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 STATES OF NEBRASKA, KANSAS, LOUISIANA, NORTH DAKOTA, SOUTH DAKOTA, AND TEXAS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Petitioner is precluded from relitigating the Crow Tribe's hunting rights within Wyoming and, more particularly, in the Bighorn National Forest.

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INTEREST OF AMICI STATES

The Amici States, like most litigants, have an interest in the finality of judgments, and correspondingly in the maintenance of doctrines that preclude repeated attacks by losing parties on settled matters of law. These interests reach their apex when the matter at hand implicates the scope of Amici States' sovereign authority within their borders. This is especially true in the realm of State-Tribal relations, where the location of a reservation boundary, the nature of a trust land acquisition, or the meaning of a 19th century treaty can have profound, real-world consequences as to who has the power to tax, who has the power to regulate, and who has the power to prosecute criminal offenses.

Put simply, which sovereign has the power to govern over particular subject matter within a particular geographic area matters greatly to government as well as to the governed. More specifically for this case, the finality and stability of what the federal judiciary has said the law is regarding that power matters at least as much. To that end, Amici States have a substantial interest in this Court's reaffirmation of the important doctrine of issue preclusion and in its limitation on expansive new exceptions to the doctrine.

This case concerns the preclusive effect of the federal judiciary's judgment on a settled issue of federal law: whether under an 1868 treaty the Crow Tribe of Indians retain unrestricted hunting rights in the "unoccupied lands of the United States," notwithstanding

the Tenth Circuit's conclusive 1995 holding to the contrary. It arises from Wyoming's misdemeanor prosecution of Petitioner, a Crow Tribe member, for elk hunting in the Bighorn National Forest in violation of Wyoming's game laws.

Despite the quintessentially local nature of the underlying facts, Petitioner's arguments in resistance to the issue preclusion doctrine as a bar to his affirmative criminal defense would have consequences far beyond tribal hunting rights in northern Wyoming. Petitioner invites the Court to import into the federal common law a broad—and heretofore unrecognized—automatic exception to issue preclusion where there has been "a change in the applicable legal context." This ill-defined, manipulable standard would incentivize losing parties to continually innovate new means of relitigating settled issues, even where, as here, the intervening "change" is dubious at best.

Amici States have an interest in this Court's rejection of these arguments. Assuming the Court remains assured that its grant of certiorari was appropriate, the Court should use this case as an opportunity to reaffirm its precedents concerning the doctrine of issue preclusion, clarify the limited nature of the exceptions to that doctrine, and repudiate Petitioner's expansive and destabilizing arguments to the contrary.

SUMMARY OF THE ARGUMENT

Petitioner proceeds from the false premise that his affirmative defense regarding tribal hunting rights is not precluded by the federal courts' decades-old judgment that those hunting rights terminated. *See Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 992 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996). In resisting issue preclusion, Petitioner argues for a dramatic expansion of a narrow exception to the doctrine where there has been a "change in the applicable legal context." Not only does Petitioner's fact-bound claim not meet the requirements for this limited exception, his desired expansion of the exception could lead to manipulation as losing parties maneuver to identify some precedent cited in the adverse opinion that appears to rest on reasons rejected in some other line of "intervening" decisions by the Supreme Court. Amici States aim to complement their sister State Wyoming's own arguments by pointing out how Petitioner's broad conception of this exception would undermine finality and stability in an area of law—State-Tribal relations—where jurisdictional certainty is of paramount importance.

Amici States will first summarize the well-established principles of issue preclusion and why the Wyoming state courts properly applied that doctrine below. Amici States will then demonstrate how Petitioner's overbroad, Restatement-based conception of the "change in the applicable legal context" exception to issue preclusion has not been recognized by this Court, would undermine the principle of judgment finality,

and, as illustrated by the facts of this case, would have destabilizing consequences on important jurisdictional questions in the sphere of State-Tribal relations.

ARGUMENT

I. The Wyoming state courts properly applied the doctrine of issue preclusion as a bar to Petitioner's affirmative criminal defense.

The doctrine of issue preclusion is designed to prevent parties who lose in one tribunal to "shop around for another." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1298-99 (2015). When two different tribunals are asked to decide the same issue, the second tribunal must usually follow the decision of the first tribunal. *Id*.

Issue preclusion bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted). The principle behind issue preclusion is straightforward: "[o]nce a court has decided an issue, it is 'forever settled as between the parties.'" *B & B Hardware*, 135 S. Ct. at 1302-03 (citing *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525 (1931)). Under the doctrine, once an issue is directly determined by a court of competent jurisdiction, that determination is conclusive and cannot be disputed in subsequent suits between the same parties or their

privies. *Montana v. United States*, 440 U.S. 147, 153 (1979).

Issue preclusion protects parties from the expense and vexation of multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent verdicts. *B & B Hardware*, 135 S. Ct. at 1302 (citing *Montana*, 440 U.S. at 153-54). Indeed, the goal of minimizing inconsistent verdicts "encourage[s] reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Moreover, issue preclusion "promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 96.

Issue preclusion is "central to the purpose for which civil courts have been established, the *conclusive resolution of disputes* within their jurisdictions." *Montana*, 440 U.S. at 153 (emphasis added). Simply put, "a losing litigant deserves no rematch after a defeat fairly suffered." *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 107 (1991).

Here, although Petitioner and his Amici are understandably eager to skip past the critical threshold question of issue preclusion, the application of the doctrine is straightforward on a fair *and complete* reading of the line of relevant decisions. As Respondent has ably and comprehensively described, and as Amici States will briefly summarize, the decided nature of the termination of the Crow Tribe's off-reservation hunting rights is clear.

Twenty years after *Repsis*, Petitioner (and, indeed, the Crow Tribe itself) seeks a rematch on precisely the legal issue his Tribe lost in 1996. Petitioner argues that the doctrine of issue preclusion does not bar him from relitigating off-reservation Wyoming hunting rights because *Repsis* lacks preclusive effect due to a "change in the applicable legal context." The basis of this argument is that *Repsis* relied exclusively on *Race Horse* and this Court effectively overruled *Race Horse* in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). Petitioner argues that *Mille Lacs* "thoroughly repudiated" *Race Horse*, the case on which *Repsis* relied, and that Petitioner should, therefore, be permitted to relitigate *Repsis* itself. *Id*.

But *Mille Lacs* did not overrule the relevant part of *Race Horse* on which *Repsis* relied. All parties agree that this Court rejected the doctrine of "equal footing" that *Race Horse* relied on in holding that Indian hunting rights are irreconcilable with state sovereignty. *Mille Lacs*, 526 U.S. at 206. Critically, however, this Court continued:

> [t]he equal footing doctrine was only part of the holding in *Race Horse*, however. We also announced an alternative holding: The treaty rights at issue were not intended to survive Wyoming's statehood.

Mille Lacs, 526 U.S. at 206. *Mille Lacs* did not explicitly overrule this alternative holding in *Race Horse*.

Mille Lacs acknowledged that *Race Horse* concluded that the rights in the treaty at issue in *Race*

Horse were not intended to survive statehood. *Id*. This Court then contrasted the treaty rights at issue in *Race Horse*, which had a "fixed termination point," with the *Mille Lacs* treaty, which had no fixed termination and did not tie the duration of rights to the occurrence of a clearly contemplated event. *Mille Lacs*, 526 U.S. at 207. It further explained that the treaty at issue in *Race Horse* "contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States" and the "happening of these conditions was 'clearly contemplated' when the Treaty was ratified." *Id.* at 207 (quoting *Race Horse*, 163 U.S. at 509).

But the Court never explicitly overruled its second holding in *Race Horse*. The *Mille Lacs* Court held that courts should determine whether the rights granted in a treaty were intended to terminate upon the happening of a clearly contemplated event, such as in *Race Horse*. At worst, this Court only refused to extend the holding in *Race Horse* beyond the precise treaty language present in *Race Horse*—the same language in *Repsis* and here. The Wyoming state courts thus properly found that *Race Horse*'s second holding remained good law since this Court had not overruled it, and that it precluded Petitioner from relitigating the ultimate holding in *Repsis*.

This Court has long taken the position that lower courts are not to conclude that its recent cases have impliedly overruled earlier precedent: "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of

decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 485 (1989)).

The facts, circumstances, and procedural posture of the present litigation illustrate the wisdom behind this Court's opinion in *Agostini*. Petitioner is asking this Court to greatly expand the exception to the doctrine of issue preclusion that limits issue preclusion due to a "change in the applicable legal context. *See Bobby v. Bies*, 556 U.S. 825, 834 (2009). Petitioner is asking the Court to hold that parties are not bound by issue preclusion when the binding decision was based on case precedent that may have been subsequently questioned, but not overruled. This runs contrary to the principle of *Agostini* and is flatly inconsistent with what this Court actually held in *Mille Lacs*.

II. This Court has never recognized the broad exception to issue preclusion urged by Petitioner.

It is upon the intersection of *Repsis* and *Mille Lacs* that Petitioner bases his primary—and farthest-reaching—argument for expanding the recognized exceptions to issue preclusion "where there has been a change in the applicable legal context." Pet. Br. 46-48. Petitioner bases his argument on *Bobby v. Bies*, 556 U.S. 825, 834 (2009), where the Court cited a comment

from the Restatement (Second) of Judgments that "an intervening change in the relevant legal climate may warrant reexamination of the rule of law applicable as between the parties." Restatement (Second) of Judgments §28 cmt. c.

Bies does not appear to represent the Court's formal adoption of the Restatement's broad exception to issue preclusion. This is particularly true, as Respondent has ably demonstrated, in light of the Court's longstanding articulation of a related—but justifiably narrow—standard for when issue preclusion should be withheld given an intervening development in the law:

> Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.

Montana, 440 U.S. at 162 (emphasis original) (quoting *United States v. Moser*, 266 U.S. 236, 242 (1924)). This standard defeats issue preclusion only "for 'unmixed questions of law' in successive actions involving substantially unrelated claims." *Id.*

The exception as set out in *Montana* and *Moser* is superior in that it provides more concrete guidance to courts and litigants as to the circumstances in which a

prior final judgment will not enjoy the benefit of issue preclusion. Petitioner's Restatement-based alternative, on the other hand, would trigger the exception whenever a disappointed party can imagine a change in the legal "context," vague though that term may be. Here, the consequences of such a malleable standard are obvious, given that two of the freestanding reasons for the *Repsis* court's holding remained categorically valid even after *Mille Lacs* overruled the first reason. This should be a circumstance where issue preclusion still unquestionably applies based on the two undisturbed reasons in the prior case.

Here, there is no "unmixed question of law." Interpretation of the 1868 treaty is necessarily a fact-intensive endeavor, as the state court recognized in its careful, well-reasoned decision to apply issue preclusion. Pet. App. 25. This is not surprising, since the overwhelming majority of cases determining State-Tribal jurisdictional disputes based on 19th century treaties will involve mixed questions of fact and law. *See*, *e.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (fact-intensive analysis in reservation diminishment context); *Hagen v. Utah*, 510 U.S. 399 (1994) (same).

Were this Court to allow Petitioner to relitigate *Repsis*, no judgment would be safe. Every final judgment would be at risk of losing its preclusive effect between the parties and their privies the moment the underpinning legal authority can be called into question through mere reference to some intervening decision that criticizes a single component of the otherwise preclusive decision. This would invite relentless

litigation of settled issues until the non-prevailing party prevails, leading to abusive, vexatious and expensive litigation, waste of judicial resources, inconsistent results, and inability to rely on any adjudication. *See B & B Hardware, Inc.*, 135 S. Ct. at 1298-99, 1302; *Montana*, 440 U.S. at 153.

States and Tribes must be able to rely on past decisions and have finality between each other, particularly when such decisions directly implicate public safety considerations by delineating which sovereign may exercise law enforcement over a certain area, and the scope of the same. The alternative would breed jurisdictional chaos. Not only would Amici States be subject to litigation of previously decided issues—including, in all likelihood, on core jurisdictional issues stemming from century-old treaties decided (and relied on) for decades—they would be concerned with forum-shopping, including for relitigation of State-Tribal jurisdictional matters in non-federal forums ill-equipped to resolve such issues.

To be clear, Amici States do not accuse Petitioner of forum-shopping. But without jurisdictional certainty, individual parties could forum shop to relitigate such issues in forums that are ill-suited to that work. For example, Wyoming Circuit Courts, with original jurisdiction in all misdemeanor cases, Wyo. Stat. Ann. § 5-9-129. Like their counterparts in many other States, they are courts of limited jurisdiction with simplified rules to provide limited, focused discovery and expedited trial dates. Relitigating significant issues

regarding treaty-based State-Tribal jurisdictional boundaries during misdemeanor criminal prosecutions in such courts would tax judicial resources and increase the possibility of inconsistent decisions.

Moreover, and without at all casting doubt on the capacity of lower State courts, such courts are simply not the appropriate venues for the resolution of such significant and inherently federal issues. A strong issue preclusion doctrine serves as a safeguard against the relitigation of federal treaty questions in misdemeanor-level State courts, at least where, as here, the federal courts have already spoken. That is desirable from a policy perspective. Jurisdictional clarity and consistency would be ill-served if, for example, the issues decided by this Court several terms ago in *Parker*, 136 S. Ct. 1072, were continually relitigated in misdemeanor prosecutions in Nebraska county courts.

The need for jurisdictional certainty is particularly true in the context of State-Tribal criminal jurisdiction. For example, this term, in *Carpenter v. Murphy*, No. 17-1107 (U.S.), this Court will resolve a jurisdictional boundary dispute covering all of eastern Oklahoma and 1.8 million residents. However the dispute is resolved, it should be expected that both the State of Oklahoma and the Creek Nation respect the finality of the decision. It should also be expected that future clarification of issues addressed in *Carpenter v. Murphy* not be used as a "change in the applicable legal context" to undermine the finality of whatever decision is reached. Once a jurisdictional boundary is determined, that determination should

be final. Yet Petitioner's position would invite every criminal defendant in a successive prosecution to relitigate in state court the federal court's determination of the underlying jurisdictional boundaries. Pet. Br. 57. Such vexatious relitigation of settled jurisdictional issues would place no value on finality. Each successive prosecution should not spawn a renewed opportunity to undo the jurisdictional boundaries settled by the last.

The general rule of issue preclusion "is demanded by the very object for which civil courts have been established." *S. Pac. Ry. v. United States*, 168 U.S. 1, 49 (1897). The doctrine of issue preclusion protects the judicial system's vital interest in the finality of judgments. Allowing Petitioner to expand the recognized exceptions to the issue preclusion doctrine in order to relitigate *Repsis* would undermine this vital interest.

III. The Tenth Circuit's alternative basis for affirmance is independently preclusive.

Repsis provided an additional "alternative basis for affirmance of the district court's dismissal of the Tribe's action" that was not based on *Race Horse*. *Repsis*, 73 F.3d at 993. *Repsis* held that, at the time the 1868 treaty was executed, the land that is now the Bighorn National Forest was unoccupied and open for settlement. *Id*. However, 11 years later when Congress created the Bighorn National Forest, it expressly mandated that national forest lands were to be regulated for environmental purposes and "were no longer available for settlement." *Id*. Specifically, people could no

longer "timber, mine, log, graze cattle, or homestead" on national forest land without federal permission. *Id*. Accordingly, the Tenth Circuit held that the Crow Tribe had no right to hunt in the Bighorn National Forest because those lands are "occupied,"[1] since the treaty only reserved off-reservation tribal hunting rights to "unoccupied" lands. *Id*.; *see also* Pet. App. 45 (1868 treaty text).

Petitioner contends that the Tenth Circuit's holding that the Bighorn National Forest land is "occupied" should not be given preclusive effect. Pet. Br. 50. His primary argument on this point, and the one Amici States will address, again urges the adoption of an issue preclusion exception drawn from a comment to the Restatement (Second) of Judgments that this Court has never recognized. Specifically, he argues that if a "judgment by a court of first instance" relies on "determinations of two issues" that independently support the result, then the judgment is not preclusive on either issue. Pet. Br. 50 (citing Restatement (Second) of Judgments § 27 cmt. i.).

This position is contrary to this Court's precedent. This Court has held "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter, but each is the judgment of the court and of

[1] The Wyoming state courts in Petitioner's case recognized that the "*Repsis* court also alternatively held that the treaty rights were no longer valid, because the creation of the Big Horn National Forest resulted in the occupation of the land." Pet. App. 22, 33 (internal quotation omitted).

equal validity with the other." *United States v. Title Ins. & Tr. Co.*, 265 U.S. 472, 486 (1924); *see also Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum").

Notably, not only has this Court not embraced this exception, it has been rejected by at least six circuits. The Second, Third, Seventh, Ninth, Eleventh, and D.C. Circuits have generally followed the traditional view that independently sufficient alternative findings that have been litigated and decided should be given preclusive effect. *See Ass'n of Battery Recyclers v. EPA*, 716 F.3d 667, 673 (D.C. Cir. 2013); *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 255 (3d Cir. 2006); *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1402 (7th Cir. 1987); *Shellong v. INS*, 805 F.2d 655, 658-59 (7th Cir. 1986); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987); *Deweese v. Town of Palm Beach*, 688 F.2d 731, 734 (11th Cir. 1982); *In re Westgate-California Corp.*, 642 F.2d 1174, 1176-77 (9th Cir. 1981). In so doing, these courts relied on the general principles of issue preclusion, including finality and promoting judicial economy: "[a]pplying issue preclusion to independently sufficient alternative findings furthers the basic objectives of the doctrine." *See*, *e.g.*, *L'Oreal USA*, 458 F.3d at 254.

In support of applying the Restatement (Second) of Judgments comment as a new exception, Petitioner contends that a court's determination of an alternative basis may not have been as carefully or rigorously

considered. Pet. Br. at 50. This argument gives woeful short shrift to the Tenth Circuit's analysis, which consisted of an entire substantive section of its opinion. *Repsis*, 73 F.3d at 993. Hardly the "passing" conclusion described by Petitioner. Pet. Br. 51. Litigants should not assume that courts would give any less consideration to an independently sufficient basis to support its judgment. *L'Oreal USA*, 458 F.3d at 254. Courts are reasonably expected to craft findings that are the product of careful judicial reasoning, and the Tenth Circuit did so in *Repsis*. *Id*.

Next, Petitioner contends that the Tenth Circuit's alternative basis is legally and factually wrong and inconsistent with other court decisions. Pet'r Br. at 51. But even if the Tenth Circuit did err, this would not prevent issue preclusion. Issue preclusion bars litigation of wrong decisions to the same degree as correct ones. *B & B Hardware, Inc*., 135 S.Ct. at 1308-09; *see also United States v. Moser*, 266 U.S. 236, 242 (1924) ("[A] fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of law.").

The Tenth Circuit in *Repsis* resolved the same issue sought to be relitigated here—*i.e.*, that the 1868 treaty hunting rights were no longer valid due to the creation of the Bighorn National Forest resulting in "occupation" of the land. This resolution was essential to the decision as an independently sufficient alternative basis that the treaty rights were no longer valid.

Title Ins. & Tr. Co., 265 U.S. at 486; *L'Oreal USA*, 458 F.3d at 255. To permit relitigation of alternative findings would "eviscerate a great number of judicial determinations that were the products of costly litigation and careful deliberation." *L'Oreal USA*, 458 F.3d at 255. Further establishing that the Tenth Circuit's alternative holding was essential to the judgment, is that it was capable of being appealed and that the Crow Tribe actually petitioned for certiorari on this issue. *See* Pet. Br. at 7, 22, 24, Supreme Court of the United States docket no. 95-1560; *see Partmar Corp. v. Paramount Pictures Theatres Corp*., 347 U.S. 89, 100, 74 S. Ct. 414, 420, 98 L. Ed. 532 (1954) ("It is only when a finding of law or fact is not necessary for a decree that the prevailing party may not appeal and the finding does not form the basis for collateral estoppel.").

Petitioner, as a member of the Crow Tribe, should not be permitted to litigate, for the second time, the precise issue litigated by the State of Wyoming and Crow Tribe and resolved by the Tenth Circuit in Wyoming's favor. This Court should hold that Petitioner is precluded from relitigating whether the creation of the Bighorn National Forest rendered the land "occupied," thereby terminating the Crow Tribe's treaty rights to hunt those lands in violation of Wyoming's game laws. States must be able to rely on past decisions and the propriety of issue preclusion to protect against the burden of needless and vexatious relitigation of settled jurisdictional issues. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979).

"Denying preclusive effect to a finding that would support a court's judgment merely because the case was disposed of on other grounds as well would result in the inefficient use of private and public litigation resources." *L'Oreal USA*, 458 F.3d at 253. Litigants, particularly States that are often litigants to cases involving the clash of sovereign and jurisdictional interests, should not be denied preclusive effect of past decisions simply because the ultimate holding was based on multiple freestanding reasons. To hold otherwise would force defendants to gamble on only one legal theory in defense or only be entitled to issue preclusion on simple cases. *See L'Oreal USA*, 458 F.3d at 255 ("under the approach of the Second Restatement, the judicial findings in nearly any complex case would be unlikely to preclude subsequent relitigation of the same issues").

CONCLUSION

The judgment of the District Court of Wyoming should be affirmed.

Respectfully submitted,

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