No. 25-165

In the Supreme Court of the United States

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
PETITIONER

v.

STATE OF MICHIGAN, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court has equitable authority to enter a decree, without applying the standards for awarding injunctive relief, that allocates a limited fishery resource between and among the State with territorial jurisdiction over the relevant waters and the five Indian Tribes that collectively hold nonexclusive treaty-preserved tribal fishing rights, where the only Tribe that objects to the decree had previously persuaded the court that the court possessed such authority when a different Tribe opposed the court's previous allocation decree in the same case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 131 F.4th 409. The opinion of the district court (Pet. App. 41a-200a) is available at 2023 WL 5444315.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2025. On May 30, 2025, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including August 10, 2025, and the petition was filed on August 8, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the allocation of the right to fish between and among the five Indian Tribes that are parties to this case (the Tribes) and the State of Michigan (a re-

spondent), which regulates nontribal fishers, in waters that were ceded to the United States in 1836 under the Treaty of Washington, 7 Stat. 491. The five Tribes—including petitioner—hold a nonexclusive tribal right to fish for both "subsistence and commercial purposes" in the ceded waters as undifferentiated "communal property." 471 F. Supp. 192, 271-272, 279-280 (1979 district court opinion in this case). By 1985, petitioner had prevailed in its argument that the district court possesses equitable authority, and that it should exercise that authority, to allocate the fishery resource between and among the tribal rights-holders and Michigan (for nontribal fishers)—even over the objection of another one of the Tribes—based on the consideration of several factors that differ from the four-factor test for imposing injunctive relief. See Pet. App. 26a n.11; 12 Indian L. Rep. 3079, 3081 (1985 allocation decision available at C.A. App. A81-A95); 4/11/1984 D. Ct. Op. 1-2, 14-17 (Doc. 642) (adopting petitioner's arguments on court's authority to allocate).

The district court's 2023 decree equitably allocating the fishery (Pet. App. 41a-200a), which the court of appeals affirmed (*id.* at 1a-40a), is the most recent in what is now a series of allocation decrees in this case that adopt petitioner's original arguments about the district court's equitable authority in this shared-fishery-resource context. Like the prior decisions, the district court's current decision balances in equity the rights of relevant entities in a scarce fishery resource to adopt an allocation plan that "is in the best interest" of the parties and the fishery, preserving the shared resource and, hence, the Tribes' fishing rights, for the future. *Id.* at 43a; see *id.* at 2a. And although petitioner objects to the most recent decree—by presenting arguments that are inconsistent with its earlier successful position regarding the trial court's equita-

ble authority—the other four Tribes that are joint owners of the communal tribal fishing right do not object.

1. In 1836, the United States entered into the Treaty of Washington, 7 Stat. 491, with Ottawa and Chippewa tribes located in what is now the State of Michigan. Under that treaty, the tribes ceded nearly all of their territory, which includes parts of the Great Lakes. Pet. App. 3a. The tribes' aboriginal title, however, included the right to fish in the ceded waters for both subsistence and commercial purposes, which the tribes reserved because the 1836 Treaty did not specifically purport to extinguish it. 471 F. Supp. at 213, 253-258, 279; see Pet. App. 44a, 46a. In addition, Article 13 of the Treaty provided that the tribal signatories retained "the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement." 7 Stat. 495. That provision has been construed as collectively reserving a shared fishing right, even after the relevant lands had been settled by non-Indians. 471 F. Supp. at 258-259, 279 (following the Michigan Supreme Court's interpretation of Article 13 in *People* v. *LeBlanc*, 248 N.W.2d 199, 205, 207 (1976)); see Pet. App. 3a.

Two features of the Treaty of Washington are presently relevant. First, although the 1836 Treaty refers to the "Ottawa and Chippewa nations," 7 Stat. 491, the Tribes' "primary unit of political and economic organization [at the time] was the band, which was frequently associated with a village." 471 F. Supp. at 220. The tribal signatories to the Treaty thus represented more than 15 distinct bands, which were Ottawa, Chippewa, or a mixture thereof, and were each associated with a different area in Michigan. *Ibid.* (listing bands).

Petitioner—the Sault Ste. Marie Tribe of Chippewa Indians—is a successor in interest to one of the original

tribal signatories. Pet. App. 3a. The other four Tribes in this case—respondents Bay Mills Indian Community (Bay Mills), Grand Traverse Band of Ottawa and Chippewa Indians (Grand Traverse), Little Traverse Bay Bands of Odawa Indians (Little Traverse), and Little River Band of Ottawa Indians (Little River)—are also successors in interest to other signatories. *Ibid.* It is undisputed that all five collectively share as "communal property" the tribal fishing right left undisturbed by the 1836 Treaty. 471 F. Supp. at 271, 280.

Second, the Treaty of Washington does not itself allocate fishing rights in the ceded waters. As petitioner has explained, "the fishery resource during treaty times was abundant," such that, presumably, "no one—Indian and non-Indian alike—was concerned about a scarcity of any [fish] species." D. Ct. Doc. 635, at 7 (Jan. 9, 1984). Only in "more recent times" has "competition for the resource increased dramatically." *Ibid.* The 1836 Treaty thus purports neither to allocate the fishery resource between tribal and nontribal fishers, nor to allocate further the tribal portion of the fishery among the Tribes. And although petitioner observes that no party disputes the "core holding" of the 1979 district court decision in this case that the Treaty "reserved the tribes' fishing rights," Pet. 7 n.1, the disputed scope of those nonexclusive rights shared as communal property by multiple tribes—which affected the ability of tribal fishers from different tribes and of nontribal fishers regulated by Michigan to fish in the waters ceded by the 1836 Treaty—lies at the heart of this case.

2. In 1973, the United States initiated this case by bringing suit on behalf of Bay Mills to prevent Michigan from applying its fishing regulations to tribal fishers, which were interfering with that Tribe's right to fish in

waters ceded under the 1836 Treaty. 471 F. Supp. at 203-204. In 1974 and 1975, Bay Mills and petitioner intervened as plaintiffs, filing their own complaints in which they claimed, *inter alia*, that each Tribe separately possessed "exclusive" rights to fish in certain areas and nonexclusive rights elsewhere in the ceded waters, *ibid.*, and, in addition, that Michigan had a duty to prevent nontribal fishers subject to its regulation from overfishing, which had caused "[in]sufficient numbers of fish" to be available to the Tribes under their treaty-preserved rights, D. Ct. Doc. 31, at 9-10 (Oct. 28, 1975) (Bay Mills' third claim). See D. Ct. Doc. 79, at 11-12 (June 17, 1976) (petitioner's third claim). Grand Traverse, Little Traverse, and Little River later intervened as plaintiffs. Pet. App. 3a.

a. In 1979, after a trial on what it called the "Phase I issues" in the case, 471 F. Supp. at 217, the district court determined that the tribal right to fish in ceded waters preserved by the 1836 Treaty "is the communal property of the tribes which signed the treaty and their modern political successors." *Id.* at 271, 280; see *id.* at 253-259. The court also determined that Michigan had no "right to regulate Ottawa and Chippewa Indian fishing on the Great Lakes in exercise of their rights." *Id.* at 270; see *id.* at 265-274. The court entered a "declaratory judgment and decree" to that effect. *Id.* at 278-281 (capitalization omitted). Paragraph 25 of the decree provided that the "[t]he court retains jurisdiction of this case for the life of this decree to take evidence, to make rulings and to issue such orders as may be just and proper upon the facts and law, and in the implementation of this decree." *Id.* at 281; see Pet. App. 4a.

b. The court of appeals stayed the district court's judgment depriving Michigan of authority to regulate

tribal fishers pending the State's appeal. 623 F.2d 448, 449 (1980) (per curiam). While that appeal was pending, the Secretary of the Interior issued comprehensive regulations governing tribal fishing on the Great Lakes. Pet. App. 4a. The court of appeals then remanded for the district court to consider the regulations' "preemptive effect." 623 F.2d at 450. The court of appeals maintained its stay pending appeal during that remand, finding a "strong possibility" that tribal fishing "would irreparably damage the piscatorial ecosystem" in Michigan's "territorial waters" if left "unfettered by state regulation." 5/30/1980 C.A. Order 3 (at D. Ct. Doc. 448).

The federal regulations lapsed during the remand proceedings, Pet. App. 5a, and the State moved the court of appeals to vacate its remand order and reverse the district court in the still-pending appeal. 653 F.2d 277, 278 (1981) (per curiam order). The court of appeals determined that the 1836 Treaty preserved tribal fishing rights, but it held that those rights were "not absolute" and were "subject to a rule of reason." *Id.* at 278-279. The court concluded that, in the absence of federal regulation, the Michigan Supreme Court's decision in *LeBlanc* accurately described the relevant principles, which limit Michigan's regulatory ability to restrict tribal fishing rights to those contexts in which state regulation is "a necessary conservation measure," reflects "the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm," and does "not discriminatorily harm Indian fishing." *Id.* at 279. The court further stated that, to justify such regulation, the State must "show by clear and convincing evidence that it is highly probable that irreparable harm will occur and that the need for [state]

regulation exists." *Ibid.* The court again remanded, *ibid.*, and this Court denied certiorari, 454 U.S. 1124 (1981).

c. On remand, Michigan informed the district court that it would not attempt to satisfy the *LeBlanc* criteria. Pet. App. 5a. As a result, the State could not lawfully regulate tribal fishers. Instead, the Tribes regulated tribal fishers under tribal laws that had evolved from the lapsed federal regulations. See *id.* at 5a-6a.

2. a. In late 1983, petitioner and the two other Tribes then in this case—Bay Mills and Grand Traverse—jointly moved the district court for an order "allocat-[ing] the fishery resource * * * between treaty and non-treaty users." C.A. App. A61; see *id.* at A61-A70 (motion and memorandum). The Tribes stated that "[a]llocation of the resource" would address the unresolved claims in their complaints seeking a reduction in the quantity of fish harvested by state-licensed nontribal fishers by "quantifying" the "rights of the Tribes and concom[]itant rights and responsibility of the State." *Id.* at A65-A66. They "acknowledge[d]" that nontribal users "have a legitimate claim to some portion of that common resource" and explained that the court's allocation of that resource among users was necessary because there was "an inadequate supply [of fish]" to satisfy the demands of tribal and nontribal fishers. D. Ct. Doc. 635, at 7 (Tribes' reply).

Petitioner and the other Tribes stated (C.A. App. 68) that they were requesting that the district court "allocate the resource in a manner similar to" the allocation upheld in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (*Fishing Vessel*). They explained that *Fishing Vessel* had ascertained the "equitable measure of [a] treaty right" to a fishery resource and that, as in *Fishing Ves-*

sel, "[t]heir treaty right entitles them to an equal division of the available fishery resource" with nontribal users. C.A. App. A67-A68. The Tribes, however, stated that the "methodology" should be "adapted slightly" to include a "management plan" for the more complicated fishery considerations here. *Id.* at A68-A69.

Finally, petitioner and the other Tribes argued that the district court had authority "to allocate the fishery resource" under "paragraph 25 of th[at] Court's [1979] Declaratory Judgment and Decree" (which retained jurisdiction to issue orders and implement the decree); under the court's "inherent powers to implement and modify its prior decree"; and under the authorization in 28 U.S.C. 2202 to grant "necessary or proper relief based on a declaratory judgment or decree." C.A. App. A61; see D. Ct. Doc. 635, at 14-19.

The district court overruled the State's objection to the Tribes' allocation request, concluding that the court had authority to "quantify[] the rights of the Tribes, and rights and responsibilities of the State, which [the Court in 1979 had previously] declared," in light of "the limited resource available to [the tribal and nontribal fishers]." 4/11/1984 Op. 2, 4, 14. The court held, as petitioner argued, that it possessed authority to allocate the resource based on its retention of jurisdiction over its original 1979 decree, its inherent equitable authority to modify its decree, and Section 2202. *Id.* at 14-15.

b. The Tribes, Michigan, and the United States subsequently agreed upon, and presented in a motion for entry of a consent decree, a zone-based 15-year allocation plan for the fishery resource that identified separate zones in the treaty waters in which tribal and nontribal fishing could occur and assigned each Tribe to zones near the locations where its members lived. Pet.

App. 7a; see 12 Indian L. Rep. at 3083-3085. The plan provided for harvest limits in particular geographic areas for certain fish species as a conservation measure. 12 Indian L. Rep. at 3082, 3087. But shortly after the district court entered the plan as a consent decree, Bay Mills withdrew its consent, objected to the zonal plan, and proposed a different allocation. Pet. App. 7a. The court scheduled a hearing to decide whether to adopt the zonal plan, Bay Mills' proposal, or neither. *Ibid.*

Petitioner contended that the zonal plan "should be imposed upon Bay Mills." Gov't C.A. App. 5. It argued that, under the applicable "standard for allocation," adopting an allocation plan over an objection is warranted if the proposal would (1) "provide sufficient fish supplies for the Tribes' reasonable needs" and (2) "adequately protect the fishery resource from depletion." D. Ct. Doc. 829, at 7-9 (May 24, 1985). Petitioner stated that "the absence of allocation" is "the principal threat to the fishery resource" and that "tribal and state regulation of their respective fishers" would adequately protect the resource under either allocation proposal. *Id.* at 9. Petitioner further argued that if an allocation proposal satisfies those two "primary" criteria, the court "may consider other factors in its exercise of its equitable powers to apportion the resource" when deciding which proposal "best accommodates the conflicting interest[s] of the parties," including factors such as "the reduction of conflict, the feasibility of implementation and enforcement, [the] protection of important fishing grounds of state licensees, and * * * lake trout rehabilitation efforts." *Id.* at 10-11.

Over Bay Mills' objection, the district court adopted the zone-based allocation plan in a decision that closely tracks the allocation standard that petitioner advocated.

See 12 Indian L. Rep. at 3080-3081. The court explained that this Court's *Fishing Vessel* decision "endorses the court's power to allocate a fishery in order to effectuate a treaty" and, in "very general terms," reflects "a standard for determining [an] appropriate allocation" that meets "'the reasonable livelihood needs'" of relevant tribes. *Id.* at 3080. The court concluded that both allocation proposals sufficiently satisfied those needs. *Id.* at 3080-3081. The court then identified 15 other criteria that were "appropriate" to consider in deciding how best to allocate the fishery resource, but it emphasized that its "paramount concern" was (as petitioner argued) "reach[ing] a fair and equitable decision" consistent with "the reserved rights of the tribal fishermen" and "the preservation of the resource." *Id.* at 3081; see Pet. App. 50a. The court ultimately adopted the "zonal plan" as petitioner had advocated, explaining that it was in "the best interests of all tribes involved" and was "superior, both in terms of protecting the Indian reserved treaty fishing right, and for the preservation of the resource." 12 Indian L. Rep. at 3088. No party appealed.

c. In 2000, the parties agreed to entry of a successor decree to the 1985 allocation decree that would be effective for the next 20 years. Pet. App. 8a.

3. a. In September 2019, the parties—the United States, Michigan, and the five Tribes—began negotiating a successor to the 2000 decree. Pet. App. 8a-9a. In September 2022, after three years of negotiations, petitioner sought an additional 90-day extension of the 2000 decree, representing that "the parties * * * ha[d] been working diligently through in-person negotiations in an effort to reach consensus"; that petitioner had "continually negotiated in good faith with all the parties," including in "all" 17 negotiation meetings over the three

prior months; but that certain provisions important to petitioner remained outstanding. D. Ct. Doc. 2006, at 1-2 (Sept. 16, 2022).[1] In November 2022, the district court extended the 2000 decree indefinitely until the parties proposed a successor decree and any objections thereto were adjudicated. D. Ct. Doc. 2027, at 3 (Nov. 14, 2022). Petitioner then informed the court that it had been "unable to reach agreement with the other parties" and requested that the court terminate the 2000 decree. D. Ct. Doc. 2028, at 1 (Nov. 14, 2022).

Shortly thereafter, in December 2022, all other parties reached agreement and sought the district court's entry of what would later become the 2023 decree in this case. Pet. App. 9a. Petitioner objected. *Ibid.*

The 2023 decree continues to reflect a "zonal" allocation approach, which divides areas in which the Tribes may engage in commercial fishing among the Tribes, Pet. App. 210a-234a, and prohibits nontribal commercial fishing except in limited areas in Lake Michigan and Lake Superior, *id.* at 235a-236a. See D. Ct. Doc. 2133 (Aug. 24, 2023) (Decree Maps 15-16 for Lake Huron; Maps 7 and 19 for Lake Michigan; and Maps 17-18 for Lake Superior).[2] The decree also provides for harvest limits for certain fish species in certain areas, *id.* at 250a-255a, 259a, allocating, for instance, the Lake Trout harvest "approximately equally" between tribal and nontribal fishers, *id.* at 255a; granting the Tribes 55% to 90% of the total Whitefish harvest, *id.* at 256a; and

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[1] Petitioner's current assertion (Pet. 2-3) that it was "excluded * * * from negotiations over a replacement decree" differs markedly from its prior description of the lengthy negotiations.

[2] Petitioner's commercial-fishing allocations include fishing zones near Sault Ste. Marie. See Pet. App. 211a-212a, 231a-232a, 232a-234a; see also *id.* at 216a, 229a-230 (tribal development zones).

providing a framework for allocating other commercially harvested species, *id.* at 259a. Tribal subsistence fishers (who may fish to "feed their families" but may not sell their catch) are not subject to those limits and may fish throughout the treaty waters. *Id.* at 72a-73a, 269a (citation omitted); see *id.* at 95a-96a, 267a-270a.

b. The district court approved and entered the 2023 decree. Pet. App. 41a-202a; see *id.* at 203a-306a (decree). As relevant here, the court rejected petitioner's contention that the court lacked "authority to approve the Proposed Decree over the objection of a party," explaining that its retention of jurisdiction in its 1979 decree and its "equitable powers" allowed it to "protect the resource" and "modify the existing decree, or enter a new decree, over a party's objection." *Id.* at 55a-57a.

The district court also determined that its 1985 opinion adopting the first allocation decree was "law of the case" that established the "standard" for deciding whether to adopt a proposed decree. Pet. App. 53a. Under that standard, the court stated, it must reach "a fair and equitable decision" after considering the factors identified in the 1985 decision, of which the "most important" considerations are "(1) preservation of the resource, and (2) preservation of Tribal fishing rights." *Id.* at 53a-54a, 59a; see *id.* at 57a-59a (rejecting petitioner's contention that the *LeBlanc* test should apply).

The district court ultimately concluded that the 2023 decree "respects and promotes Tribal fishing rights and opportunities," "recognizes the shared nature of the resource," and "preserves the Great Lakes fishery," and that the decree's "approval and entry * * * is in the best interest of the fishery" and "the Parties." Pet. App. 43a.

4. The court of appeals affirmed. Pet. App. 1a-40a.

a. As relevant here, the court of appeals rejected on multiple independent grounds petitioner's contention that the district court could not adopt the 2023 decree without satisfying "the legal standards for injunctive relief," Pet. App. 22a. See *id.* at 22a-26a. The court first held that petitioner had "forfeited this argument by failing to make it before the district court." *Id.* at 22a.

The court of appeals alternatively held that "even overlooking [that] forfeiture, [petitioner's] argument lacks merit" for several reasons. Pet. App. 22a; see *id.* at 22a-26a. First, the court observed, "the 2023 Decree is not a 'consent decree'" requiring the consent of all parties as petitioner had argued. *Id.* at 22a-23a; see *id.* at 27a. Second, the court concluded that the "decree is not a permanent injunction," "despite [petitioner's] attempt" to treat it as one. *Id.* at 24a, 26a.

Third, the court of appeals stated that its conclusion that the "decree is not a permanent injunction" is "[c]onsistent with the law of the case" because "the [district] court ha[d] continually relied on its continuing jurisdiction and inherent equitable power to allocate treaty resources, without having to apply the injunction factors." Pet. App. 24a, 26a; see *id.* at 24a-26a. The court declined to "disturb the law of the case" because "[petitioner] has not shown that any of the exceptions to the doctrine apply." *Id.* at 22a n.10; cf. *id.* at 14a-22a (rejecting separate contention that entry of the 2023 decree was inappropriate without the consent of all parties on law-of-the-case grounds).

Fourth, the court of appeals determined that petitioner's newfound position about the need to satisfy the standard for a permanent injunction was "inconsistent" with "the position that [petitioner]" had successfully advocated "when Bay Mills objected to the entry of the

1985 Decree." Pet. App. 26a n.11. But because the court had already determined that that "the law of the case controls," it "decline[d] to invoke the equitable doctrine of judicial estoppel to preclude [petitioner] from now arguing a contrary position." *Ibid.*

b. The court of appeals agreed with petitioner that a federal court decree must relate to and "further the objectives of the law upon which the [initial] complaint was based," Pet. App. 30a (quoting *Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431, 437 (2004)) (brackets in original), but it concluded that the 2023 decree does so because it "ensure[s] that the Tribes' treaty rights to a scarce natural resource [will] remain protected" and is "appropriately 'tailored' to address the original conditions that offended the Tribes' federal treaty rights [when this suit was filed] in 1973," *id.* at 36a-37a (citation omitted). See *id.* at 30a-37a.

The court of appeals explained that "the problem that prevents the effective realization of the Tribe's fishing rights" is "the shared nature of the rights," which the Tribes jointly hold as "'*communal* property.'" Pet. App. 35a. The court stated that, without the 2023 decree's "zonal approach," tribal fishing would become "an unchecked, all-against-all race to the bottom" to harvest the limited fishery resource. *Ibid.* That decree, the court explained, "furthers the objectives of the 1836 Treaty" by preventing any state "role with respect to how each Tribe implements" the 2023 decree (thus avoiding the "unilateral state regulation" that first prompted this suit), and by protecting tribal fishing rights by allocating them among the Tribes, limiting nontribal commercial fishing, and allocating to the Tribes "a substantially greater share" of the "primary commercial species harvested." *Id.* at 30a-31a.

ARGUMENT

Petitioner contends (Pet. 15-26) that the court of appeals erred by upholding the 2023 decree in this case because its decision purportedly conflicts with this Court's decisions identifying two restrictions on equitable authority: (1) equitable relief must be tailored to the legal wrong being remedied, Pet. 17-21; and (2) injunctive relief is appropriate only if the traditional four-part test for a permanent injunction is satisfied, Pet. 21-26. Petitioner further contends (Pet. 26-31) that review is warranted because the decision adversely affects its treaty rights. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. And this case would be a poor vehicle for addressing the question presented. The Court should therefore deny certiorari.

1. Petitioner first contends (Pet. 17-21) that the 2023 decree is not appropriately "tailored to the legal wrong being remedied," Pet. 17 (capitalization omitted). That is incorrect. The complaints in this case sought to prevent Michigan's application of its fishing regulations to the Tribes and, in addition, to protect the Tribes' collective fishing right to the limited and increasingly scarce treaty-water fishery by reducing nontribal fish harvests. See p. 5, *supra*. The district court's decrees allocating the fishery between and among the Tribes and the State, including the 2023 decree, directly redressed the harms to those tribal fishing rights.

Both courts below recognized that the district court's equitable allocation of treaty-preserved rights in a limited fishery resource followed a course that this Court charted in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). See Pet. App. 7a, 10a-11a, 18a, 51a; see also pp. 7-8, 10,

supra. In *Fishing Vessel*, the United States sued the State of Washington to protect several tribes' treaty-recognized right to harvest certain fish species making seasonal "runs." 443 U.S. at 669-670; see *id*. at 662-663. There, as here, the relevant treaties preserving the tribes' "right to take fish" did not address how to "allocate[]" the fishery resource between the tribes and nontribal fishers because, when they were negotiated, the fishery had "always been thought [to be] inexhaustible." *Id*. at 669. Only later, when the resource "became scarce," did allocation become "critical." *Ibid*. The district court allocated the fish between the tribes and the State "on a river-by-river, run-by-run basis, subject to certain adjustments," and "left it to the individual tribes involved to agree amongst themselves on how best to divide the Indian share." *Id*. at 671.

This Court concluded that the relevant treaties "secured to the Indians the right of taking fish in common with other citizens" and that both groups were entitled to "a fair share of the available fish." *Fishing Vessel*, 443 U.S. at 684-685. The Court then observed that its decisions concerning "Indian treaty rights to scarce natural resources" typically require "a trial judge or special master, in his discretion, to devise some apportionment" to meet "reasonable livelihood needs." *Id*. at 685. The Court recognized that "an equitable measure of the common right" to take fish embodied in the treaties should be adopted and concluded that the appropriate measure in that case would "divide the harvestable portion of each run" in areas where the tribes had customarily fished "into approximately equal treaty and nontreaty shares" before reducing the tribes' "treaty share if tribal needs may be satisfied by a lesser amount." *Id*. at 685-686. The Court observed that such

a division was a "fair apportionment of a common asset" and that an initial allocation should "be modified [by the trial court] in response to changing circumstances." *Id.* at 686-687 & n.27. This Court found the district court's "exercise of its discretion" in allocating the resource to be largely "unobjectionable," but concluded that a few discrete adjustments were warranted. *Id.* at 687.

The district court's equitable allocation of the shared fishery resource in this case appropriately follows this Court's approach in *Fishing Vessel* and clearly redresses the asserted harms to such rights that form the basis of this case. First, "[t]he State plays no role with respect to how each Tribe implements the 2023 Decree." Pet. App. 31a. The court's allocation of the fishery in the decree thus "avoids the kind of unilateral state regulation that this suit was initially brought [by the United States] to enjoin." *Ibid.* Second, the Tribes' complaints in this case sought to protect their fishing right by reducing nontribal fishing in treaty waters. See p. 5, *supra*. The decree does so by limiting the areas for nontribal commercial fishing and allocating a "substantially greater share" of the harvest of the "primary commercial species" for the Tribes. Pet. App. 31a.

Moreover, as *Fishing Vessel* illustrates, the question of allocation is itself ancillary to the interpretation of the tribal fishing rights that this case was brought to protect. If one group is allowed to act on its "claim to an untrammeled right to take as many [fish] * * * as it chose," it may "destroy the rights of other[s]" to the shared, limited resource. *Fishing Vessel*, 443 U.S. at 684; see pp. 6-8, *supra*. Here, the need to allocate rights to the shared resource applies not only between Tribes and the State, but also among the Tribes with their undifferentiated communal fishing right. The district

court's first allocation decree in 1985 recognized that a zonal allocation was necessary to end the "'racehorse' fishery" in which "everyone is out to get what they can as fast as they can," which "result[s] [in] overfishing" and threatens the Tribes' future ability to exercise their right. 12 Indian L. Rev. at 3084, 3086-3087. The 2023 decree does the same. Pet. App. 35a-37a.

Petitioner does not dispute that *Fishing Vessel* provides the proper approach for this case. It instead focuses (Pet. 17-18, 21) on the portion of the case challenging Michigan's attempt to impose state regulation on tribal fishers, concluding that the district court was "required to tailor its new decree to 'eliminate the conditions or redress the injuries caused by that unlawful action,'" Pet. 21 (citation and brackets omitted). But as noted, the decree *is* tailored to that harm, because it gives Michigan "no role with respect to how each Tribe implements the 2023 Decree." Pet. App. 31a. Thus, petitioner's focus (Pet. 18) on *People* v. *LeBlanc*, 248 N.W.2d 199 (Mich. 1976), which governs when Michigan may impose state-law restrictions on federally protected tribal fishing, is misplaced. Moreover, the decree's allocation of the fishery is tailored to the Tribes' original request to reduce nontribal fishing in treaty waters and is ancillary to a determination of the tribal fishing right that this action was filed to protect.

2. Petitioner contends (Pet. 21-26) that "[t]he district court failed to apply well-established injunctive relief standards," Pet. 21 (capitalization omitted). But the court of appeals did not disagree with petitioner's tautological contention that the four-part test for permanent injunctions applies to permanent injunctions. The court of appeals instead rejected petitioner's challenge on multiple alternative grounds. No sound basis there-

fore exists for the Court's review of the injunction-focused question that petitioner presents.

a. First, as the court of appeals held, petitioner "forfeited this argument by failing to make it before the district court." Pet. App. 22a. Petitioner responds (Pet. 23 n.3) that it objected to the district court's "use of consent decree authority to enter [the] decree." To be sure, petitioner did argue in district court (and on appeal) that a consent decree requires the consent of all parties and that it had not consented to the decree. See Pet. App. 55a-56a; see also *id.* at 13a. But that differs from its current contention that the 2023 decree could be issued only after applying the "traditional four-factor test governing the issuance of injunctive relief," Pet. 16; see Pet. 21-22. Petitioner forfeited that contention. And it provides no reason why this Court should review such a factbound and commonplace question of forfeiture. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Petitioner asserts (Pet. 23 n.3) that the court of appeals excused petitioner's forfeiture to resolve the merits of the injunction-standard question. But that too is incorrect. The court of appeals addressed the merits of petitioner's contention as an *alternative* ground for rejecting it, stating that, "even overlooking forfeiture, the argument lacks merit." Pet. App. 22a. And this case is an unsuitable vehicle for considering that alternative ruling because the court of appeals' judgment would still properly rest on the forfeiture ground.

b. Second, the court of appeals rejected petitioner's "attempt" to treat "the district court's entry of [the 2023 decree] as a permanent injunction," holding instead that the "decree is *not* a permanent injunction." Pet.

App. 24a, 26a (emphasis added). If that is so, then the court of appeals did not err because "the traditional test governing permanent injunctions," Pet. 21-22, is inapplicable. Petitioner is thus forced to advance (Pet. 22) an antecedent question, asserting that "the 2023 Decree obviously operates as an injunction." But that question is unworthy of this Court's review. Petitioner does not claim that the court of appeals' understanding of the 2023 decree conflicts with any decision of this Court or any other court of appeals. And even if it were incorrect, this Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions." *Boag* v. *MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) (citation omitted); accord, *e.g.*, *Martin* v. *Blessing*, 571 U.S. 1040, 1045 (2013) (Alito, J., respecting the denial of certiorari) ("[W]e are not a court of error correction.").

In addition, this Court's resolution of the question whether the 2023 decree is a permanent injunction would be unlikely to provide meaningful guidance to the lower courts, given the decree's idiosyncratic nature. At the very least, the decree is in significant part an allocation of fishing rights that is simply declaratory of the scope of those rights. Such an allocation—identifying who may fish where and under what conditions—reflects "an equitable measure of the common right" to take fish preserved by treaty, which the district court, in an appropriate "exercise of its discretion," has determined is a "fair apportionment of [the] common asset." *Fishing Vessel*, 443 U.S. at 685, 686 n.27, 687. Furthermore, it is undisputed that the five Tribes in this case hold their nonexclusive right to fish in treaty waters as "*communal* property." Pet. App. 35a (citation omitted). And each tribal holder of that right except petitioner agrees

with the district court's allocation, reinforcing the equitable nature of that discretionary decision.

c. Third, the court of appeals relied on the law-of-the-case doctrine because the predecessor decrees have "never been treated [as permanent injunctions]" and petitioner did "not show[] that any of the exceptions to the doctrine apply." Pet. App. 22a n.10, 26a; see *id.* at 24a-25a. Petitioner attempts to sidestep that conclusion by asserting (Pet. 24) that the 1985 decree was "entered with the effective agreement of all tribes." But Bay Mills objected to the decree, and petitioner nevertheless argued that the decree "should be imposed upon Bay Mills." Gov't C.A. App. 5; see pp. 9-10, *supra*. Thus, petitioner ultimately relies (Pet. 23) on the observation that it is a "strange notion" that the court may "repeat [what petitioner now says is an] error in perpetuity" simply because of its prior decision adopting the 1985 decree for equitable considerations different from the four-part injunction standard—a now-40-year-old ruling made "in the course of a nearly 50-year litigation."

That observation provides no basis for this Court's review. Even if the court of appeals erroneously applied law-of-the-case principles, petitioner would be judicially estopped from arguing that the injunction standard applies. Although the court of appeals "declined to invoke the equitable doctrine of judicial estoppel," it did so only because it had already determined that a parallel doctrine "controls." Pet. App. 26a n.11. If the law-of-the-case rationale were set aside by this Court, judicial estoppel would compel the same outcome.

The doctrine of judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire* v. *Maine*,

532 U.S. 742, 749 (2001) (citation omitted). In other words, where "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Ibid.* (citation omitted). Courts typically consider three factors when deciding whether judicial estoppel has been properly invoked: whether the party's "later position" is "'clearly inconsistent' with its earlier position"; whether the party "succeeded in persuading a court to accept that party's earlier position"; and "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-751 (citation omitted). Here, all three factors "firmly tip the balance of equities in favor of barring" petitioner's present contentions. *Id.* at 751.

Petitioner's current position that the standard for injunctions must be applied to the 2023 decree is clearly inconsistent with its earlier position that the district court should adopt the 1985 predecessor decree based on a series of different equitable factors. See p. 9, *supra*. The court of appeals itself determined that petitioner's new position is "inconsistent" with its original position, which "made no reference to the injunction factors" when "Bay Mills was the objecting party." Pet. App. 26a n.11. Petitioner also succeeded in persuading the district court to adopt its prior position: The decision adopting the 1985 decree applied the same standard that petitioner advocated. See p. 10, *supra*. And petitioner would derive an unfair advantage over Bay Mills and the other Tribes, which have complied with the 1985 decree for 15 years and relied on that decree for decades as the foundation for negotiating successor

decrees. It would be patently unfair to allow petitioner to overturn the core legal framework under which seven sovereigns—five Tribes, Michigan, and the United States—have ordered their affairs for the past 40 years simply because the tables have turned and petitioner now objects to the most recent decree.

Given petitioner's conduct, its invocation of "long-standing principles of equity," Pet. 15, is particularly misplaced. One "who seeks equity must do equity." *Koster* v. *Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947); see *Ramirez* v. *Collier*, 595 U.S. 411, 434 (2022).

3. Petitioner provides no other sound basis for this Court's review. Petitioner asserts (Pet. 27-28) that the Court "routinely grants review in cases implicating Indian tribes' treaty rights." But this case bears little resemblance to other contexts in which questions of exceptional importance have warranted review of decisions adversely affecting Indian tribes. Petitioner states (Pet. 26) that the court of appeals' decision causes "significant" harm to it and its members, but petitioner's actual complaints do not substantiate that view.

Petitioner complains (Pet. 26-27; see Pet. 22) about limited aspects of the 2023 decree that purportedly limit its "treaty rights," but it has not renewed its challenges to those provisions for good reason. Petitioner asserts (Pet. 26) that the decree prohibits "traditional fishing gear such as spears and set hooks," but the cited provision addresses only *commercial* fishing operations, Pet. App. 245a-246a, and petitioner "waived" its challenge by failing to proffer evidence that the relevant modern tribal fishers would today use such gear, *id.* at 61a-62a.

Petitioner similarly complains (Pet. 27) that commercial fishers may not target certain fish species unless "stocking efforts" result in a "commercially harvest-

able adult population," Pet. App. 262a-263a. But that has been true since 2000 under the decree to which petitioner agreed, *id.* at 86a, and petitioner provides no reason to believe that the targeting of such populations would be commercially viable or consistent with the other Tribes' right to the shared resource.

Petitioner asserts (Pet. 27) that the decree closes "traditional fishing areas" that are "important" to it. But the closures apply to *all* commercial fishing, tribal and nontribal. Pet. App. 236a. The first involves an "extremely busy" area around the Sault Ste. Marie locks, where commercial fishing would create "danger[ous]" "navigational hazards for international shipping traffic" and which has been closed to commercial fishing since 2000. *Id.* at 67a-68a. Three other areas were closed as part of a favorable deal to newly open "much of Lake Superior" to commercial gill-net fishing by tribal fishers: one "small" and "heavily trafficked tourist area posing navigational and safety hazards" that had previously been closed to fishing, another that was "rarely fished," and a third that was "never fished" commercially. *Id.* at 147a-149a. The remaining closures involve three harbors that have been closed since 2000 (as petitioner agreed) without much difference in the closures' boundaries: One is now smaller; another is more clearly marked to allow all water users to better identify where fishing nets may be; and the third involves many fewer restrictions than before. *Id.* at 149a-151a. Such closures are modest in comparison to the areas in which petitioner's commercial fishers operate, apply equally to State-regulated fishers, and reflect the collective judgment of all other Tribes that share the collective tribal right to the fishery resource.

Petitioner's remaining complaints involve the allocation of fishing opportunities in treaty waters *among* the Tribes themselves. Petitioner complains that it does not have a "year-round exclusive fishing zone," Pet. 27, but petitioner's zone is exclusive during the salmon season (August to October), Pet. App. 231a-232a, even though it is located within an "intertribal zone," which is otherwise open to fishers from the other Tribes, *id.* at 64a. Petitioner also complains that certain fishing zones for "other tribes" have increased in size, Pet. 27, but it points (*ibid.*) to the size of a Little Traverse zone that did not change, Pet. App. 121a; a Grand Traverse zone that is actually smaller, *id.* at 128a; and an expanded Little River zone distant from petitioner's commercial fishers that "does not impact [petitioner] in any way," *id.* at 129a; see D. Ct. Doc. 2133 (Map 7). In any event, the district court found that adoption of the 2023 Decree "is in the best interest of the fishery" and "the Parties." Pet. App. 43a. Petitioner's disagreement with the court's exercise of discretionary authority to allocate the fishery resource to protect tribal fishing rights provides no sound basis for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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