7(a)(2), which provides that federal agencies "shall . . . insure" that their actions do not jeopardize the continued existence of protected species, or destroy or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2). To fulfill that obligation, Section 7(a)(2) requires agencies first to consult with designated federal wildlife officials to determine the likely effects of their actions on species and habitat. *See id.* In *NAHB*, EPA argued that such consultation was inappropriate to the question of transferring permitting authority, because the Clean Water Act provides an exhaustive list of criteria to be considered when making that decision, and "effects to endangered species" is not one of them. *Id.*

The Ninth Circuit disagreed. *See Defenders of Wildlife v. U.S. Environmental Protection Agency*, 420 F.3d 946, 979 (9th Cir. 2005), *rev'd sub nom. National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). The court held that, notwithstanding the Clean Water Act's seemingly exclusive criteria, the Endangered Species Act requires EPA to insure that permitting transfers do not jeopardize protected species. *See* 420 F.3d at 971. That conclusion followed, in the Ninth Circuit's view, for two principal reasons. First, federal agencies cannot effectively "insure" that their actions will avoid jeopardy to species unless "the authority conferred on agencies to protect listed species goes beyond that conferred by agencies' own governing statutes." *Id.* at 964. Second,

the Clean Water Act and the Endangered Species Act share "complementary objectives," *see id*. at 967, such that compliance with the former "cannot relieve the EPA of its independent obligations under" the latter, *id*. at 971. Thus, the *NAHB* panel's construction of the Endangered Species Act would, as ably described by the principal dissent from the denial of rehearing en banc, "modify not only EPA's obligation under the [Clean Water Act], but *every* categorical mandate applicable to *every* federal agency." *Defenders of Wildlife v. U.S. E.P.A.*, 450 F.3d 394, 399 n.4 (9th Cir. 2006) (Kozinski, J., dissenting from denial of rehearing en banc).

This Court granted review and reversed. Rejecting the Ninth Circuit's super-statute construction, the Court ruled that the Endangered Species Act does not apply to EPA's decision to transfer Clean Water Act permitting authority to the states because that process is governed by the Clean Water Act's exclusive criteria. *NAHB*, 551 U.S. at 673. To hold otherwise would result in the Endangered Species Act's partial overriding of every federal statute that mandates agency action that may affect protected species and their habitat. *See id*. at 663-64. In particular, adding an endangered species criterion to the Clean Water Act permitting transfer process, as the Ninth Circuit's decision purported to do, would impermissibly rewrite the statute, a result the Court held to be unreasonable. *See id*. at 666-67, 669. In contrast, the reasonable construction that the Court ultimately adopted—conditioning application of Section 7(a)(2) on the presence of agency discretion—would strike a better balance between the two statutes, because it would "guide agencies' existing discretionary authority [without] overrid[ing] express

statutory mandates." *Id.* at 666. Thus, the Court's reasonable interpretation of the Endangered Species Act appropriately balanced that statute's particular environmental purposes with the sometimes countervailing policies embodied in the Clean Water Act and other federal statutes.

II.

The Ninth Circuit's Construction of the Stevens Treaties Commits the Same Interpretive Errors That This Court Rejected in *NAHB*

The Ninth Circuit's construction of the Stevens Treaties imposes a de facto environmental servitude on Treaty areas, such that all public and private actions therein must be re-calibrated to avoid harming salmon populations. In *NAHB*, the Ninth Circuit construed the Endangered Species Act to impose a similar environmental servitude on all federal agency action. Just as this Court rejected that extravagant interpretation in *NAHB*, 551 U.S. at 666-67, so too should the Court reject its re-deployment here.

First, just like the lower court ruling in *NAHB*, the ruling below does not identify any logical stopping point to the environmental duties it creates. By failing to cabin those obligations, the Ninth Circuit's decision provides a broad basis for the judicial creation of environmental duties to govern any activity that affects wildlife or habitat in areas governed by similar Indian treaties. *See* App. to Pet. Cert. 10a-11a. For example, the decision could be used to regulate impacts to any traditionally hunted (and Indian-treaty-protected) animal, including deer, elk, bears, and birds. *Id.* at 28a-29a. Those impacts

could be caused by run-of-the-mill productive activities, such as dams, logging, grazing, driving, and construction. *Id.* As Judge O'Scannlain frankly explained in his dissent from denial of rehearing en banc, "the panel's decision opens a backdoor to a whole host of potential federal environmental regulation-making." *Id.* at 31a.

Second, just like the lower court ruling in *NAHB*, the decision below makes the critical error of absolutizing the Treaties' fishing clause. The Ninth Circuit's decision in *NAHB* failed to acknowledge the legitimate reasons as to why Congress would not have wanted EPA to take endangered species impacts into account when deciding whether to transfer Clean Water Act permitting authority to the states. *See Defenders of Wildlife v. U.S. E.P.A.*, 450 F.3d at 402 & n.2 (Kleinfeld, J., dissenting from denial of rehearing en banc). So too, the decision below fails to take account of competing concerns that would handily justify a less sweeping interpretation of the Treaties' fishing clause. For example, the decision gives little attention to the impacts to state and local governments' budgets and infrastructure. In just this case alone, the district court's culvert order will cost Washington hundreds of millions of dollars (if not more) to implement. *See* App. to Pet. Cert. at 118a-119a. Yet the panel decision affirming that order fails to take into account more cost-effective methods of improving salmon abundance, such as trucking fish above any culvert blockages. *Id.* at 31a-32a; Kat Kerlin, *Disconnected Salmon: Catching a Ride Over Dams*, UC Davis (Sept. 21, 2017).[5]

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[5] *Available at* https://www.ucdavis.edu/news/disconnected-salmon-catching-ride-over-dams/.

And third, just like the lower court ruling in *NAHB*, the decision below raises an immense risk of increased litigation. Under the Endangered Species Act, private parties may bring citizen suits to challenge federal agencies' failure to abide by their consultation obligations, *see* 16 U.S.C. § 1540(g)(1)(A)—indeed, *NAHB* started off in part as just such an action, *see Defenders of Wildlife*, 420 F.3d at 955. Had the Ninth Circuit's decision in that case been upheld, the litigation floodgates would have been opened by lawsuits challenging all manner of federal activity that had undergone no consultation. Similarly, upholding the Ninth Circuit's overbroad construction of the Stevens Treaties would result in a significant increase in liability as well as lawsuits. By failing to establish which human-caused reductions in fish populations would trigger liability, the panel decision reveals to enterprising litigants a treasure trove of potential treaty rights claims. App. to Pet. Cert. 10a-11a, 19a. Nor is there any reason to think that such claims would be directed toward government entities only. *See Fishing Vessel*, 443 U.S. at 692 n.32 (non-party fishermen may be subject to the district court's enforcement of the Treaties' fishery clause).

III.

The Court's Resolution of the Interpretive Question in *NAHB* Should Guide the Court's Analysis Here

The parallels discussed in the preceding section demonstrate that the errors which led this Court to reverse in *NAHB* should lead the Court to the same outcome here. Similarly, the reasonable construction that this Court adopted in *NAHB*—which balances endangered species protection with other worthy federal objectives—should guide the Court's analysis of the Stevens Treaties. In *NAHB*, the Court harmonized the Endangered Species Act with the Clean Water Act's permitting transfer provision—as well as with other categorical obligations—by construing the Endangered Species Act's consultation provision to apply only to actions over which federal agencies have some measure of discretion. *NAHB*, 551 U.S. at 673.

Similarly here, the Court can reasonably balance Tribal and non-Tribal interests by construing the Treaties' fishing clause to prohibit only those actions that have the primary purpose of reducing salmon abundance. Such a construction would avert the lower courts' anti-culvert campaign, as even the federal government and the Tribes acknowledge that Washington's road construction and maintenance program is not intended to frustrate the Tribes' fishery rights.[6] *See* App. to Pet. Cert. 95a, 27a-28a

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[6] In fact, Washington recognizes that salmon populations are an important resource and has sought to protect salmon through various state programs. *See generally* Washington State Recreation and Conservation Office, *Washington's Efforts to*

n.8. Yet, while respecting the interests of non-Indians, keying the Treaties' fishing clause to "intent" would preserve substantial protection for the Tribes. For example, nothing in this interpretation would alter the Court's prior rulings that forbid Washington and other entities from blocking access to traditional fishing grounds, *see Winans*, 198 U.S. at 382, or from enforcing unduly burdensome fish and game laws against the Tribes, s*ee Tulee*, 315 U.S. at 684-85. Because Washington's program of construction and maintenance of road culverts is not intended to reduce salmon abundance, its implementation cannot violate the Stevens Treaties. This conclusion respects the Tribes' interests in a healthy salmon fishery, while vindicating the interests of all Washington citizens—Indian and non-Indian alike—in safe and efficiently maintained roadways.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Respectfully submitted,

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Recover Salmon Species, https://www.rco.wa.gov/salmon_recovery/efforts.shtml (last visited Feb. 21, 2018).