No. 17-269

In The
Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.

Respondents.

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

REPLY TO BRIEFS IN OPPOSITION

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REPLY BRIEF FOR PETITIONER

Attempting to avoid this Court's review, Respondents claim the opinion below is consistent with precedent and narrowly prohibits the State of Washington from "destroying" salmon fisheries and abrogating treaty rights. These claims cannot withstand scrutiny.

The Ninth Circuit opinion is not a narrow restriction on "destroying" salmon runs. If it were, Washington would not have sought certiorari. Salmon are vital to our State's people, culture, and economy. In reality, the panel held that the Treaties make a promise beyond the State's control: "that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Pet. App. 94a. This Court rejected that unworkable rule in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (*Fishing Vessel*).

Respondents similarly err in claiming that Washington's equitable defenses would abrogate treaty rights. As this Court recognized in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 213 (2005), equitable defenses address what relief is available, not what rights exist. And as this Court and the Second Circuit have recognized, such defenses are available in treaty cases. The Ninth Circuit disagreed, rejecting these holdings and the powerful equities here, where the federal government designed and granted permits for the very culverts it now claims violate treaties it signed 160 years ago.

Finally, Respondents' attempt to reconcile the injunction here with precedent fails. Respondents cannot dispute that the injunction requires the State

to replace many culverts that will make no difference, flying in the face of federalism principles.

The Court should grant certiorari.

I. Respondents Mischaracterize the Ninth Circuit's Opinion

To minimize the conflict with *Fishing Vessel* and the importance of this case, Respondents mischaracterize the Ninth Circuit's opinion in two crucial respects.

First, Respondents claim that the Ninth Circuit's opinion narrowly "addressed whether the Treaties place any limits on the State's ability to destroy the fisheries that form the Treaty *res*, and held that they do." Tribes BIO at 17; *id.* at 18; U.S. BIO at 14. If that were all that the panel held, this case would be as unimportant as Respondents claim. Indeed, the Ninth Circuit held 40 years ago that "neither the treaty Indians nor the state on behalf of its citizens may permit the subject matter of these treaties to be destroyed." *United States v. Washington*, 520 F.2d 676, 685 (9th Cir. 1975). The State has made clear that it has no objection to that rule. Ninth Circuit Oral Argument at 50:20 to 51:10 (Oct. 16, 2015), http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000008307.

But that is not what the Ninth Circuit held. It held that the Treaties "promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Pet. App. 94a; U.S. BIO at 13 (admitting that the panel held that Washington "violates the treaty fishing right by interfering with the Tribes' ability to ensure a moderate living").

There are crucial differences between what Respondents claim the Ninth Circuit held (a guarantee against fishery destruction) and what it actually held (a guaranteed moderate living). Most importantly, as detailed below, an anti-destruction principle could be reconciled with *Fishing Vessel*, while the moderate-living guarantee cannot. An anti-destruction rule would also lead to a very different test for treaty violation from the one the courts below applied. Rather than simply concluding that Tribes are not earning a moderate living from fishing and that culverts play some unknown part in that, the courts below would have needed to consider whether the State destroyed the salmon fishery or particular salmon runs by building culverts, given factors like: (1) the State built culverts to standards that the federal government said were sufficient to allow streams to pass through and comply with federal law; (2) Respondents' highest estimate of salmon affected by state culverts (200,000) is a small fraction of annual harvests even in recent times (e.g., less than 5% of the 4 million salmon harvested in 2003, ER 267), and an even smaller percentage of historic harvests; (3) state culverts are vastly outnumbered by non-State culverts, including federal culverts, Pet. App. 203a, ER 196-209, 407-555; and (4) salmon runs had declined dramatically long before the State built any culverts, *see, e.g.*, *Vail v. Seaborg*, 207 P. 15, 16 (Wash. 1922) ("It is a well-known fact that the salmon industry of the state is rapidly disappearing.").

Respondents' second mischaracterization is that the Ninth Circuit's opinion makes clear that it addresses only culverts, so it will not have the far-reaching impacts the State and amici describe. *See,*

e.g., Tribes BIO at 36 ("[T]he Court of Appeals could not have been clearer about the narrow scope of its decision[.]"); U.S. BIO at 13-14, 19-20. But every passage Respondents cite to support this proposition comes from the concurrence in denial of rehearing en banc authored by two panel members—not the opinion. *See, e.g.*, Tribes BIO at 36 (citing Pet. App. 10a-11a); U.S. BIO at 13-14 (citing Pet. App. 10a-11a); U.S. BIO at 20 (citing Pet. App. 11a-12a). And when Respondents or others file the next case based on the panel's opinion, they will surely argue that the concurrence in denial of rehearing "is not a means by which [the Ninth Circuit] can definitively speak on legal questions." *Hughes v. Kisela*, 862 F.3d 775, 797 (9th Cir. 2016), *as amended* (June 27, 2017) (Ikuta, J., dissenting from denial of rehearing en banc) (citing *EEOC v. Bass Pro Outdoor World, LLC*, 865 F.3d 216, 234 (5th Cir. 2017) (Jones, J., dissenting from denial of rehearing en banc) ("[T]he panel has only the right to comment on the dissent from denial, not to articulate *any* additional binding precedent."); *Young v. Borders*, 850 F.3d 1274, 1287 (11th Cir. 2017) (Hull, J., concurring in denial of rehearing en banc) ("[O]rders denying rehearing en banc, even this published one, have no binding or precedential value.").

The panel could have amended its opinion to address the concerns of the State and the dissent that the opinion contained no "limiting legal principle that will prevent its holding from being used to attack a variety of development, construction, and farming practices . . . throughout the Pacific Northwest." Pet. App. 19a. The panel chose not to do that (despite making other amendments on rehearing), instead

issuing a concurrence in the denial of rehearing en banc. The Court should see through the panel's (and Respondents') efforts to downplay the opinion's scope.

Subsequent events support the State's concern about the opinion's breadth and the need for this Court's review. For example, the EPA "cited the Ninth Circuit culvert decision as a basis for disapproving some of Washington State's water quality standards under the Clean Water Act" and Maine's water quality standards.[1] And the commission that regulates land use in the Columbia River Gorge under 16 U.S.C. §§ 544-544p, relied on the panel decision to uphold the denial of a railroad's land-use permit in Oregon.[2]

In short, Respondents' attempts to narrow the opinion ring hollow, failing to undermine the exceptional importance of this case.

II. The Conflict with *Fishing Vessel* Is Real

The Ninth Circuit ruled that the Treaties "promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Pet. App. 94a. This is irreconcilable with *Fishing Vessel*, which specifically rejected the Tribes' argument "that the treaties had reserved a pre-existing right to as many fish as their commercial

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[1] Conference of Western Attorneys General, *American Indian Law Deskbook* § 9:18, 674-76 & nn.28, 31-32 (2017).

[2] *Union Pac. R.R. Co. v. Wasco County Bd. of Comm'rs*, No. COA-16-01, at 32-47 (Columbia River Gorge Comm'n Sept. 8, 2017), http://www.gorgecommission.org/images/uploads/appeals/20170908_Final_Opinion_and_Order_%2816-01%2C_16-02_%28Consolidated%29%29.pdf, *appeal docketed*, No. A166300 (Or. Ct. App. Nov. 7, 2017).

and subsistence needs dictated." *Fishing Vessel*, 443 U.S. at 670.

To avoid the conflict, Respondents first rewrite *Fishing Vessel*. They claim the Court recognized a "right" to as many fish as the Tribes need for a moderate living, subject to a "ceiling" of 50% of the available fish. U.S. BIO at 13; Tribes BIO at 19-20. This reverses the opinion and conflates the right with the remedy. *Fishing Vessel* declared "a *right*, secured by treaty, *to take a fair share of the available fish*." *Fishing Vessel*, 443 U.S. at 684-85 (emphasis added). The Court then turned to the remedy, affirming an equitable apportionment of 50% of the catch to the Tribes unless "tribal needs may be satisfied by a lesser amount." *Id.* at 685-86. Thus, rather than declaring a right to a "moderate living," the Court declared a right to a fair share, capped at 50%. If a lesser share were sufficient to "provide the Indians with a livelihood—that is to say, a moderate living," their share could be reduced. *Id*. at 686-87. Thus, as the Tribes themselves admit, *Fishing Vessel* used the moderate living "standard to bound the tribal share" of the catch, not to declare a minimum guarantee. Tribes BIO at 20. By contrast, "the panel opinion turns *Fishing Vessel* on its head" by "impos[ing] an affirmative duty upon the State to provide a certain quantity of fish[.]" Pet. App. 24a.

Next, Respondents claim that the panel needed to read *Fishing Vessel* to guarantee a moderate living because otherwise the State could "entirely eliminate the supply of harvestable salmon." U.S. BIO at 14 (quoting Fletcher, J., concurring in the denial of rehearing en banc, Pet. App. 9a). Judge O'Scannlain properly described this theory as "utter nonsense."

Pet. App. 28a. Courts have equitable powers to protect the shared salmon fishery from waste, overfishing, or destruction. *See Fishing Vessel*, 443 U.S. at 692 n.32; *United States v. Washington*, 520 F.2d at 685 ("[N]either the treaty Indians nor the state on behalf of its citizens may permit the subject matter of these treaties to be destroyed."); *United States v. Oregon*, 657 F.2d 1009, 1015-16 (9th Cir. 1981). Countless other state and federal laws protect salmon, and the State has strong incentives to preserve and restore salmon runs to benefit all Washingtonians, evidenced by the State's voluntary expenditure of hundreds of millions of dollars on salmon recovery.

The Tribes also claim there is no conflict because *Fishing Vessel* left "open" "whether the Treaties place any limits on the State's ability to destroy the treaty fisheries." Tribes BIO at 18. It is true that *Fishing Vessel* did not specifically address that question. But the Ninth Circuit's holding is not limited to that question. The court held the Treaties "promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Pet. App. 94a. That rationale is irreconcilable with *Fishing Vessel*, which rejected that very principle. *Cf. Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

III. The Ninth Circuit's Rejection of Equitable Defenses in Treaty Cases Creates a Real Conflict

Despite this Court's holding in *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005)

(*Sherrill*), that equitable defenses are available to treaty claims, the Ninth Circuit adhered to its own prior precedent holding the opposite. Pet. App. 97a-98a. Respondents fail in their attempts to distinguish *Sherrill* and Second Circuit cases applying it.

Respondents first argue that equitable defenses cannot be available to treaty claims because only Congress can abrogate treaty rights. U.S. BIO at 21; Tribes BIO at 26. But equitable defenses do not abrogate treaty rights. As this Court explained in *Sherrill*, equitable defenses are rooted in the idea that even if a right exists, the remedies available may be limited. *Sherrill*, 544 U.S. at 213. And *Sherrill* and subsequent Second Circuit cases have applied equitable defenses to bar analogous treaty claims.

Next, Respondents claim *Sherrill* is distinguishable because it did not address "specific rights" created by Treaties. U.S. BIO at 22. Not so. The tribe's claim in that case was that it was exempt from tax on property within its "reservation set aside by the 1794 Canandaigua Treaty." *Sherrill*, 544 U.S. at 212; *see also id.* at 203-05. Although it was undisputed that the land at issue was within the treaty reservation, the Court held that equitable considerations barred the tribe's claim. *Id.* at 213-20.

Respondents also point out that the federal government was not a party to *Sherrill*. Tribes BIO at 27; U.S. BIO at 22. But Respondents never explain why this matters, especially given that the United States appeared as amicus in *Sherrill* to support the tribe. Nor does this lessen the circuit conflict—the United States was party to Second Circuit cases applying equitable defenses. *See Oneida Indian*

Nation v. Cty. of Oneida, 617 F.3d 114 (2d Cir. 2010), *cert. denied*, 565 U.S. 970 (2011); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006).

Next, Respondents assert that this case differs factually from *Sherrill* and the Second Circuit cases, which involved "long-moribund sovereignty" over land held by others. U.S. BIO at 22-23; Tribes BIO at 27. But these arguments go to whether the State's equitable defenses should prevail on the merits, not whether the State can raise these defenses at all. Here, the district court dismissed the State's defenses as a matter of law at the pleading stage, Pet. App. 273a-74a, and the Ninth Circuit affirmed that decision, creating a clear conflict.

These factual distinctions are also weak. *Sherrill* and the Second Circuit cases all involved claims within a tribe's historic reservation lands. *Sherrill*, 544 U.S. at 212; *Oneida Indian Nation*, 617 F.3d at 119. By contrast, Respondents here seek to regulate State actions outside of reservations in areas where the Tribes "cede[d], relinquish[ed], and convey[ed] . . . all their right, title, and interest in and to the lands." Treaty with the Nisqualli, Puyallup Etc. 1854 (Medicine Creek Treaty), arts. I, III, 10 Stat. 1132, 1133 (Dec. 26, 1854, ratified Mar. 3, 1855, proclaimed Apr. 10, 1855). If anything, such claims threaten to be more disruptive than claims to reservation lands. And if equity can limit a treaty claim to reservation land itself, surely it can limit other types of claims.

Finally, Respondents claim that this case differs because the Treaties here have been the

subject of litigation for over a century. But the same was true in *Sherrill*, where litigation seeking compensation for the tribe's lost land began in 1893. *Sherrill*, 544 U.S. at 207. And the history of litigation over these Treaties actually supports the availability of equitable defenses here. At least since *United States v. Winans*, 198 U.S. 371 (1905), and throughout subsequent decades, the federal government has brought many cases to enforce the Stevens Treaties. Yet at the exact same time, the federal government was encouraging and funding Washington's highway construction and directing the State's culvert design.[3] Even after this case was filed in 1970, the federal government continued to issue permits for culverts in Washington, saying that they complied with federal law. ER 990. Given that the federal government spent decades suing to enforce the Treaties while simultaneously providing the design and permits for the State's culverts, the State's reliance interests are clear. *Cf. Sherrill*, 544 U.S. at 217 ("It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief.").

IV. The Injunction is Irreconcilable with This Court's Precedent

The United States claims that normal principles of injunctive relief—that injunctions be narrowly tailored to redress only conduct that violates

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[3] The federal government was also building dams in areas covered by the Treaties that completely or partially blocked salmon runs. *See, e.g.*, *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 516-17 (9th Cir. 2010); *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1020-21 & nn.2-5 (1983).

federal law, issued only after considering public impacts, and shaped with due regard for federalism—do not apply to treaty claims, and that the only relevant precedent is *Fishing Vessel*. U.S. BIO at 25-26. But *Fishing Vessel* announced no different standard and upheld an injunction carefully designed to implement the treaty right to a fair share of available fish. *United States v. Washington*, 384 F. Supp. 312, 413 (W.D. Wash. 1974); *see Fishing Vessel*, 443 U.S. at 685-89. By contrast, the injunction here is not narrowly tailored to prevent "destruction" of salmon or even to implement the "moderate living" right declared by the Ninth Circuit. Pet. App. 94a. As Judge O'Scannlain noted, the injunction forces the State to replace hundreds of culverts "without regard to whether replacement of a particular culvert actually will increase the available salmon habitat." Pet. App. 37a.

Neither Respondent disputes this. The United States excuses this overbroad injunction by claiming that the district court followed the State's own prioritization methodology. U.S. BIO at 24. Not so. The district court criticized and rejected the State's prioritization, Pet. App. 169a-70a, and substituted its own, Pet. App. 237a. It gave equal priority to all culverts that have "200 lineal meters or more of salmon habitat upstream to the first natural passage barrier," Pet. App. 237a, regardless of whether other barriers prevent salmon from getting to the culvert, and regardless of cost, Pet. App. 247a.

Finally, Respondents claim the State has inflated the injunction's costs. U.S. BIO at 25; Tribes BIO at 33. The State has been living under the injunction for four years, and during that time,

removing and replacing highway culverts to the standard the district court ordered has averaged several million dollars per culvert.[4] Even if just a fraction of the hundreds of culverts the injunction orders replaced have no impact, tens of millions of state dollars will be wasted.

CONCLUSION

The Ninth Circuit's opinion conflicts with decisions of this Court and others and imposes massive, ill-defined burdens on the State of Washington. This Court should grant certiorari.

RESPECTFULLY SUBMITTED.

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[4] *See WSDOT Fish Passage Performance Report* 30-31 (June 30, 2017), http://www.wsdot.wa.gov/publications/fulltext/projects/FishPassage/2017FishPassageAnnualReport.pdf (construction costs for projects from 2013-2016).