

No. 21-1484

In the Supreme Court of the United States

STATE OF ARIZONA, ET AL., PETITIONERS

v.

NAVAJO NATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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The Navajo Nation sued the federal parties in this case, alleging that the federal government owes the Navajo Nation an affirmative, judicially enforceable fiduciary duty to assess and address the Navajo Nation's need for water from particular sources. Pet. App. 15-16; see Gov't Pet. 9-12. The district court dismissed the suit, holding that the Navajo Nation had not identified any substantive source of law establishing such a duty. Pet. App. 91-92; see Gov't Pet. 12. The court of appeals reversed and remanded. Pet. App. 1-41; see Gov't Pet. 13-14. The court of appeals held that the Navajo Nation has established the existence of a fiduciary duty "premiered on the [Navajo] Nation's treaties with the United States and [its] federally reserved *Winters* rights." Pet. App. 6; see Gov't Pet. 13-14; *Winters v. United States*, 207 U.S. 564 (1908). The court of appeals further held that the Navajo Nation's claim does not fall within the

jurisdiction retained by this Court in *Arizona v. California*, 547 U.S. 150, 166-167 (2006). Pet. App. 19-22; see Gov't Pet. 12.

The federal parties have filed a petition for a writ of certiorari seeking review of the court of appeals' holding that "a fiduciary duty exists." Pet. App. 35; see Gov't Pet. 14-26. The petitioners here—States and local governmental entities that intervened as defendants below (state petitioners), Pet. App. 15—likewise seek review of whether the federal government owes the Navajo Nation a fiduciary duty. See 21-1484 Pet. ii (second question presented). For the reasons stated in the government's petition, that issue warrants this Court's review. See Gov't Pet. 14-26.

The state petitioners ask this Court to grant review of an additional issue, concerning the relationship between the relief sought by the Navajo Nation in this case and the decree that this Court entered in *Arizona v. California*. See 21-1484 Pet. i-ii (first question presented). Characterizing the relief sought by the Navajo Nation as an order requiring the federal government to manage the Lower Colorado River in a manner that would result in the delivery of mainstream water to the Navajo Nation, *id.* at 9-13, the state petitioners contend that such relief would be "in direct conflict" with this Court's decree in *Arizona v. California*, *id.* at 22. Review of that contention, however, is not warranted at this time.

The decree in *Arizona v. California* expressly "enjoin[s]" the federal government from "releasing water controlled by the United States"—*i.e.*, "the water in Lake Mead, Lake Mohave, Lake Havasu, and all other water in the [Colorado River] mainstream below Lee Ferry and within the United States"—except as specified

in provisions of the decree. 547 U.S. at 153-154 (Arts. I(E), II). One of those provisions specifies that “mainstream water shall be released or delivered to water users * * * in Arizona, California, and Nevada only pursuant to valid contracts therefor made with such users by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act or any another applicable federal statute.” *Id.* at 156 (Art. II(B)(5)). Another provision specifies that, notwithstanding the absence of such a contract, mainstream water may be released “for the benefit of any federal establishment named” in the decree. *Id.* at 157 (Art. II(D)).

The Secretary has not entered into a contract to supply mainstream water to the Navajo Nation, and the Navajo Reservation is not a federal establishment named in the decree. See *Arizona v. California*, 547 U.S. at 157-159 (Art. II(D)). Thus, as the state petitioners observe (21-1484 Pet. 22), any order compelling the government to deliver water from the Lower Colorado mainstream to the Navajo Reservation would violate the Court’s decree. At this juncture, however, such an order (or other relief) has not been issued in this case. Accordingly, review of the first question presented in the state petitioners’ petition is unwarranted at this time.

Unlike the issue of whether the relief sought by the Navajo Nation would be barred by the Court’s decree in *Arizona v. California*, the issue of whether the federal government owes a fiduciary duty in the first place presents a “threshold question” that is ripe for this Court’s review. *United States v. Navajo Nation*, 556 U.S. 287, 293 (2009) (citation omitted). After all, the court of appeals has already decided that “a fiduciary duty exists.” Pet. App. 35. The issue is a purely legal

one, so this Court's consideration of it would not benefit from further proceedings below. And reversal of the court of appeals' decision would obviate the need to ever reach any questions concerning relief, including the issue of whether the relief sought by the Navajo Nation could be reconciled with the proceedings and decree in *Arizona v. California*.

Because the federal government has the most direct interest in the issue of whether it owes a fiduciary duty to the Navajo Nation in the first place, the Court should grant the government's petition for a writ of certiorari and hold this petition filed by the state petitioners pending the disposition of that case.

Respectfully submitted.

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