No. 21-1484 and 22-51

IN THE

Supreme Court of the United States

STATE OF ARIZONA, ET AL., PETITIONERS

v.

NAVAJO NATION, ET AL.

DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

NAVAJO NATION, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*

The Citizen Equal Rights Foundation ("CERF") was established by the Citizens Equal Rights Alliance ("CERA"). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. CERF is primarily writing this *amicus curiae* brief to explain how political accountability federalism relies on the 14th Amendment applying to the United States to use the structure of the Constitution to limit the territorial war powers of the 1871 Indian policy.[1] This *amicus* brief continues the analysis begun in CERF's amicus in *Oklahoma v. Castro-Huerta*, Docket No. 21-429. CERA has represented individuals in water cases that involve claimed federal reserved rights since the early 1990's, particularly in New Mexico. All water adjudications are complicated even before including issues of tribal water

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amicus curiae*, CERF, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief. *Amicus* is filing by motion because consent letters were sent too late for all of the parties to respond. Consent was received from Arizona and the Navajo Nation.

rights. CERA and CERF concluded many years ago that even without the federal reserved rights doctrine that the Indian Pueblo's and Tribes of New Mexico should be entitled to having their water rights conferred as municipal water rights as a matter of state law. CERF submits this *amicus curiae* brief to further explain how federalism can protect not only State jurisdiction but can empower individual rights and liberty of Native Americans by requiring all State citizens to be treated equally by the State and National governments.

SUMMARY OF THE ARGUMENT

These consolidated cases present what appear to be opposing issues regarding the federal government/Indian trust relationship and federal reserved rights doctrine over water. Both sets of issues come from the same source of federal power. *Amicus* has been arguing for more than twenty-five years that federal Indian law is schizophrenic and that two sets of conflicting laws over Native Americans have existed since the Civil War.

Political accountability federalism was designed to confront the specific holdings in *Dred Scott v. Sandford*, 60 U.S. 393 (1857) that are still governing federal Indian law today through the provisions of the 1871 Indian policy and the federal reserved rights doctrine. The first part of this *amicus* will explain how the Indian trust relationship as discussed by the Department of the Interior and State parties is a

foreign law doctrine found in *Worcester v. Georgia*, 31 U.S. 515 (1832). The second section of this brief explains how there was and is a way for Indian reservations to acquire state municipal water rights that works under our legal system within our constitutional structure. The United States has made it appear that the only way for Indian tribes to acquire water rights is through the Winter's Doctrine. This is just another federal fabrication to keep these extra-constitutional powers over the Indians.

ARGUMENT

The opening briefs of all the parties in both of these consolidated cases essentially disagree with the conclusion of the Ninth Circuit Court of Appeals that somehow the Winter's Doctrine creates an enforceable duty in the United States to acquire water for the Navajo Nation from the mainstream of the Lower Colorado River. CERF agrees with most of the arguments made in the opening briefs. CERF also agrees that the district court and appellate court lack jurisdiction over these issues under the original jurisdiction of this Court over *Arizona v. California*, Orig. No. 2208. CERF writes this *amicus* brief in support of no party to explain that denying the Navajo Nation an enforceable trust relationship against the Department of the Interior will not deny the Navajo Nation future water rights if this Court adopts a new equal protection standard that includes the Native Americans and tribes in the consolidated cases of *Haaland v. Brackeen*, Dkt No. 21-376. This is true

because under the 1848 Treaty of Guadalupe Hidalgo the Pueblo Indians who were defined as tribal people already living in permanent villages when the Spanish arrived in what we today call the Southwest were given the full rights of American citizenship to retain their ownership of property and water they held under Spain and Mexico. This became the Pueblo Rights Doctrine in California as state law. Municipal water rights were adjudicated to all of the Pueblos. New Mexico did something similar until this Court after adopting the reserved rights doctrine removed the citizenship rights of the New Mexico Pueblos in *United States v. Sandoval*, 231 U.S. 28 (1913). Activating the equal protection clause of the 14th Amendment to apply to all Indians today will reverse the racist decision of *Sandoval* and restore the complete ownership rights of the Pueblo Indians.

The structure of the constitution was designed to require federal territorial lands to be made into States to ensure that the territorial war powers of British law that had prevented the American colonists from ever becoming equal to English citizens who resided in Great Britain would not interfere with the right of self-governance of the people in our new republic.

I. THE INDIAN TRUST RELATIONSHIP WAS BASED ON *WORCESTER v. GEORGIA*

A. *The Federal Trust Relationship is a Legal Fiction USDOJ Exploited to Exercise Territorial War Powers Against U.S. States and Citizens*

The problem with each party's position in the action at bar, as this Court now recognizes, is that the United States-Indian federal trust relationship is a legal fiction first created by Chief Justice John Marshall through exercise of this Court's general equity power in the case of *Worcester v. Georgia*, 31 U.S. 515 (1832). Marshall was apparently emboldened, in *Worcester*, to declare the existence of a federal trust relationship between the United States and the Cherokee Nation because of the Removal Policy of 1830. And the USDOJ has long exploited the *Worcester* opinion to break the written safeguards that were so carefully designed by the Framers to prevent the Territorial War Powers from interfering with domestic law.

The *Cherokee Nation* dissent and the *Worcester* opinion elicited the concepts of **protection** and trusteeship as more than "a mere moral responsibility" recognized by the ruling eighteenth century powers, i.e., as customary state practice engaged in as a matter of obligation (*opinio juris*) thus comprising part of the law of nations explained in the treatise of then contemporary international law expert Emer de Vattel

("Vattel"). *See Worcester* 31 U.S. at 581; *See also United States v. Rogers*, 45 U.S. 567, 572 (1846) (referring to them as in "the spirit of humanity and justice"). In *Worcester*, this Court exercised its equity powers to acknowledge such responsibility as having been fulfilled previously by the British Crown in North America, and as thereafter having inherited and assumed, initially, by the American colonies in the context of "defensive war," and ultimately, by the newly formed United States government following the Revolutionary War. *Worcester*, 31 U.S. at 543-551. Indeed, in *Worcester*, this Court cited Vattel's treatise as the basis for concluding, first, that Indian tribes or bands could be considered 'sovereign' nations or states able to enter into enforceable treaties with independent sovereigns so long as they retained one facet of sovereignty – political and administrative self-governance, and second, that unequal treaties and alliances entered into between the evolving United States government and Indian tribes or bands not otherwise "acknowledged or treated as independent nations by the European governments." *Rogers*, 45 U.S. at 572.

In *Worcester*, this Court viewed the Indian nations as "politically distinct, independent political communities" – i.e., as foreign alien nations – "[t]he very term 'nation,' so generally applied to them, means 'a people distinct from others.'" 31 U.S. at 559. And it construed these indicia as evidencing the dependent and 'ward' status of said tribal nations in the eyes of the U.S. government as establishing a sort of a

protectorate, 31 U.S. at 555-557, as the basis for creating a fictional "tribal trust" relationship for their benefit.

Had this Court limited its exercise of these equity powers, this and other amicus briefs filed by CERF might not have been necessary. But this Court went much further in *Worcester* and focused on federalism concerns relating to the treaty clause (Art. II, Sec. 2) to ensure the sanctity of treaties the United States had executed with Indian tribes as "the supreme law of the land" amid sovereignty challenges from U.S. States (e.g., Georgia).

B. *Indian Treaty Interpretation was Inverted to Conform to the Fictional Federal Trust Relationship*

Chief Justice Marshall, in *Worcester*, inverted the interpretation of the U.S. government treaty with the Cherokee Nation so that it and all other Indian treaties would "never be construed to their prejudice." 31 U.S. at 582. Following the Act of March 3, 1871, which ended the federal government practice of treaty-making with Indian tribes, the Court later reaffirmed this approach to interpreting previously executed Indian treaties, in *United States v. Winans*, 198 U.S. 371, 372-374 (1905). In *Winans*, the Court cited *Worcester* as providing the basis for this construction: "As to the spirit in which Indian treaties should be construed see *Worcester v. Georgia*." *Winans*, 198 U.S. at 372. In *Winans*, this Court thereafter upheld this

inverted manner of treaty interpretation: "the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted" 198 U.S. at 381, which allowed the USDOJ to pervert the "Indian country" definition into claiming a reserved federal interest in perpetually "territorial" lands and aboriginal waters to render the Constitution inapplicable in "Indian country." And in *Winters v. United States*, 207 U.S. 564, 576-577 (1908), the Court thereafter referred to the inverted treaty interpretation rule-of-thumb it upheld in *Winans* – "[b]y a rule of interpretation of agreements and treaties with Indians, ambiguities occurring will be resolved from the standpoint of the Indians."

The Vattel philosophy was combined with specific statutes of the Reconstruction era requiring the Indians to remain on their reservations or face our military. The 1871 Indian policy is actually very harsh to the Native Americans even though it was supposed to favor and protect them. This power was also used to displace state jurisdiction and powers that had been allocated to the States.

II. HAVING REJECTED, IN *CASTRO HUERTA*, VATTEL'S ARGUMENT THAT INDIAN INTERESTS SUPPLANT FEDERALISM, IN LIGHT OF THE LINCOLN INDIAN ASSIMILATION POLICY, THIS COURT MUST REJECT OR OVERULE THE *WINTERS* AND *WINANS* RESERVED RIGHTS DOCTRINES

In *Oklahoma v. Castro Huerta*, (Dkt. No. 21-429, Jun. 29, 2022), this Court rejected the view long ago espoused in *Worcester*, that reservations are "distinct nations," holding that "'a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law.'" *Castro Huerta*, Slip op. at 21 (quoting *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962)). Thus, the Court now recognizes that "Indian country is part of a State, not separate from a State," and that "the Federal Government and the State have concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country," which includes "'all Indian allotments, the Indian titles to which have not been extinguished.'" *Castro Huerta*, Slip op. at 21-22.

In recognizing the true relationship between the States and the Federal Government, the Court reaffirmed that "under the Constitution and this Court's precedents, the default is that States may exercise criminal jurisdiction within their territory. […] States do not need a permission slip from Congress to

exercise their sovereign authority' [...], unless that jurisdiction is *preempted*." (emphasis in original). *Castro Huerta*, Slip op. at 22 (citing Amdt. 10). And by emphasizing the concurrent criminal jurisdiction of States and the Federal Government, the Court effectively interpreted both the Act of March 3, 1871 pursuant to which treaty-making with Indian tribes was abolished and replaced with congressional legislation, and the General Allotment Act of 1887, as further signaling "the eventual assimilation of Indians into our society" as State and Federal citizens. *Castro Huerta*, Slip op. at 22 (citing *Organized Village of Kake*, 369 U.S. at 72.

This Court also effectively embraced the long buried but recently revealed Lincoln Indian policy of assimilation set forth in President Lincoln's annual addresses of December 1, 1862, and of December 8, 1863, and in the Removal Act of March 3, 1863, 37th Cong. Sess. III, Ch. 99, 12 Stat. 792-794, which *inter alia* expanded upon and softened the harsh assimilation policy of the Removal Act of May 28, 1830, 21st Cong. Sess. I, Ch. 148, 4 Stat. 411-412, focused on individual Indian tribes, and provided for extinguishment of Indian title held in common with the State to make Indians in Indian Territory (Indian "country") bona fide State citizens. *See* Citizens Equal Rights Foundation, Amicus Curiae Brief in *United States v. Cooley* (Dkt. 19-1414), at 16-22. Consequently, having already rejected *Worcester*, this Court must now also expressly reject/overrule the *Winans* and *Winters* Indian/federal

reserved rights doctrines which undermine and are inconsistent with the Lincoln Indian assimilation policy.

In taking this critically important next step, the Court can rely on *Castro Huerta's* specific references to the Court's prior decisions in *Organized Village of Kake*, 369 U.S. at 67-68, 75-76, *United States v. McBratney*, 104 U.S. 621, 623-624 (1881), and *Draper v. United States*, 164 U.S. 240, 242-246 (1896). These specific cases held that nine congressionally ratified western State enabling acts effectively containing the same "Indian lands in [] remained 'under the absolute jurisdiction and control' of the United States" language, evidenced the "admission of a State into the Union" in an "undiminished, not exclusive" condition – i.e., as "authoriz[ing] concurrent State and Federal [civil and criminal] jurisdiction" (369 U.S. at 72). This, in turn, guaranteed to individual tribal and non-tribal members, alike, State and Federal citizenship, and thus, full constitutional and civil rights, including equal protection, due process, and private property-based State adjudicated water rights, as the Lincoln Indian assimilation policy had envisioned.

III. THERE HAVE BEEN TWO FEDERAL INDIAN POLICIES SINCE THE CIVIL WAR

CERF has been saying that there are two conflicting Indian policies running at the same time for more than twenty-five years in multiple amicus briefs to this Court. In this case, the 1871 Indian policy based

on the territorial war powers and the British Proclamation of 1763 have finally been shown not to create any kind of enforceable trust relationship with the Native Americans and Indian tribes. At least, there is no legal means for the Indian tribes to sue and enforce any kind of "trust" against the United States or its parts. So while the Departments of the Interior and Justice used the Indians as their "wards" and justification for these extra-constitutional powers, no real responsibility to provide for the Indians ever existed as the Department of the Interior now explains and admits in detail in their opening brief. This would be a disastrous situation if the other Indian policy--the most maligned assimilation policy that the Framer's of our Constitution initially designed was not still viable.

A. *Expanding the Equal Protection Clause to Include Indians will implicate the constitutionality of the reserved rights doctrine.*

This Court has before it the case of *Haaland v. Brackeen,* Dkt.No. 21-376 and the question whether the equal protection clause should be interpreted to include all Native Americans. If this Court decides that it is time to grant the Native Americans the application of the Constitution to where they live and with their dealings with the United States it will also be contradicting the 1871 Indian policy and the reserved rights doctrine. The reserved rights doctrine of *United States v. Winans* requires the United States to assert the territorial powers. As said in *United States v.*

Winans, 198 U.S. 371 (1905), "At the time the treaty was made, the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands, and to define rights outside of them." *Id.* at 379. "Indian country" is defined as federal territorial land. 18 U.S.C. §1151-1153. The opinion continues by quoting the lower court ruling and the basis of the decision as treating the treaty as a concession of tribal rights. But then it turns, ruling that: "In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." *Id.* at 381. This creates a permanent property right in the United States to the territorial lands just like was enjoyed by George III as declared in the Proclamation of 1763. *See Worcester v. Georgia*, 31 U.S. 515, 548 (1832).

As John Locke and the Framer's realized, under the doctrine of natural rights the right of every American to be treated equally cancels out the asserted sovereign authority of the King to treat the citizens any way he chooses. The people are sovereign, not the King. There is an absolute contradiction between the two legal philosophies. Either one exists or the other. This is what President Lincoln realized and why his efforts were not to thwart Secretary of War Edwin Stanton but to make sure the 13th and 14th Amendments were passed and adopted to become a part of the Constitution. Eventually, the day would come where the use of the reserved powers by the United States would prove that they are extra-constitutional and

unworkable in a republic based on democratic principles of natural rights.

Long time counsel for CERF is well versed in Western water law having litigated successfully on both the Rio Grande and Colorado rivers. Frankly, allowing the United States to apply the implied reserved water rights doctrine from *Winters v. United States*, 207 U.S. 564 (1908) has affected much more than just the gross unfairness of how water has been allocated or not allocated to Indian tribes. The fact is that one of the main reasons that the Western States are ill prepared for the current water shortage crisis is because of this implied federal water rights doctrine. The United States has been the enemy to the Western States developing additional water resources since this Court's decision in *Arizona v. California*, 373 U.S. 546 (1963). Any additional water source could be attacked and federalized using the Winter's doctrine. For this reason none of the Western states have done the groundwater studies or general hydrological studies that we need to be prepared for drought conditions. The best way not to be attacked by the United States wielding this extra-constitutional power was simply not to know of any additional water sources. Every citizen in the Western United States is being harmed by this extra-constitutional federal power.

This Court had the right idea when it approved of "equitable apportionment" as the main doctrine for the allocation of water between states under its original jurisdiction. *See Kansas v. Colorado*, 206 U.S. 46 (1907).

This doctrine is what should have been applied on the Colorado River but was not because of the granting of the motion to intervene of the United States to represent the Indian tribes in the litigation. Equitable apportionment allows cooperative federalism to form. *See California v. United States*, 438 U.S. 645 (1978) Cooperative federalism can be further interpreted using the principle of making the United States accountable to the people as Congress intended in Section 8 of the Reclamation Act of 1902.

B. *The Framer's assimilation policy, unlike the 1871 Indian policy, works with the expansion of the equal protection clause of the 14th Amendment.*

The assimilation policy is very much alive and can be used to give Indian communities state water rights. This is the main reason CERF is submitting this *amici* brief. While neither the Indian tribes or the states may appreciate what CERF is about to say, the fact is that this Court needs to be aware that there is a real way under current law to provide water to the Indian tribes that have been left out of the bonanza applications of the federal reserved water rights doctrine. In fact, the United States has been actively trying to reject just such a solution on the Rio Grande in New Mexico for the past 25 years in *United States, et al v. Abousleman*, New Mexico Federal District Court No. 83-CV-01041 KWR/JHR known as the Jemez River adjudication. The *Abousleman* case was filed by the United States just after this Court's ruling in *Arizona*

v. California, 373 U.S. 546 (1963) by the same United States Department of Justice attorney that filed the Motion for Intervention in that case, William H. Veeder. In fact, the latest briefing in *Abousleman* is whether *United States v. Winans* and the federal reserved rights doctrine can be used to overcome the Settlement Agreement entered into by every party except the United States twenty-five years ago.

The *Abousleman* Settlement grants state municipal water rights to the Indian Pueblos in the suit. Every drop of water the Pueblos could prove had ever been applied to beneficial use was included in the municipal water right. This was made possible under the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848) that designates that the civilized Indian tribes were supposed to have full ownership of everything granted by Spain and Mexico within the United States including full and immediate citizenship. *See generally United States v. Joseph*, 94 U.S. 614 (1876). Civilized Indian tribes were considered by the Spanish and Mexicans to be those that had established permanent communities. As the descendants of the Anasazi cliff dwellers, the Pueblo Indians had permanent adobe and stone homes of several stories with town squares when the Spanish conquistadors arrived in the Southwest. The Pueblos around their towns had substantial irrigated farms growing corn, squash and all kind of peppers. From New Mexico's earliest territorial days as part of the United States, the Indian Pueblos have been municipalities recognized in the Organic Act, Territory Act and Statehood act as well as currently in the state

constitution. Nomadic Indian tribes were treated as uncivilized Indians and were considered Indian wards under a general trust responsibility of the United States.

By 1848, the United States was beginning to get its new laws and policies from creating a new public land system worked out. In 1845 this Court had decided *Pollard's Lessee v. Hagan*, 44 U.S. 212, finally adapting the general public trust doctrine of Britain that covered navigation, rivers and harbors and waterway issues to the federalism division of power between the United States and States. Similarly, *United States v. Gratiot*, 39 U.S. 526 in 1840 defined when a final disposal of federal lands occurred in a State. These new definitions are evident in the Treaty of Guadalupe Hidalgo in how the Spanish and Mexican land grants are treated. After the Pueblo Revolt of 1680 the King of Spain made actual land grants to each of the Pueblos in New Mexico and to the Hopi in Arizona before the Spanish returned. The treaty does not discuss water rights. Under the division made in *Pollard's Lessee*, water allocation was left to the states.

None of the new territories brought in under Guadalupe Hidalgo had a problem allocating water to the Indian Pueblos. The word pueblo means town in Spanish. California even adopted the Pueblo Rights Doctrine to protect pueblo water rights. The Pueblo Rights Doctrine was the first water doctrine of California. It was specifically created to protect the Mexican land grant rights to public and private waters.

It applied equally to all towns recognized by Mexico. The other Southwestern states were not as formal in adopting a legal doctrine but all acknowledged the pre-existing Mexican water rights.

Neither the states or federal government could allocate water to nomadic tribes. It was not until the United States enforced the Indian reservation system that this water issue arose. The previously nomadic Indian tribes were not farmers but the Department of Interior decided they were going to farm. This was the situation that created *Winters v. United States*. Apparently, the United States did not want to purchase state allocated water rights and instead used the reserved rights doctrine first created in *United States v. Winans* to literally take the pre-existing state allocated private property rights away from farmers without any compensation. *Winters v. United States*, 207 U.S. 564_(1908). The *Winters* Doctrine has been used as a reckless hammer against the States since this Court made the mistake of allowing its creation. It has done significant harm to the development of water law and should be terminated. To give this Court an idea of how badly manipulated the doctrine has been only requires a quick discussion of the creation of the Colorado River Indian Tribe.

On the Colorado River the United States created its own Indian tribe by first removing the remaining Chemehuevi Indians from the riverbed lands in the Chemehuevi Valley (the location of Lake Havasu today) and placing them in Parker, Arizona. The Department

of Interior then invited Indians from other tribes to go to Parker to settle. When that did not work, the Department began raiding the Navajo reservation and several New Mexico Pueblos to kidnap Indians walking in their home reservations onto trucks to relocate them to Parker. Hundreds of Indians disappeared without any notice to their families in the 1930's and early 1940's. When the Indians agreed to stay in Parker they were allowed to write their families and invite the whole family to live in Parker. They were not allowed to return to their original homelands. Parker is important because of a large rock that juts out into the Colorado River, called Headgate rock. Headgate rock allows a major water diversion to occur from the river. The Department of Interior buildings are all located adjacent to this rock. This is what is called the Colorado River Indian Tribe (CRIT) which holds the great majority of federal reserved water rights on the lower Colorado River awarded to the Indian tribes in the 1963 ruling of *Arizona v. California*. The creation of CRIT is and was a complete federal fabrication to gain total control of the Colorado River from the adjoining states. Most of the serious salinity problem in the river comes from the lands irrigated by CRIT that never should have been irrigated.

The federal reserved rights doctrine has never been a workable legal doctrine. It has created ridiculous disparities between Indian tribes and attacked state authority and jurisdiction to the detriment of all people. Revoking the doctrine will stop the federal government from being an absolute enemy to the States and

hopefully allow cooperation to meet the water allocation challenges of today and the future.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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