No. 17-532

In the
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

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

BRIEF OF AMICI CURIAE INDIAN LAW PROFESSORS IN SUPPORT OF PETITIONER

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September 11, 2018

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INTEREST OF AMICI CURIAE[1]

Amici are professors and scholars of Indian law listed in the APPENDIX. Amici submit this brief to assist the Court with the proper application of its precedent relevant to the Supremacy Clause of the United States Constitution, treaties between the United States and Indian tribes, and the Court's standards for interpreting those treaties.

SUMMARY OF THE ARGUMENT

This Court consistently applies well-established principles of interpretation to treaties between the United States and Indian tribes. Those interpretive standards protect important aspects of both the United States' constitutional structure and tribal identity. The decision below by the Wyoming District Court did not adhere to those time-honored rules of interpretation and is inconsistent with this Court's precedent. Therefore, the Court must reverse that decision.

Prior to 1868, Crow Tribal territory, at least as recognized by the United States in the 1851 Fort Laramie Treaty, encompassed nearly 40 million acres, most of which was located in what became Montana and Wyoming. First Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749 (reprinted in 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 594-595 (1904)). In

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

1868, the Crow Tribe ("Tribe") ceded more than three-quarters of that land, over 30 million acres, to the United States via a subsequent treaty. *Crow Tribe of Indians v. United States*, 284 F.2d 361, 362 (Ct. Cl. 1960). Importantly, however, in exchange for that cession and in order to protect access to game they needed to survive, the Tribe reserved the essential right to utilize traditional hunting, fishing, and gathering sites located outside their reservation. Specifically, the 1868 Treaty reserved to the Tribe the "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." Treaty with the Crows, art. 4, May 7, 1868, 15 Stat. 649, 650.

Treaties are the supreme law of the land, U.S. Const. art. VI, § 1, cl. 2, and they remain valid unless and until Congress clearly expresses its intent to abrogate them. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) ("*Mille Lacs*"). ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." (citations omitted)); *see also United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346, 353-54 (1941) (Congress must be "plain and unambiguous" or "clear and plain" when abrogating tribal property rights.). Additional long-standing principles of treaty interpretation developed and applied by the Court require that treaties, along with any ambiguous language therein, be construed as the Indians would have understood them and be liberally interpreted in favor of the Indians. *See*, *e.g.*, *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Bryan v. Itasca Cty.*, 426 U.S. 373, 392 (1976); *Menominee Tribe*

of Indians v. United States, 391 U.S. 404, 412-13 (1968) (declining "to construe the [Menominee] Termination Act as a backhanded way" to destroy the hunting and fishing rights, described by the Court as "property rights," reserved by the Tribe in an earlier treaty).

The Court's long tradition of applying these interpretive standards ensures that government power is based on the consent of the governed and protects important structural aspects of federal Indian law and jurisprudence. *See*, *e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 551-57 (1832) (interpreting the Treaty of Hopewell in view of congressional policy to "treat [tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate"). Following that tradition, which culminated most recently in the Court's 1999 *Mille Lacs* decision, provides clear and straightforward answers to the questions presented in this case.

Like other Indian nations, the Crow Tribe formally associated with the United States through treaties that cemented a consensual, intergovernmental relationship. The Treaty of 1868 memorialized certain terms of that agreement, including the Tribe's right to continue to "hunt on the unoccupied lands of the United States." Treaty with the Crows, art. 4, May 7, 1868, 15 Stat. 649, 650. No subsequent treaties or statutes, including the Act admitting Wyoming to the Union, demonstrate any clear or unambiguous statement that Congress intended to terminate that right. Therefore, when properly applied, this Court's standards for Indian treaty interpretation confirm the Crow Tribe's

ongoing right to hunt in the Bighorn National Forest in Wyoming.

The decisions of the Wyoming courts below ignored these judicially recognized legal principles and, instead, relied exclusively on the flawed reasoning of a 1995 United States Court of Appeals for the Tenth Circuit case, *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, and a United States Supreme Court case from 1896, *Ward v. Race Horse*, 163 U.S. 504. This approach incorrectly rendered the Crow Treaty subject to different, uncertain, and less stringent interpretive rules than those applied by this Court to all other Indian treaties. Therefore, the Court should reverse the judgment of the Wyoming District Court.

ARGUMENT

I. As the Supreme Law of the Land, Indian Treaties Establish the Central Tenets of Federal Indian Law.

Treaties made by and between the United States and Indian tribes form the foundation of the unique federal-tribal relationship and have defined that relationship since this Court's earliest decisions. These treaties are the supreme law of the land, U.S. Const. art. VI, § 2, cl. 2, and remain enforceable unless Congress has clearly abrogated them by subsequent treaty or statute. *See*, *e.g.*, *Mille Lacs*, 526 U.S. at 202; *United States v. Dion*, 476 U.S. 734, 739-40 (1986).

Through their treaty relationships with the United States, Indian tribes have been recognized as distinct nations since the beginning of the Republic. In one of its earliest Indian law decisions, for example, this Court recognized that "[t]he numerous treaties

made with [Indian tribes] by the United States recognize them as a people . . . responsible in their political character for any violation of their engagements.". *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831). The Court continues to recognize Indian tribes based on that conception of their separate political character. *See*, *e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) ("For nearly two centuries now, we have recognized Indian tribes as 'distinct, independent political communities.'" (quoting *Worcester*, 31 U.S. at 559)).

Furthermore, although Indian nations are subject to federal authority, their exclusive treaty relationship with the United States generally insulates them from state authority in the absence of express federal legislation to the contrary. "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union." *Worcester*, 31 U.S. at 557. Because the acts of the State of Georgia in *Worcester* "interfere[d] forcibly with the relations established between the United States and the Cherokee nation" and were "in direct hostility with [those] treaties," the Court determined the state laws could "have no force" within Cherokee territory. *Id.* at 561. It remains well established that treaties are a central component of the federal relationship with Indian tribes, and even outside of their territory, Indian tribes and their individual members exercising federally guaranteed treaty rights are generally free from regulation by the

states. *See*, *e.g.*, *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942).

II. The Court Developed and Relies on Long-Standing Principles of Interpretation for Analyzing Indian Treaties.

In light of the importance of treaties to the federal-tribal relationship, the Court fashioned specific rules of construction for interpreting treaties that give proper respect to the solemnity and purpose of those contracts. These rules, sometimes referred to as "canons of construction," *see*, *e.g.*, *Cty. of Oneida*, 470 U.S. at 247; *Antoine v. Washington*, 420 U.S. 194, 199 (1975), honor both the elevated status of treaties under the Constitution and their meaning and intent. *See*, *e.g.*, *Worcester*, 31 U.S. at 551-57 (interpreting the Treaty of Hopewell in view of congressional policy to "treat [tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate"). These fundamental maxims of treaty interpretation are not simply an effort to address a perceived inequality in bargaining power between tribes and the United States. Instead, the rules are "rooted in the unique trust relationship between the United States and the Indians[,]" *Cty. of Oneida*, 470 U.S. at 247, and "have quasi-constitutional status . . . provid[ing] an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit congressional derogation." *Cohen's Handbook of Federal Indian Law* § 2.02[2], at 118-19 (Nell Jessup Newton, ed., 2012).

The Court employs three basic interpretive principles when analyzing treaties between the United States and Indian tribes. First, the Court

"interpret[s] Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Mille Lacs*, 526 U.S. at 196 (citations omitted) (emphasizing the importance of the context of a treaty). This rule requires looking at treaty language "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *see also United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938) (Treaties "are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them." (citations omitted)).

Second, the Court liberally interprets the language of Indian treaties in favor of the Indians. As early as 1832, in *Worcester*, the Court instructed that, if the context of a treaty suggests its language can be extended beyond its "plain import," then the language must be interpreted with that broader understanding. 31 U.S. at 582. Ambiguities in the treaty language are resolved in favor of the Indians. *See*, *e.g.*, *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174 (1973). The responsibility to interpret treaties in this manner seeks to ensure that treaty terms "are carried out, so far as possible . . . in a spirit which generously recognizes the full obligation of this nation to protect the interests of [Indian] people." *Tulee*, 315 U.S. at 684-85; *see also Antoine*, 420 U.S. at 199 ("The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." (citing *Worcester*, 31

U.S. 515)); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("*Fishing Vessel*"). Justice Scalia, writing for the majority in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, recognized that this principle is "deeply rooted in th[e] Court's Indian jurisprudence" and "dictated" the Court's interpretive choices in that case. 502 U.S. 251, 269 (1992).

Finally, the rights reserved by treaties remain intact unless Congress has expressed clear and unambiguous contrary intent. *Mille Lacs*, 526 U.S. at 202 ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." (citations omitted)); *Cty. of Oneida*, 470 U.S. at 257; *Fishing Vessel*, 443 U.S. at 690. This rule avoids the inadvertent taking of tribal property rights—and the corresponding obligation to provide due compensation—by ensuring that federal actions should never be interpreted to abrogate reserved treaty rights by implication. *See, e.g.*, *Menominee Tribe of Indians*, 391 U.S. at 412-13, 417.

The state court decisions in this case ignored this Court's interpretive rules and, instead, determined that the mere admission of Wyoming as a state impliedly abrogated hunting rights promised to the Crow Tribe by the federal government in the 1868 Treaty. *See* Pet.App.32, 34.

III. The Court's Long-Standing Principles of Indian Treaty Interpretation Demonstrate Why the Decision Below Should Be Reversed.

A. These Principles Apply to All Indian Treaties.

The Court developed specific standards for interpreting Indian treaties in order to protect the quasi-constitutional status of treaties and preserve the benefit of the bargains that those documents memorialize. Failing to apply those rules when engaging in treaty interpretation endangers the very foundations of this Court's Indian law and constitutional jurisprudence. The Court developed those interpretive rules because of the importance of Indian treaties to the creation of our nation and in recognition that the United States' promises should be honored, whether pledged two centuries or two minutes ago. *Cf. Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word."). Thus, failing to adhere to these principles is an affront to the dignity of those solemn guarantees.

Treaty promises continue to define the contours of this Court's more modern Indian law jurisprudence, *see*, *e.g.*, *Mille Lacs*, 526 U.S. at 196-203, and form the basis of the ongoing government-to-government relationship among tribes, states, and the United States. Allowing alternative interpretive approaches by state courts would render both the United States and signatory tribes subject to inconsistent and potentially arbitrary judicial review of their

agreements. While the different language, meaning, and intent of each treaty demand specific attention, the rules by which courts must attend to that analysis are well-established. Allowing deviation from those standards, given the long history of this Court's stalwart commitment to them, would not only demean the hundreds of treaties between the United States and Indian tribes, it would plunge into uncertainty the meaning and scope of the relationships established by those treaties.

B. The Court Has Applied These Interpretive Principles to Permit Indians to Exercise Reserved Treaty Rights to Hunt and Fish Off-Reservation Notwithstanding State Regulation.

The exercise by an individual Indian of a treaty-reserved right to hunt or fish off-reservation can lead to conflict with local and state laws. With the exception of *Race Horse*, the Court has consistently resolved these conflicts by applying the well-established standards for interpreting Indian treaties to insulate the exercise of tribal treaty rights from state regulation except in narrow and specific circumstances.

The Court's approach to enforcing tribes' off-reservation treaty rights began with *Winans* in 1905. 198 U.S. 371. In that case, non-Indians had effectively blocked tribal members from accessing their traditional fishing grounds by constructing a fish wheel on the non-Indians' private property. *Id.* at 377. The Court interpreted treaty language to require tribes' access to their traditional sites even though the non-Indians had complied with state law. *Id.* at 381-

82, 384. The Court recognized that the right to use traditional fishing locations was "part of larger rights possessed by the Indians," and that the "form of the [treaty] and its language was adapted" to preserve the exercise of those rights. *Id.* at 381. The Court expressly rejected the argument that the Tribe's reserved rights were abrogated by admission of the State of Washington to the Union. *Id.* at 382-84.

Similarly, in *Tulee*, the Court considered Washington's conviction of a member of the Yakima Tribe for failure to obtain a state license to fish. 315 U.S. at 682. "Viewing the treaty in . . . light" of the rule requiring liberal construction and an understanding of the language as the Indians would have understood it, the Court determined that the "state is without power to charge the Yakimas a fee for fishing" because the State's licensing requirement could not "be reconciled with a fair construction of the treaty." *Id.* at 685.[2]

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[2] In a series of cases following *Winans* and *Tulee*, the Court defined the balance between off-reservation treaty rights and state authority by allowing that states may regulate off-reservation exercise of treaty rights only as necessary for the conservation of a species, and only if the state's regulation does not discriminate against Indians. *See Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392 (1968) (*Puyallup I*); *Dep't of Game of Wash. v. Puyallup Tribe*, 414 U.S 44 (1973); *Antoine*, 420 U.S. 194; *Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165 (1977); *Fishing Vessel*, 443 U.S. at 675-76. In each of these cases, the Court analyzed the relevant treaty or other agreement in accordance with established interpretive principles. *E.g., Puyallup I*, 391 U.S. at 397-98 ("It is in th[e] spirit [of liberal treaty construction] that we approach these cases."); *Antoine*, 420 U.S. at 199-200; *Fishing Vessel*, 443 U.S. at 675-76. The decision

The Court most recently and extensively pronounced its interpretive standards for Indian treaties in 1999 in *Mille Lacs*. 526 U.S. at 196-203. There, the majority interpreted treaty language to recognize that the usufructuary rights reserved by the treaty were more than mere "privileges" that would "justify [a] difference[ ] in [allowing] state regulatory authority." *Id*. at 205-06. As described in greater detail *infra*, *Mille Lacs* does not support the decision below.

These principles of construction are fundamental to this Court's Indian law jurisprudence and necessary for ensuring that treaties and the rights preserved by them are given due consideration and protection as usufructuary rights reserved under federal law.

C. The Court's Interpretive Rules Require Preservation of Tribal Treaty Rights to Ensure That Constitutional Power Is Based on the Consent of the Governed.

Congress has broad authority to legislate in the domain of Indian affairs; however, the exercise of federal power over Indian nations is problematic because Indian nations were not parties to the Constitution. Indian nations like the Crow Tribe negotiated agreements with the United States. Those treaties have a quasi-constitutional status, both because they are the supreme law of the land and because they provide a source of federal power that is potentially based on mutual consent.

Treaties provided a mechanism for Indian tribes to retain the lands, waters, and hunting, fishing, and

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below did not take up the "conservation necessity issue" and it is not before the Court in this case. Pet.App.25 n.7; Pet.App.14 n.3;

gathering rights on which their ways of life would continue to depend. At the time the treaties were entered, these rights were "not much less necessary to the existence of the Indians than the atmosphere they breathed," *Winans*, 198 U.S. at 381, and they have remained so to the present day. As Judge Boldt noted in his landmark 1974 decision regarding tribal fishing rights in the State of Washington, treaty rights protect "the means of economic livelihood and the foundation of native culture," and "[r]eservation of the right to gather food in this fashion protected the Indians' right to maintain essential elements of their way of life, as a complement to the life defined by the permanent homes, allotted farm lands, compulsory education, technical assistance and pecuniary rewards offered in the treaties." *United States v. Washington*, 384 F. Supp. 312, 406-07 (W.D. Wash. 1974), *aff'd* 520 U.S. 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Off-reservation usufructuary rights remain essential to the very identity of the tribes and tribal people who exercise them today. *See*, *e.g.*, Columbia River Intertribal Fish Comm'n, *We Are All Salmon People*, http://www.critfc.org/salmon-culture/we-are-all-salmon-people/ (last visited Oct. 25, 2017); Allison M. Dussias, *Spirit Food and Sovereignty: Pathways for Protecting Indigenous Peoples' Subsistence Rights*, 58 Clev. St. L. Rev. 273, 276 (2010) (Subsistence resources "are not just food for the body, but also 'spirit food.'").

Thus, the Court's approach to treaty interpretation ensures the fulfillment of the historic bargains through which the United States acquired much of its territory. The treaties marked the terms of that exchange. The United States obtained land and

an end to hostilities and pledged in return to respect remaining tribal homelands, tribal political existence, and the ability for tribes to sustain themselves. The terms of those treaties "seemed to promise more, and give the word of the nation for more" to Indian tribes than that guaranteed to other citizens. *Winans*, 198 U.S. at 380. In order to ensure those promises are kept, the Court's interpretive standards recognize that a "treaty was not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted." *Id.* at 381.

IV. The Decision of the Wyoming District Court Is Inconsistent With This Court's Interpretive Tradition.

The Wyoming District Court failed to apply the Court's long-standing interpretive rules of construction. Instead, it simply endorsed the trial court's "adopt[ion of] the analysis and conclusions" of *Repsis*, which largely tracked the Supreme Court's 1896 decision in *Race Horse*. Pet.App.34. In addition, the District Court, like the trial court before it, misinterpreted *Mille Lacs* to support its decision. *Id.* The decision below is contrary to this Court's jurisprudence.

A. *Race Horse* and *Repsis* Depart From This Court's Indian Treaty Precedent.

Both *Race Horse* and *Repsis* interpreted Indian treaties to resolve ambiguities against the tribes involved. First, the *Race Horse* Court took pains to interpret the relationship between the phrases "unoccupied lands of the United States" and "so long as peace subsists among the whites and Indians on the borders of the hunting districts" in the Eastern

Shoshone and Bannock Treaty. 163 U.S. at 507-14. While initially conceding that the former phrase alone would protect hunting rights across all federal lands, the Court then determined that the meaning of that phrase must be controlled by the subsequent phrase, specifically the words "hunting districts." *Id.* at 507-08. Although the Court did not define the term "hunting districts," it interpreted that phrase to mean that the treaty rights at issue were contingent upon the continuing existence of the "hunting districts" and, therefore, were of a "temporary and precarious nature." *Id.* at 509-10 (The treaty no longer "authorized the continued enjoyment of the right of killing game . . . when the territory ceased to be a part of the hunting districts, and came within the authority and jurisdiction of a state.").

While the parties to the treaty may have understood that the treaty language conditioned the tribal hunting rights on certain circumstances—"unoccupied land," the presence of game, peace—the *Race Horse* Court combined those terms to concoct its own understanding of the treaty, which denigrated those rights without regard for the parties' intent or the tribal interests at stake. The Court then relied on that construction to find that Wyoming's subsequent statehood, an event occurring much later, unmentioned in the treaty, and not considered during its negotiation, ended the tribal rights. By interpreting the treaty to secure only "temporary and precarious" rights, the *Race Horse* Court simply "declined to follow" the applicable interpretive rules in favor of its own approach. *Race Horse*, 163 U.S. at 516; *Repsis*, 73 F.3d at 992.

Ignoring the absence of any express language in Wyoming's statehood act regarding treaty rights, the *Repsis* court applied to the Crow Treaty *Race Horse*'s "abrogation-by-implication" approach. *Id*. ("The Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union." (citing *Race Horse*, 163 U.S. at 514)). *Repsis* further followed the lead of *Race Horse* to fashion its own interpretive construction of the Crow Treaty. After deferring entirely to *Race Horse*'s "temporary and precarious" construction, the *Repsis* court then struck out on its own to find an "alternative basis" for its holding. *Id.* at 993. Interpreting the treaty term "unoccupied," the court determined that creation of the "Big Horn National Forest" limited certain activities on those lands, thereby rendering them occupied and ending the Crow's treaty rights. *Id.* ("These lands were no longer available for settlement. No longer could anyone timber, mine, log, graze cattle, or homestead on these lands without federal permission." (citing Act of June 4, 1897, ch. 2, 30 Stat. 11, 35-36)).[3] The *Repsis* court neither considered what the parties to the treaty intended by "unoccupied" nor engaged in any treaty interpretation on that question.[4]

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[3] While now named the Bighorn National Forest, the area was originally called the Big Horn Forest Reserve. *See*, *e.g.*, Presidential Proclamation No. 393, 29 Stat. 909 (Feb. 22, 1897).

[4] *Repsis* also overlooked interpretations of that term and similar treaty language by other courts, most of which reached exactly the opposite conclusion about its meaning. *See Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 42 F.3d 1278 (9th Cir. 1994); *State v. Tinno*, 497 P.2d 1386 (Idaho 1972); *State v. Stasso*,

B. *Mille Lacs*, Not *Race Horse* or *Repsis*, Guides Resolution of the Questions Presented Here.

Applying the interpretive guidance set forth in *Mille Lacs* to the treaty language at issue in this case demonstrates the inconsistency of *Race Horse*, *Repsis*, and the decisions below with the great weight of this Court's jurisprudence interpreting Indian treaties. Applying that guidance to the Crow Treaty confirms the ongoing existence of the hunting rights reserved therein.

First, *Mille Lacs* reiterated the need to understand treaty language as the tribal party to that treaty would have understood it. 526 U.S. at 196. No court yet has analyzed what the members of the Crow Tribe would have understood the treaty to mean with regard to their "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." Treaty with the Crows, art. 4, May 7, 1868, 15 Stat. 649, 650.

Second, *Mille Lacs* flatly rejected the notion that the admission of a state to the United States would, standing alone, mark an end to treaty-reserved rights within that state. 526 U.S. at 205 ("[S]tatehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries."). Congress apparently understood the same, as legislation enacted subsequent to Wyoming's

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563 P.2d 562, 565 (Mont. 1977)*; State v. Arthur*, 261 P.2d 135, 143 (Idaho 1953).

statehood expressly recognized the continuing existence of rights reserved in the Crow Treaty of 1868. *See*, *e.g.*, An Act: Making appropriations for the current and contingent expenses of the Indian Department, ch. 543,§ 31, 26 Stat. 989, 1042, (1891) (ratifying an agreement with the Crow Indians regarding sale of lands and construction of school houses and other facilities with the proviso that "all existing provisions of the treaty of May seventh Anno Domini eighteen hundred and sixty-eight . . . shall continue in force"); An Act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect, Pub. L. No. 58-183, Art. VII, 33 Stat. 352, 355 (1904) ("The existing provisions of all former treaties with the Crow tribe of Indians not inconsistent with the provisions of this agreement, are hereby continued in force and effect, and all provisions thereof inconsistent herewith [pertaining to sale of a portion of the reservation] are hereby repealed."). Nonetheless, according to *Race Horse* and *Repsis*, Wyoming's admission to the Union created an "irreconcilable conflict" with the treaty rights reserved by the Crow. *Race Horse*, 163 U.S. at 514; *Repsis*, 73 F.3d at 990.

Third, according to *Mille Lacs,* "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." 526 U.S. at 202 (citations omitted). Although construing the Eastern Shoshone and Bannock Treaty, not the Crow Treaty, the *Race Horse* majority found no express language in that treaty or in Wyoming's statehood act that signaled the end of those treaty rights. *See* 163 U.S. at 511, 514 (Although "repeals by implication are not favored . . .

repeal [of the treaty-reserved rights] result[ed] from the conflict between the treaty and the act admitting [Wyoming] into the Union," despite the silence of that act as to treaty rights.). *Repsis* then adopted this misguided approach when interpreting the Crow Treaty. *Repsis*, 73 F.3d at 990.

Finally, *Mille Lacs* reiterated the Court's prior instructions that "Indian treaties are to be interpreted liberally in favor of the Indians . . . and that any ambiguities are to be resolved in their favor." 526 U.S. at 200 (citations omitted). The Court followed that rule when interpreting language in an 1855 treaty pursuant to which the Mille Lacs Band of Chippewa had agreed to "fully and entirely relinquish and convey to the United States, any and all right, title and interest . . . in, and to any other lands." *Id.* at 195 (quoting Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165). Noting that the language said nothing about the Chippewa's 1837 treaty; the hunting, fishing, and gathering rights in territories across Minnesota they reserved in that treaty; or the abrogation of those rights, the Court concluded that even if such silence amounted to a "plausible ambiguity," the Court's interpretive standards required ruling in favor of the Chippewa. *Id.* at 200.

Rather than follow *Mille Lacs*' deliberate and thorough approach to treaty interpretation, the Wyoming circuit court instead relied solely and erroneously on *Repsis*, concluding that the Crow "hunting rights were temporary and ended upon the occupation of the [Bighorn National Forest]." Pet.App.41. Then, rather than correct that misguided approach and adhere to *Mille Lacs*, the Wyoming

District Court instead determined that *Mille Lacs* only "reaffirmed the principle that the court must look at the language in the treaty to determine whether it was intended to be perpetual or if it was intended to terminate at the occurrence of a 'clearly contemplated' event." Pet.App.34. Neither of these approaches is viable in light of *Mille Lacs* and the Court's long-standing interpretive principles repeated in that decision.

C. *Mille Lacs* Repudiated *Race Horse* and *Repsis*.

By myopically relying on *Race Horse* and *Repsis*, the decisions below ignored this Court's evisceration of the legal theories undergirding those decisions. The majority opinion in *Mille Lacs* repeatedly criticized the reasoning of *Race Horse*, saying that the decision "has been qualified by later decisions of th[e] Court," 526 U.S. at 203, that it "rested on a false premise," *id.* at 204, and that it "[wa]s simply too broad to be useful as a guide to whether treaty rights were intended to survive statehood." *Id.* at 206. Even the core of *Race Horse*'s central inquiry, *i.e.*, "whether Congress . . . intended the rights secured by the [relevant treaty] to survive statehood," 526 U.S. at 207, was mistaken:

> Race Horse rested on a false premise. As this Court's subsequent cases have made clear, an Indian tribe's treaty rights to hunt, fish, and gather are not irreconcilable with a State's sovereignty over natural resources in the State. . . . [*Race Horse*] was informed by that Court's conclusion that the Indian treaty rights were inconsistent with state sovereignty over natural resources . . . .But . . . Indian treaty-based

> usufructuary rights are not inconsistent with state sovereignty over natural resources.

Id. at 204, 207-08.

In light of the majority's obvious disagreement with *Race Horse*, Chief Justice Rehnquist, in dissent, concluded that the *Mille Lacs* majority had "effectively overrule[d]" *Race Horse*. *Id.* at 219. Thus, contrary to the overly narrow and inapt reading of *Race Horse* by the Wyoming District Court, *see* Pet.App.24, *Mille Lacs* implicitly overruled *Race Horse* and, by extension, *Repsis*. *See also State v. Tinno*, 497 P.2d 1386, 1392 n.6 (Idaho 1972) (In a decision pre-dating *Mille Lacs* by a quarter century, the Idaho Supreme Court read this Court's precedent to see that "*Race Horse* and the theory it posited ha[d] been entirely discredited.").

By relying on *Repsis* and *Race Horse*, the decision below failed to follow this Court's directions for interpreting the Crow Treaty. This Court must correct those errors by applying its well-established rules for interpreting Indian treaties.

CONCLUSION

This Court has faithfully and repeatedly protected the tribal rights reserved in treaties with the United States from unjustified abrogation and improper subjugation to state authority. Such protection is mandated by the supremacy of federal treaties under the Constitution and the need to ensure justice for the tribal parties to those agreements. *See*, *e.g.*, *Winans*, 198 U.S. at 380-81 (interpreting the treaty at issue so as to "counterpoise the inequality" of treaty negotiations and observing that the "negotiations and a convention . . . seemed to promise more, and give the

word of the nation for more" than the mere "rights . . . that any inhabitant of the territory or state would have").

The decisions of the Wyoming courts in this matter diverged from that tradition in favor of following the faded hoof prints of *Race Horse* and *Repsis*. Those decisions below ignored the fact that *Mille Lacs* fatally undercut both *Race Horse* and *Repsis*. This case presents an opportunity for this Court to reaffirm the well-founded interpretive principles it developed for Indian treaties. Doing so is necessary to honor the "deeply rooted" role of those principles in the Court's Indian law jurisprudence and avoid the uncertainty and confusion that would result from endorsing alternative approaches to treaty interpretation by state and lower federal courts. *Cty. of Yakima*, 502 U.S. at 269.

The Court should reverse the judgment of the Wyoming District Court.

Respectfully submitted,

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September 11, 2018

APPENDIX

TABLE OF APPENDICES

APPENDIX A

This Appendix provides titles and institutional affiliations for identification purposes only.

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