No. 21-1248

IN THE
Supreme Court of the United States

SNOQUALMIE INDIAN TRIBE,
Petitioner,

v.

STATE OF WASHINGTON, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* COUGAR DEN, INC. IN SUPPORT OF PETITIONER

DEREK RED ARROW FRANK
BRENDAN V. MONAHAN
STOKES LAWRENCE
VELIKANJE MOORE & SHORE
120 N. Naches Ave.
Yakima, WA 98901

JAIME CUEVAS, JR.
COUGAR DEN, INC.
2910 Wesley Rd.
White Swan, WA 98952

ADAM G. UNIKOWSKY
Counsel of Record
LEONARD R. POWELL
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

QUESTIONS PRESENTED

1. Whether the federal courts have the constitutional authority to unilaterally abrogate all rights guaranteed to an Indian Tribe under a treaty with the United States absent congressional action.

2. Whether the Ninth Circuit erred by applying issue preclusion to hold that Snoqualmie was not a party to the Treaty even though the Executive Branch expressly recognizes Snoqualmie as a Treaty party.

CORPORATE DISCLOSURE STATEMENT

Amicus Cougar Den, Inc. has no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No publicly held company has a 10% or greater ownership interest in *amicus*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae submits this brief in support of petitioner, the Snoqualmie Indian Tribe, a federally recognized Tribe and signatory to the Treaty of Point Elliot of 1855.[2]

Amicus Cougar Den, Inc. stands as an Indian enterprise that exercises its treaty rights, rights similar to those at issue here. As an *amicus*, Cougar Den hopes to (1) emphasize the importance of treaties as pre-constitutional bilateral agreements between sovereigns, whose covenants are expressly incorporated in Article VI of the U.S. Constitution as the supreme law of the land; (2) expound on the constitutional division of powers of the Legislative and Executive authorities over Indian affairs; and (3) outline the role the Judiciary maintains when interpreting the treaties it is bound to uphold.

In *Washington State Department of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019), this Court

---

[1] Pursuant to Supreme Court Rule 37, *amicus* timely notified all parties of its intention to file this brief. Counsel of record for all parties gave their written consent to the filing of this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amicus curiae* and its counsel made any monetary contribution toward the preparation and submission of this brief.

[2] This brief will not weigh in on the interpretation of any specific treaty right of petitioner, but instead will discuss the importance of treaties and the role of this Court in upholding treaty-preserved rights and ensuring strict compliance with the Constitution and laws made in pursuance thereof.

vindicated and upheld *amicus curiae* Cougar Den's treaty right to travel and trade freely. Cougar Den is owned by "Punia"—Kip Richard Ramsey, Sr., an enrolled member and elder of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation"). On June 9, 1855, the United States and the Yakama Nation entered into a treaty that defined rights between nations and acts as a "founding document" in the government-to-government relationship between sovereigns. *See* Treaty with the Yakamas, 12 Stat. 951 (June 9, 1855); *see also Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1237-38 (E.D. Wash. 1997), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

Amicus Cougar Den's history of exercising and fighting to vindicate treaty rights is well documented, and it files this brief to alert this Court to the damaging precedent that would be established if certiorari were denied.

INTRODUCTION

> *"If we make a treaty with you and our Great Chief and his council approves it, you can rely on all its provisions being carried out strictly."*
>
> - *General Palmer, Walla Walla Treaty Council, June 2nd, 1855.*

At the Walla Walla Treaty Council, United States Agent General Palmer promised that the United States would carry out the provisions in our Treaties strictly. Like our people on the east side of the Cascades, the Snoqualmie Tribe to the west signed the Treaty of

Point Elliot relying on what Governor Isaac I. Stevens and General Palmer guaranteed. Unlike the Yakamas, Snoqualmie did not receive a reservation as promised and were left to live among the settlers, waiting.

Snoqualmie people continued to live throughout their ancestral homeland. The United States, however, determined Snoqualmie to be landless and removed their status as a federally recognized Tribe during the Termination Era of the 1950's. Subsequently, Snoqualmie people sought to join in the hallmark case of *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), hoping to claim the fishing rights memorialized in their Treaty. The court denied their rights under the pretext that its tribal members "intermarried with non-Indians" and took "up the habits of non-Indian life, and lived as citizens of the State of Washington in non-Indian communities." *Id.* at 1103, 1108-09.

Snoqualmie eventually reclaimed a fragment of their Treaty promises. One hundred sixty-five years after the Treaty was signed, in 1997, the United States formally recognized Snoqualmie. The Department of Interior confirmed Snoqualmie's status as both a Treaty signatory and a federally recognized Tribe holding political and cultural cohesion dating back to 1855. *See* Final Determination To Acknowledge the Snoqualmie Tribal Organization, 62 Fed. Reg. 45,864, 45,865 (Aug. 29, 1997). In 2020, Snoqualmie obtained a small section of their ancestral homeland as promised. The Executive Branch recognized Snoqualmie under federal law, and determined that Snoqualmie and its people maintained continuity from the time it signed

the Treaty of 1855, stating "Snoqualmie [was] a party to the Treaty" and that the Treaty "remains in effect." Letter from Tara Sweeney, Assistant Secretary, Indian Affairs, to Robert de los Angeles, Chairman, Snoqualmie Indian Tribe 7, 38-39 (Mar. 18, 2020) ("Sweeney Letter"). To Snoqualmie, this fact was never in doubt.

Despite these federal actions, Washington State, a non-treaty party, determined in 2019 that Snoqualmie lacked off-reservation hunting and fishing rights. Looking to the federal courts to uphold the words of their Treaty, Snoqualmie challenged the state's unlawful determination of rights. Rather than follow the actions of the Executive, the district court and Ninth Circuit broke from the judiciary's role, failed to interpret and enforce the words of the Treaty, and chose instead to abrogate Snoqualmie's Treaty rights via the discretionary rule of issue preclusion.

Treaties represent intergovernmental agreements between sovereign nations who came together for terms of peace. Treaties contain promises our ancestors preserved and promises the United States made for the mutual benefit of both sovereigns. As stated by Chief Justice John Marshall nearly 200 years ago:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial…. The very term 'nation,' so generally applied to them, means 'a

> people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Worcester v. Georgia, 31 U.S. 515, 519 (1832). "In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them…. And the form of the instrument and its language was adapted to that purpose." *United States v. Winans*, 198 U.S. 371, 381–82 (1905).

These Treaties were entered into by the Executive and ratified by Congress. The Judiciary's role is to interpret the ratified treaties; it is unable to abrogate Treaty terms without clear congressional direction. The lower courts violated this Constitutional mandate. The Supreme Court should grant certiorari to stable the balance of federal power to align with the Constitution and longstanding principles of Indian policy.

SUMMARY OF ARGUMENT

In federal Indian law, each branch of government exercises specific power under express restraints. The powers of each branch of government are informed by the historical interplay of federal and indigenous relationships. Both the powers and the limitations on each branch must remain in place for the security and safety of Indian People and the unfulfilled promises buried throughout time. Legislative policymakers, executive branch administrators, and the courts owe a leveled respect to the rights of Indian Tribes which stem from their preexisting sovereignty—a sovereignty memorialized in the Constitution.

Each branch of government has separate roles in their relationships with Tribes. The Executive Branch drafted our treaties and may today federally recognize a Tribe. The Legislative Branch historically ratified treaties; today it approves tribal recognition through legislation and holds a plenary power over Indian affairs pursuant to the Commerce Clause. Finally, the Judiciary interprets the words of the treaties and the Acts of Congress, and determines how each applies to Indian Tribes and their people. To us, these constitutional principles and bedrock tenets of Federal Indian law are pillars of security for the treaty-promises made with our people, with our elders, and for the children of our children. Each promise that was written, signed, and ratified warrants a prophetic caliber of reverence to the lives lost to a series of assurances between proud cultures, native and non-native.

Before the Court is a Tribe and its people whose ancestors attended a Treaty Council called by an agent of the Executive Branch, and whose ancestors listened to and held the words of the Executive's interpreters and purposefully chose to sign a Treaty subsequently ratified by the Legislative Branch. The district court and the Ninth Circuit below failed their duty to protect and interpret the words of the ratified Treaty. The lower courts usurped constitutional authority, overriding executive determinations that Snoqualmie is a party to the Treaty of Point Elliot whose members are entitled to exercise the hunting rights preserved behind the ink on the Treaty's parchment. The courts reached this decision in contravention of executive and legislative acts, and their holdings conflict directly with the division of powers set forth in the Constitution.

ARGUMENT

I. TREATIES REPRESENT LIVING COVENANTS BETWEEN NATIONS FOR THE BENEFIT AND PROTECTION OF THE GENERATIONS TO COME.

> *"I shall do you no wrong and you do me none, both our rights shall be protected forever; it is not for ourselves here that we are talking, it is for those that come that we are speaking.*
>
> - *Chief Lawyer, Walla Walla Treaty Council, June 4th, 1855.*

To understand the importance of a treaty right, the Court must consider the heavy and honest history behind treaty negotiations. With that history in view,

it becomes clear why treaty rights cannot be abrogated or diminished without congressional action. Each promise made, memorialized, and congressionally ratified signifies pieces of our cultures we practice today.

The discussions below illustrate the experiences of the Tribes to the east of the Cascades, and while all Tribes are distinct from one another, our ancestors both in the east and west of the Washington Territory approached each Treaty Council with a parallel heart. This section will provide that heart and the context of treaty negotiations, discussing (1) early American history and the move west; (2) the weight of the promises made at the treaty grounds; and (3) how we breathe life into the preserved promises and cultures secured by our ancestors.

A. Moving to the Occupied West.

> *"[O]ur people continued coming; every year vessels came until our people got as numerous as the leaves on the trees. It was but a few years before [the Indians'] game was all killed off; for the white man killed the game as well as the Indians...."*
>
> - *Gen. Palmer, Walla Walla Treaty Council, May 31st, 1855.*

Manifest destiny consumed American people with a directive to colonize the west for non-Indian settlement. Indian lands filled with pioneer families, and the fact the land belonged to our people remained unimportant to the settlers. The Tribes holding

original Indian title to the lands within the Washington and Oregon Territories played no role in property decisions. As the settler population increased in the Pacific Northwest territories, the need for a transcontinental railroad was apparent and the legal right to indigenous lands became a principal issue.

The United States historically dealt with intergovernmental Indian affairs through powers delegated to the branches of government by the Constitution. "The Constitution both defines and limits national powers, and, as interpreted by the Supreme Court, provides ample support for the national regulation of Indian affairs." Felix S. Cohen, *Handbook of Federal Indian Law* § 5.01[1] at 383 (2012 ed.). The Treaty Clause granted power to the President to negotiate treaties subject to ratification by the Senate, and this has stood as the principal foundation for contemporary federal power over Indians and their territories. *Id.* § 5.01[2] at 386. Pursuant to this power, the President authorized agents of the federal government to negotiate treaties with Indian Tribes.

Governor Isaac I. Stevens represented the treaty-making agent of the United States for the Tribes in the Pacific Northwest. Governor Stevens served as the Territorial Governor and Superintendent of Indian Affairs for the Washington Territory. He also served as Chief Engineer of the Northern Division of the Pacific Railroad Surveys chartered by Congress to ascertain the transcontinental railroad route. *Yakama Indian Nation*, 955 F. Supp. at 1240. At the time, United States policy favored settlement of the northwest but sought to avoid hostilities. *Id.* Stevens's

duties therefore required him to quickly but peacefully negotiate treaties with our Tribes because our lands were important to the railway and settling of the territory. *Id.* at 1240-41. Consequently, the Treaty Councils of 1855 were called.

B. Promises Made, Life Protected.

> *"Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the reservation on lands not claimed[,] ... that he can catch fish at any of the fishing stations, that he can kill [g]ame and can go to Buffalo when he pleases, that he can get roots and berries on any of the lands not occupied...."*
>
> - *Gov. Stevens, Walla Walla Treaty Council, June 9th, 1855.*

Similar to the councils west of the Cascade Mountain Range, and like the Treaty Council of Point Elliot, Governor Stevens called and set the 1855 Walla Walla Treaty Council for the Tribes east of the Cascades. As powerful sovereign nations, the Tribes were unafraid and ensured Governor Stevens understood that fact through illustrations of power and verbal challenges to the truth of the United States agents' words. Importantly, both treaty parties understood the treaty negotiations were fragile, and each side considered diplomatic demands in hope to obtain peace and safety for their people.

At the Walla Walla Treaty Grounds, many Tribes gathered. For the Yakama Nation, it produced

representatives from the: Yakama, Palous, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shy-iks, Oche-chotes, Ka-milt-pah, and Se-ap-Cat. Treaty of 1855, preamble. Also in attendance were representatives of the Cayuse, the Walla Wallas, the Umatillas, the Spokanes, and the Oak-kin-a-kanes. *See Certified Copy of the Original Minutes of the Official Proceedings at the Council in Walla Walla Valley, Treaty of 1855* (June 11, 1855) (hereinafter "Treaty Min."). As a show of force and power the Tribes possessed, the Nez Perce Tribe entered the treaty grounds with a cavalry of 2,500 "warriors mounted on fine horses ... riding at a gallop, two abreast, naked to the breech-clout, their faces covered with white, red, and yellow in fanciful designs." Alvin M. Josephy, Jr., *The Nez Perce Indians and the Opening of the Northwest: Complete & Unabridged* at 316 (1997). Our grandfathers understood why they were at the Treaty Council, and they wanted to ensure the government agents understood this as well.

The Treaty negotiations were anything but simple. Many Tribes were present, and each spoke different languages. *See United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). When discussing the English terms of each Treaty, a language unknown to most of the tribal representatives present, the terms were translated by a United States interpreter using the Chinook Jargon. *Id.* at 331. This Jargon, having about three hundred words in its vocabulary and known only to some tribal representatives, could express basic concepts but not the complex or implied meanings of each treaty

provision. *Id.* at 330. This is why when construing any treaty between the United States and an Indian Tribe, courts must consider historical context and keep "in mind that the negotiations for the treaty [were] conducted, on the part of the United States ... by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of ... their law, and assisted by an interpreter employed by themselves." *Id.*

Although coercion was prevalent, the United States agents negotiated with the Tribes understanding that conversations with our sovereign nations required persuasion and agreement. For example, Governor Stevens originally proposed only two reservations, placing many of the Tribes together. When Tribes showed their displeasure with the proposed reservations, General Palmer explained to them that "when we quit talking yesterday your minds were very much troubled ... [when w]e desired first to have you go all to one place." Treaty Min. at 90.

Rather than force the Indians together, the agents proposed another reservation for the Cayuses, the Walla Wallas, and the Umatillas. *Id.* These bilateral considerations demonstrated that the Treaty Council was an intergovernmental negotiation between powerful sovereigns. Indeed, at no point did the Tribes plead with the federal agents for anything, but remained skeptical and even challenged the words of the country's agents. Multiple moments in the record show the Tribes asked for the agents to speak straightforwardly, saying "Your words since you came here have been crooked." *Id.* at 85.

Protecting indigenous lands and resources for future use stood imperative for our Tribes. Our Tribes stressed the need to preserve access to their usual and accustomed hunting grounds and fisheries, explaining that these territories were necessary for our survival. Treaty Min. at 75-76. Governor Stevens listened to each Tribe's needs, and hoping to negotiate, he promised important qualities that each reservation offered. For example, many Tribes lived on their lands for roots, berries, wild game, and of course the salmon runs; Governor Stevens specifically emphasized that the reservations offered these qualities. *Id.* at 26, 28, 57, 66. Governor Stevens promised that the Tribes and their lands would be protected from the "bad white men." *See id.* 18, 19, 32, 36. Among other things, Governor Stevens promised the Tribes could travel and trade off-reservation, could go into the plains for buffalo, and could fish at all usual and accustomed places. *See*, *e.g.*, *id.* 26, 69, 106.

With a clear understanding that Governor Stevens and General Palmer represented the words of the President of the United States, *see* Treaty Min. at 52, the Tribes signed their respective treaties at the Walla Walla Treaty Council, like those of Point Elliot. With each signature, the Tribes ceded their homelands in consideration for peace and a guarantee that they preserved and secured their pre-existing rights and cultures. What those practices and cultures are is for the Indian Nations to explain, and for the Courts to give weight to when interpreting the words of our treaties with the United States.

C. Our Actions Today Breathe Life into the Rights and Cultures Preserved Therein.

> *"The treaty is, in a way, a founding document. It is like a beginning point in the modern government, you might say, of the [Indians], in that they see this as something that is sacred, it needs to be observed, that it was entered into in good faith, and whose provisions need to be protected at all costs."*
>
> - *Yakama Indian Nation*, 955 F. Supp. at 1237-38.

Enjoying the rights preserved by our ancestors has not been easy. For centuries Tribes and their people have exhausted resources to protect what is theirs. With each legal battle, Tribes rely on both the canons of federal Indian law and the bedrock principles of the Constitution.

"A treaty, including one between the United States and an Indian Tribe, is essentially a contract between two sovereign nations." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979), *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979) (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)). "When the signatory nations have not been at war and neither is the vanquished, it is reasonable to assume that they negotiated as equals at arm's length. There is no reason to doubt that this assumption applies to the treaties at issue here." *Id.* Accordingly, it is the intention of the parties, and not solely that of the

United States, that controls any attempt to interpret our Treaties.

This Court has further held the United States, "as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side." *Id.* at 675-76. "[T]he Treat[ies] must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by" us. *Id.* at 676 (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)). This Court consistently employs this canon when interpreting our treaties in our favor. *Tulee v. Washington*, 315 U.S. 681 (1942); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *Winans*, 198 U.S. 371; *Cougar Den*, 139 S. Ct. at 1019 (Gorsuch, J., concurring in the judgment) ("Our job in this case is to interpret the treaty as the Yakamas originally understood it in 1855—not in light of new lawyerly glosses conjured up for litigation a continent away and more than 150 years after the fact.").

For example, when Washington State attempted to violate our treaty right to fish off-reservation, the courts interpreted our treaties to correct it. In the landmark decision of *United States v. Washington*, 384 F. Supp. 312, the courts understood their role. The district court began its opinion stating, "The 'Constitution ... of the United States ... and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Id.* at 330 (ellipses in original) (quoting U.S. Const. art. VI, cl. 2). Through this lens the court determined our "treaty fishing rights are personal rights held and exercised by individual tribe members" and that our exercise of our preserved treaty rights may only be modified through the "received authority ... from Congress." *Id.* at 337.

Today, we fish as our ancestors had before as this is our right. We go to our usual and accustomed places in reverence to those that fought and died for our ability to do so unburdened. We place our nets throughout "Nch'i-Wana"—the "Great River" ("Columbia River") —and its tributaries, and dip our nets into the streams leading all the way to the headwaters of the Clearwater River. We do this today because promises were made and were subsequently upheld through the judicial role of treaty protection and interpretation.

When Washington State attempted to violate our treaty right to trade and travel, the courts again interpreted the treaty to correct Washington's action. Pursuant to its duty of interpretation, the court acknowledged the testimony of a Yakama elder to find that "[p]rior to the signing of the Treaty, the Yakamas traveled extensively. This far-reaching travel was an intrinsic ingredient in virtually every aspect of Yakama culture. Travel was significant for many reasons, including trade, subsistence, and maintenance of religious and cultural practices. Travel was such an essential component of the Yakamas' way of life that they could not have performed and functioned as a distinct culture in the pla[ne] in which they performed

and functioned without extensive travel." *Yakama Indian Nation*, 955 F. Supp. at 1238 (alterations and internal quotation marks omitted). The court used its canons of treaty interpretation to conclude that the Yakamas and its members preserved inviolate the right to travel unburdened, and we may therefore continue to do so without state law interference today. *Id.* at 1260.

Washington State did not, and has never, stopped its intentional attacks on our treaty rights. Again, in 2018, Washington State decided to tax *amicus* Cougar Den for its contemporary travel and trade activity of fuel distribution. This Court adhered to the role of the judiciary and interpreted Article III, paragraph I of our Treaty, concluding that Washington's fuel tax "acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Cougar Den*, 139 S. Ct. at 1013 (Gorsuch, J., concurring in judgment) (quotation marks omitted). Today, our Tribes use this right as we travel across the country trading with other tribal nations along "public highways [of the United States] without restriction for [today's] trading endeavors." *Id.* at 1017-18 (Gorsuch, J., concurring in the judgment).

Further, when municipalities of Washington State attempted to zone the Yakama's Closed Area, this Court interpreted our treaty and held firm that our treaty provisions must be upheld. Relying on the district court's factual findings, this Court looked to the promises made and the contemporary status of our closed area. Our closed area is off-limits to the general public, we regulate who may enter, and we determine

what can be built or taken therein. Within this area we practice our Washut religion, we enjoy "the tribal natural resources and ... the treaty right of [our] members to have an area in which they may camp, hunt, fish and gather roots and berries in the tradition of [our] culture." *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735, 741 (E.D. Wash. 1985) (quotation marks omitted), *aff'd sub nom. Confederated Tribes & Bands of Yakima Indian Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987), *aff'd in part, rev'd in part sub nom. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). Here we gather together in peace, practicing our preserved ways within our traditional encampments, places, or even within the old home of the x̱wyáach - sweathouse.

With every traditional act and word we speak we intentionally breathe life into the promises preserved in our treaties. With every pour of the water on the hot stones in the sweathouse, we inhale the same medicines our grandfathers breathed as they prepared to approach Governor Stevens during treaty times. With every piece of regalia made and every dance at our powwows, we remember the souls of our people. And with every good transferred from our trucks, every gallon of fuel traded, each elk taken, and every fish caught today we honor the words within the sacred documents we call our Treaties.

The above written words offer no equity to the reverence we, as Indian People, and this Court must give treaties. Therefore, they should not be rendered meaningless in the face of judicial discretion.

II. THE FEDERAL GOVERNMENT'S CONSTITUTIONAL ROLES FOR TREATY RELATIONS ARE CLEAR: THE EXECUTIVE ENFORCES, THE LEGISLATIVE AFFIRMS AND APPROVES, AND THE JUDICIARY INTERPRETS.

The Ninth Circuit below created a paradox that requires this Court's correction. In 1997, the United States recognized Snoqualmie as a treaty signatory Tribe to the Treaty of Point Elliot. *See* Final Determination, 62 Fed. Reg. at 45,865. In 2020, the Executive affirmed the Tribe's status as a treaty signatory and reestablished a small section of the Tribe's ancestral homeland, taking it into trust under federal law. *See* Sweeny Letter. Rather than respect the actions of the Legislature and Executive to conclude Snoqualmie retained its rights within its treaty, both the district court and the Ninth Circuit usurped their delegated power to conclude the exact opposite.

A. The Powers Conferred on the Legislative and Executive Branches of Government.

"Federal supremacy is a bedrock principle of Indian law." Cohen's § 2.01[2] at 111. This dates back to the Proclamation of 1763 where King George I declared that only the Crown, and not the colonies, was authorized to interact with the Indian Tribes. *Id.* Contemporary federal power to regulate Indian affairs derives from the text and structure of the Constitution. *Id.* § 5.01[1] at 383; *see United States v. Lara*, 541 U.S. 193, 200 (2004). The text of the Constitution refers to

Indians and Indian Tribes in the commerce clause and the apportionment clauses of Article I and the Fourteenth Amendment. In addition, Article II's treaty clause, while not explicitly referencing Indian Tribes, has played a major role in structuring the government-to-government relationship between Tribes and the United States.

Congress holds a "plenary and exclusive" authority over Indian affairs. *See Lara*, 541 U.S. at 200. The term "plenary" indicates the scope of congressional power to legislate in the area of Indian affairs, and the term "exclusive" refers to the supremacy of federal over state law. Therefore, to determine whether a Tribe possesses certain rights or a reservation, "there is only one place [this Court] may look: the Acts of Congress." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020).

Centrally, federal Indian law protects Indian Tribes and ensures their rights will not be illegitimately abrogated, as they were by the Ninth Circuit below. *See* Cohen's § 2.02[1] at 113. This Court "ha[s] required that Congress' intention to abrogate Indian treaty rights be clear and plain," and "in the absence of [an] explicit statement, 'the intention to abrogate or modify a treaty is not lightly imputed to the Congress'" because "Indian treaty rights are too fundamental to be easily cast aside." *United States v. Dion*, 476 U.S. 734, 738-39 (1986) (citations omitted).

Executive authority over Indian affairs flows from the President to the Secretary of the Interior and is then further delegated to the Bureau of Indian Affairs ("BIA"). *See* 25 U.S.C. §§ 1, 1a, 2; 43 U.S.C. § 1457.

Historically, the Executive held the power to engage Tribes for the purpose of making treaties, to be later ratified by Congress. U.S. Const. art II, § 2. Today, the Executive Branch holds significant authority in Indian affairs, but this authority results from delegations by Congress. *See, e.g.*, 25 U.S.C. § 2. Through these delegations, the Executive manages "all Indian affairs and ... all matters arising out of Indian relations." *Id.* The Executive may prescribe "regulations as [it] may think fair for carrying into effect the various provisions of any act relating to Indian affairs." *Id.* § 9. Given such broad Executive authority and the Executive's directive to service Indian affairs, the deference a court must give pursuant to that authority proves critical. *See Baker v. Carr*, 369 U.S. 186, 212 (1962); *Blake v. Am. Airlines, Inc.*, 245 F.3d 1213, 1215-16 (11th Cir. 2001).

The Executive Branch determined that Snoqualmie stands as a party to the Treaty of Point Elliot, which Congress ratified in 1859. A judicial determination contradicting these actions represents a decision contrary to the plenary authority of the Legislative Branch and the policy determinations of the Executive. This cannot occur. "Absent explicit statutory language, [the courts must be] extremely reluctant to find congressional abrogation of treaty rights and there is no reason to do so here." *Fishing Vessel*, 443 U.S. at 690 (internal citation omitted).

B. The Judiciary's Limited Role.

> "*Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning,*

> *and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."*
>
> - *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

The Constitution does not grant the Judicial Branch authority to make independent determinations in Indian affairs. An Act of Congress is therefore required to conclude that a Tribe lacks the rights expressly reserved in its Treaty. Executive and legislative actions guide the courts as they make determinations pursuant to the law and the Constitution. It is "the provisions of Congress, passed in the exercise of its constitutional authority ... if clear and explicit, [that] must be upheld by the courts, even in contravention of express stipulations in an early treaty." *Dion*, 476 U.S. at 738 (ellipsis in original) (quotation marks omitted).

The decisions below step beyond the judicial role. Even in the late nineteenth and early twentieth centuries, the courts avoided novel questions of Indian law. Rather than approach an issue blind and without clear congressional or executive guidance, courts would invoke the political question doctrine as precluding judicial review of issues committed to Congress. *Lone Wolf*, 187 U.S. at 565; *see Beecher v. Wetherby*, 95 U.S. 517, 525 (1877); *see also* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 221-24 (1984). What has remained subject to judicial review are the administrative processes, and the constitutional

limitations thereof, followed by the Executive and Congress when making decisions of Indians affairs. *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1369-73 (Fed. Cir. 2005) (discussing that recognition itself is generally unreviewable, but the courts may review whether the BIA followed the appropriate law and procedure).

This Court in *McGirt* emphasized the limited function of the courts, explaining that the judiciary holds no role in making decisions of Indian affairs. 140 S. Ct. at 2462. The Court followed the well-traveled path shaped by itself, remembering that "long ago [it] held that the Legislature [is the entity that] wields significant constitutional authority when it comes to tribal relations, possessing even the [conflicting] authority to breach its own promises and treaties," *id.* (citations omitted), whereas the courts do not.

It is pursuant to this principle, that even when tempted or the laws suggest an intended abrogation, the courts stand confined within their constitutional prerogatives, and may not deliver that final push absent clear direction. *See id.*

CONCLUSION

The Legislative and the Executive Branches of our federal government recognized and established that Snoqualmie is a signatory to the Treaty of Point Elliot. No act by Congress has changed this fact. The courts are bound by these actions and must uphold treaty rights as the supreme law of the land. Any step otherwise disrupts our democratic system of

governance, and perpetuates the legacy of broken treaties.

Respectfully submitted,

DEREK RED ARROW FRANK
BRENDAN V. MONAHAN
STOKES LAWRENCE
VELIKANJE MOORE & SHORE
120 N. Naches Ave.
Yakima, WA 98901

JAIME CUEVAS, JR.
COUGAR DEN, INC.
2910 Wesley Rd.
White Swan, WA 98952

ADAM G. UNIKOWSKY
Counsel of Record
LEONARD R. POWELL
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com