No. 21-1484

In the Supreme Court of the United States

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In 1964, the Court issued a decree partially apportioning the waters of the Colorado River among several states and five Indian tribes, not including the Navajo Nation, represented by the United States as trustee. *Arizona v. California*, 376 U.S. 340, 342-45 (1964). The United States both failed to assert a claim to the Colorado's mainstream on behalf of the Nation and successfully opposed the Nation's attempt to assert such a claim on its own behalf. The Court thus did not adjudicate the Nation's rights to the Colorado.

The Court retained jurisdiction to modify the decree, but also underscored that the decree "shall not affect … [t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation." *Id.* at 352-53. The Court has modified the decree since 1964, but the decree in effect today contains those same provisions. *Arizona v. California*, 547 U.S. 150, 166-67 (2006). The questions presented are:

1. Whether the lower courts had jurisdiction over the Navajo Nation's breach-of-trust claim seeking an order requiring the United States to assess and develop a plan to meet the Nation's water needs, but not a judicial quantification of the Nation's rights to Colorado River water, or whether this Court has exclusive jurisdiction under the Consolidated Decree.

2. Whether, given the United States' promise to provide the Navajo Nation sufficient water by entering into the treaties establishing the Navajo Reservation, coupled with the government's nearly exclusive statutory and regulatory control over the Colorado River, the United States owes the Navajo Nation a fiduciary duty to assess the Nation's water needs and develop a plan to meet them.

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INTRODUCTION

Petitioners here and the federal government in *Department of Interior v. Navajo Nation*, No. 22-51, seek review of the same judgment. The court of appeals held that the Navajo Nation's breach-of-trust claim seeking an order requiring the United States to assess and develop a plan to meet the Nation's water needs did not implicate this Court's retained jurisdiction in the Consolidated Decree in the decades-long case adjudicating several states' and other tribes' rights to water from the Colorado River. *See Arizona v. California*, 547 U.S. 150, 166-67 (2006) (*Consolidated Decree*). The court of appeals also held that the Nation could amend its complaint to state a claim that the United States owes the Nation a fiduciary duty to assess, protect, and preserve the Nation's water rights.

Petitioners' questions presented challenge each of those holdings. Neither warrants this Court's review.

1. The court of appeals correctly held that the Nation's breach-of-trust claim does not implicate this Court's retained jurisdiction in the *Arizona* litigation. That conclusion does not conflict with any decision of this Court or any other court of appeals. Even the United States agrees that review of this question "is unwarranted" because no court has ordered (and the Nation has not sought) relief that would implicate the Consolidated Decree. Mem. for Fed. Resp'ts 3 (Fed. Mem.).

2. The second question presented doesn't warrant review, either, for the reasons explained in the Nation's Brief in Opposition to the United States' petition (No. 22-51) (Navajo Fed. Opp.). The court of appeals' decision is correct, implicates no circuit split,

and isn't otherwise certworthy. Navajo Fed. Opp. 20-29, 29-32, 32-33. To claim a split, Petitioners invoke several cases the United States declined to cite. But far from suggesting circuit conflict, those additional cases only reinforce the court of appeals' decision.

The Court should deny review.

STATEMENT

1. The Navajo Nation is a federally recognized Indian tribe. Pet. App. 6. The Navajo Reservation stretches into Arizona, New Mexico, and Utah, and is located almost entirely within the Colorado River Basin. Pet. App. 7. The Colorado River forms a large part of the Reservation's western border. *Id.*

2. Despite the development of authority over the last century governing allocation of the Colorado's waters, *see id.*, the Nation's rights to water from the Colorado's mainstream have never been adjudicated.

a. In 1922, after failed negotiations over how to allocate water from the Colorado River, Arizona, California, Nevada, Colorado, New Mexico, Utah, and Wyoming entered into the Colorado River Compact and agreed to divide the Colorado River Basin in two. Pet. App. 7-8. The Lower Basin included California, Arizona, and Nevada, and the Upper Basin included the remaining states. Colorado River Compact, art. I, Colo. Rev. Stat. § 37-61-101. The Compact gave each basin 7.5 million acre-feet per year of water but specified that "[n]othing in [it] shall be construed as affecting the obligations of the United States of America to Indian tribes." *Id.* arts. III, VII.

b. In 1928, Congress enacted the Boulder Canyon Project Act (BCPA) to enable "the Secretary of the Interior … both to carry out the allocation of the

waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water." *Arizona v. California*, 373 U.S. 546, 580 (1963) (*Arizona I*). The BCPA granted the Secretary broad control over the water from the Colorado River. 43 U.S.C. §§ 617–619b, 617c(a).

The BCPA also authorized the Lower Basin States to enter into a compact that would specify how to divide water among themselves. *Arizona I*, 373 U.S. at 561-62; 43 U.S.C. § 617c(a). Although the Lower Basin States failed to reach an agreement, the Secretary began contracting with them for water under the BCPA. *Arizona I*, 373 U.S. at 562.

c. Continued disagreement over access to the Colorado River led to litigation in this Court. In 1952, Arizona invoked the Court's original jurisdiction by filing a complaint against California and seven of its public agencies "over how much water each State has a legal right to use out of the waters of the Colorado River and its tributaries." *Id.* at 551. Nevada, New Mexico, Utah, and the United States—in part, as tribal trustee—intervened. *Id.*

With respect to the Colorado mainstream, the United States asserted claims on behalf of five tribes, not including the Navajo Nation. Pet. App. 9. The government, in its capacity as the Nation's trustee, asserted claims only to the Little Colorado River, a tributary in the Colorado River system. *Id.*

The Nation and other tribes unsuccessfully sought appointment of a Special Assistant Attorney General to represent their interests. *Id.* The Nation also moved to intervene, but the federal government successfully opposed the motion. *Id.*

d. In 1964, the Supreme Court issued a decree quantifying various rights to the Colorado River, including those of the five tribes whose rights the federal government had asserted. *Arizona v. California*, 376 U.S. 340, 344-45 (1964) (*1964 Decree*); *see Winters v. United States*, 207 U.S. 564, 576 (1908); *Arizona I*, 373 U.S. at 599-600. But the Court underscored that its decree did not affect "[t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation." *1964 Decree*, art. VIII(C), 376 U.S. at 353. The Court concluded that the BCPA left allocation of the tributaries to the Lower Basin states and so did not adjudicate the Nation's claim to the Little Colorado River. *Id.* art. VIII(B), 376 U.S. at 352-53; *Arizona I*, 373 U.S. at 565, 595. Nor did it adjudicate the Nation's rights to the Colorado mainstream.

Article IX of the Decree retained the Court's jurisdiction "for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy." *1964 Decree*, art. IX, 376 U.S. at 353. As the Court later explained, Article IX is "mainly a safety net added to retain jurisdiction and to ensure that [the Court] had not, by virtue of res judicata, precluded [itself] from adjusting the Decree in light of unforeseeable changes in circumstances." *Arizona v. California*, 460 U.S. 605, 622 (1983) (*Arizona II*). Article IX thus allows the Court "to correct certain errors, to determine reserved questions, and, if necessary, to make modifications in the Decree." *Id.* at 618.

Over the next half-century, the 1964 Decree was modified several times. *See, e.g.*, *Arizona v. California*, 466 U.S. 144 (1984); *Arizona v. California*, 531 U.S. 1

(2000). Finally, in 2006, the Court issued the Consolidated Decree in effect today. *Consolidated Decree*, 547 U.S. 150. The Consolidated Decree included the same provision retaining the Court's jurisdiction that was included in the 1964 Decree. *Id.* art. IX, 547 U.S. at 166-67. It also reiterated that the Decree "shall not affect … [t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation." *Id.* art. VIII, 547 U.S. at 166. At no point in the course of the *Arizona* litigation did the United States seek to quantify the Nation's rights to the Colorado mainstream.

3. This case arises from the Navajo Nation's request to file a third amended complaint in its breach-of-trust litigation against the Department of the Interior, the Secretary of the Interior, the Bureau of Reclamation, and the Bureau of Indian Affairs over the government's management of the Colorado River. Arizona, Nevada, Colorado, and various state and local government entities are intervenors.

In its third amended complaint, the Nation alleged that the United States breached its fiduciary duties arising from the two treaties to provide the Nation with sufficient water. The Nation sought an injunction requiring the government to determine its water needs and develop a plan to meet them. Pet. App. 15, 20.

The district court denied the Nation's motion for leave to file an amended complaint, Pet. App. 75, holding that the Nation's requested relief implicated this Court's retained jurisdiction in the *Arizona* litigation, Pet. App. 83. The court reasoned that to determine whether the United States breached its trust duties to the Nation, the court necessarily would have to

determine the Nation's rights to the Colorado River mainstream. Pet. App. 82-83 & n.2. On the merits, the court reasoned that unquantified water rights under *Winters* could not support any fiduciary duties and that the Nation otherwise failed to identify a "specific, applicable, trust-creating statute or regulation that the Government violated." Pet. App. 82-92.

4. a. The court of appeals reversed. Pet. App. 1-39. The court held that the relief the Nation sought did not implicate this Court's retained jurisdiction in the *Arizona* litigation. The court explained that the Nation "does not seek a quantification of its rights in the Colorado River," but only an injunction requiring the United States "to investigate the Nation's needs for water, to develop a plan to meet those needs, and to exercise its authority over the management of the Colorado River consistent with that plan." Pet. App. 20-21. And the Consolidated Decree made clear that it does not affect "[t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation." *Id.* (quoting *1964 Decree*, 376 U.S. at 353). Because the Nation's requested relief did not fall within the scope of this Court's retained jurisdiction in the *Arizona* litigation, the court of appeals declined to resolve whether any retained jurisdiction was exclusive. Pet. App. 21-22.

On the merits, the court of appeals held that the Nation's request to amend its complaint was not futile. The court explained that the Nation had identified "specific treaty, statutory, and regulatory provisions that impose fiduciary obligations on [the government]." Pet. App. 29. By establishing the Reservation as a permanent homeland suitable for farming, those provisions promised the Nation a right to sufficient water "under the long-established

Winters doctrine." *Id.* The court thus remanded with instructions to permit amendment. Pet. App. 38-39.

b. Judge Lee concurred. He emphasized that the relief the Nation seeks doesn't implicate this Court's retained jurisdiction because the "proposed injunction does not ask the district court to quantify any rights that the Nation may have to the Colorado River mainstream." Pet. App. 40.

REASONS FOR DENYING THE PETITION

The Court should deny the petition. Neither question presented warrants this Court's review.

As to the first question, the court of appeals correctly held that the Nation's breach-of-trust claim doesn't implicate the Court's retained jurisdiction under the Consolidated Decree. That decision is case-specific and does not conflict with any decision of this Court or any other court of appeals. What's more, the court of appeals' decision merely remands with instructions to permit the Nation to amend its complaint. As the Solicitor General explains, review "is unwarranted" because the Nation has not sought, and no court has ordered, relief that would implicate the Consolidated Decree. Fed. Mem. 3.

As to the second question, the Court should deny review for the reasons explained in the Nation's Brief in Opposition to the federal government's petition in No. 22-51. The court of appeals' decision is correct and implicates no circuit split, and the question presented doesn't warrant this Court's intervention. To claim a circuit split, Petitioners cite several decisions the United States does not. But far from suggesting circuit conflict, those decisions support the court of appeals' decision here.

I. The first question presented does not warrant this Court's review, as the Solicitor General observes.

The first question presented doesn't warrant this Court's intervention. The court of appeals' holding that the Nation's breach-of-trust claim doesn't fall within the scope of the Court's retained jurisdiction in the *Arizona* decrees is correct. That conclusion doesn't conflict with any decision of this Court or another court of appeals, and presents no important issue requiring this Court's review.

A. The court of appeals' decision is correct.

1. The court of appeals correctly held that the Nation's breach-of-trust claim does not implicate the jurisdiction this Court retained in the Consolidated Decree. The "subject matter in controversy" in the *Arizona* litigation was "how much water each State has a legal right to use out of the waters of the Colorado River and its tributaries." *Arizona I*, 373 U.S. at 551. And Article IX retains jurisdiction "to correct certain errors, to determine reserved questions, and, if necessary, to make modifications in the Decree." *Arizona II*, 460 U.S. at 618. But the Nation's requested relief doesn't require a court to do any of those things, much less to reevaluate the apportionment in the decree. The Nation seeks an injunction requiring the government to determine its water needs and develop a plan to meet them, Pet. App. 15, 20—not, as the court of appeals explained, a judicial quantification of its rights in the Colorado River, Pet. App. 20.

Nor would granting the Nation's requested relief conflict with the Consolidated Decree's prohibition on "releasing water controlled by the United States" except in specified circumstances. *Consolidated Decree*,

art. II, 547 U.S. at 154-59, *infra* p. 10. In fact, the court of appeals made clear that if the federal government "later determine[s] that [it] cannot meet [its] trust obligation to provide adequate water for the Nation unless the jurisdictional question is resolved, then [the federal government] can petition the Supreme Court for modification of the 1964 Decree." Pet. App. 39 n.7. For that same reason, Petitioners' claim that this Court must have exclusive jurisdiction because "[a]ll other water users … will need to be given the opportunity to be heard" about any modification to "their water rights" misses the mark. Pet. 14. As the Solicitor General explains, no "order compelling the government to deliver water from the Lower Colorado mainstream to the Navajo Reservation" has been issued, so "review of the first question presented … is unwarranted." Fed. Mem. 3.

2. Even if the Nation's breach-of-trust claim fell within the Consolidated Decree's provision retaining jurisdiction, that wouldn't make this Court's jurisdiction exclusive. As the court of appeals observed, this Court's "own interpretation of the Decree" doesn't say that the reserved jurisdiction is exclusive. Pet. App. 21. Article IX was designed "mainly [as] a safety net" to allow the Court to "adjust[] the Decree in light of unforeseeable changes in circumstances." *Arizona II*, 460 U.S. at 622. And, again, the Nation does not seek judicial quantification in these proceedings of its rights to the Colorado River, or modification of the Court's Consolidated Decree, so Petitioners' arguments miss the point.

B. The question is not important for this Court to resolve.

Not only is the court of appeals' holding correct, but the first question presented isn't an important one for this Court to resolve.

At bottom, Petitioners' argument seems to be that the Court should reverse the court of appeals' jurisdictional holding because otherwise they will have no opportunity to protect their water rights and a lower court will attempt to modify this Court's Consolidated Decree. *See* Pet. 9-13. Again, those arguments misunderstand the Nation's claims and the court of appeals' reasoning. The dispute here between the Navajo Nation and the federal government concerns the federal government's duty to assess the Nation's water needs and develop a plan to meet them. That dispute does not require a lower court to adjudicate Petitioners' water rights, much less to do so in a way that requires this Court to intervene to protect its Consolidated Decree. Indeed, as the federal government has observed, no court has issued "any order compelling the government to deliver water" in violation of the Consolidated Decree. Fed. Mem. 3. After all, the court of appeals remanded the case with instructions simply to let the Nation *amend its complaint*.

As between Petitioners and the federal government, "the federal government has the most direct interest" in the merits of this case. *Id.* at 4. And even the federal government does not seek this Court's review on Petitioners' first question presented. *Id.* at 2.

II. The second question presented does not warrant review.

For the same reasons explained in the Nation's response to the United States' petition, Petitioners'

second question presented isn't certworthy either. *See* Navajo Fed. Opp. 19-33. In short, the court of appeals' decision is correct; it doesn't implicate any circuit split; and the question presented does not merit this Court's intervention.

Unlike the federal government, Petitioners claim (Pet. 26-28) that the court of appeals' decision conflicts not just with the decisions of the D.C. and Tenth Circuits, but also with those of the Eighth and Federal Circuits. That claim fails.

1. As the Nation explained in response to the United States' petition, the claimed split rests on the notion that the court of appeals did not apply the standard from this Court's Indian Tucker Act cases, including *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011). In Petitioners' and the United States' view, the court of appeals did not require the Nation to meet that standard because the Nation seeks injunctive relief, rather than damages, whereas other courts of appeals apply the same standard to claims seeking both kinds of relief. That notion is wrong. The court of appeals held that the Nation "has identified specific treaty, statutory, and regulatory provisions that impose fiduciary obligations on [the United States]" in light of *Winters*. Pet. App. 29. Indeed, the court explained that the relevant treaty provisions "serve as the 'specific statute' that satisfies *Jicarilla*." Pet. App. 32; *see* Navajo Fed. Opp. 18-19.

2. The Nation's response to the federal government's petition explains that the D.C. Circuit's and Tenth Circuit's decisions do not even involve *Winters*, much less call into question the court of appeals' holding here or application of *Jicarilla* to this case. *See* Navajo Fed. Opp. 29-32.

The additional decisions Petitioners cite here (Pet. 26-28) do not suggest circuit disagreement either. In fact, the United States did not even cite those cases, despite filing its petition after Petitioners filed theirs. One of the additional decisions doesn't even involve a breach-of-trust claim; another does not involve reserved water rights under *Winters*; and in yet another, the tribe—unlike the Nation here—failed to identify a specific source of law establishing a fiduciary duty. None of the decisions undermines the conclusion that treaty-based *Winters* rights combined with extensive statutory and regulatory government control over water can impose fiduciary duties.

a. *Hawkins v. Haaland*, 991 F.3d 216 (D.C. Cir. 2021), cuts *against* Petitioners. As an initial matter, *Hawkins* didn't involve a breach-of-trust action brought by a tribe against the government. Instead, *Hawkins* held that certain treaties and statutes gave the Klamath Tribes "reserved instream water rights" and refused to imply a requirement that the federal government concur with the Tribes' assertion of those rights. *Id.* at 227. In fact, the court noted that "such a concurrence requirement would directly interfere with the Tribes' … assertion and control of their reserved water rights." *Id.* And contrary to Petitioners' argument (Pet. 27) that *Hawkins* imposed no fiduciary duties, the court observed that "the federal government maintains that it was *obligated*, if asked, to concur in lawful water calls proposed by the Tribes." 991 F.3d at 227 (emphasis added). Here, the United States exercises extensive control over the Nation's reserved water rights. The federal government holds in trust the Nation's unquantified *Winters* rights under the 1849 and 1868 Treaties, and it exercises nearly

exclusive control over the Colorado pursuant to the BCPA. *See* Navajo Fed. Opp. 23-25.

b. *Rosebud Sioux Tribe v. United States*, 9 F.4th 1018 (8th Cir. 2021), cuts against Petitioners, too. There, the Eighth Circuit held that a treaty and various statutes, when "read in conjunction," imposed on the government a duty to provide the tribe "competent physician-led healthcare." *Id.* at 1023. The court reached that result even though competency wasn't expressly required by treaty or statute, but rather was the only natural way "to make a tribe whole when treaties are read decades later." *Id.* at 1025. The court reasoned that the tribe would not "have agreed to the Government's delivery of 'incompetent' healthcare." *Id.* In reaching that conclusion, the court applied the same principles underlying the *Winters* doctrine: treaties should be interpreted "to give effect to the terms as the Indians themselves would have understood them," *id.* at 1024 (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999)), and ambiguous provisions should be interpreted to the Indians' benefit, *id.* at 1023. In short, *Rosebud Sioux* only reinforces the court of appeals' reliance here on *Winters*.

c. *Hopi Tribe v. United States*, 782 F.3d 662 (Fed. Cir. 2015), doesn't get Petitioners a split, either. There, the Federal Circuit held that the tribe could not pursue damages under the Indian Tucker Act for an alleged breach of a fiduciary duty to "provid[e] water infrastructure and treatment needed to eliminate naturally occurring contaminants" from sources of drinking water within the reservation. *Id.* at 668-69. Unlike the Nation here, the Hopi Tribe claimed "unspecified common-law fiduciary obligations on the basis of control alone," and, according to the court, was

free to "manag[e] the resource itself." *Id.* at 671. But the Nation's claim is premised on specific treaty, statutory, and regulatory provisions—not on control alone. *Supra* pp. 6-7; Navajo Fed. Opp. 20-23. And the Nation cannot manage the Colorado River itself, because it's the United States that has comprehensive control over the Colorado. *See* Navajo Fed. Opp. 23-25.

d. Finally, Petitioners claim that the court of appeals' decision conflicts with earlier Ninth Circuit precedent. That's wrong. As the court explained, those decisions did not involve *Winters* rights. Pet. App. 29. In any event, any intracircuit disagreement would be a problem for the Ninth Circuit, not this Court. *See, e.g.*, *Davis v. United States*, 417 U.S. 333, 340 (1974).

In sum, this case does not implicate any circuit conflict. Petitioners' contrary claim rests on the mistaken notion that the court of appeals failed to apply this Court's standard for Indian Tucker Act cases. But the court held that the Nation satisfied that very standard based on "specific treaty, statutory, and regulatory provisions that impose fiduciary obligations on [the United States]" in light of *Winters*. Pet. App. 29. None of the decisions Petitioners cite—all in different contexts—casts doubt on that case-specific application of this Court's precedents. To the contrary, as discussed, several of the decisions *reinforce* the court of appeals' holding.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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