No. 17-269

In the Supreme Court of the United States

STATE OF WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR BUSINESS, HOME BUILDING, REAL ESTATE, FARMING, AND MUNICIPAL ORGANIZATIONS AS AMICI CURIAE SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, treaties, statutes, and regulations:

Treaties, statutes, and regulations —Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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INTEREST OF AMICI CURIAE*

Amici are organizations that represent businesses, home builders, real-estate professionals, farmers, and

* No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief. Amici timely notified all parties of their intention to file this brief, and letters of consent from all parties to the filing of this brief are on file with the Clerk.

municipalities in Washington State and around the country.

The Association of Washington Business (AWB) is Washington State's Chamber of Commerce and the principal representative of the State's business community. AWB is the State's oldest and largest general business membership federation, representing the interests of approximately 8000 Washington companies who, in turn, employ more than 700,000 employees, approximately a quarter of the State's workforce. AWB's members are located in all areas of Washington, represent a broad array of industries, and range in size from sole proprietorships to large corporations that do business around the world.

The National Association of Home Builders (NAHB) is a Washington, D.C.–based trade association whose mission is to enhance the climate for housing and the building industry. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and they account for 80% of all homes constructed in the United States.

The Building Industry Association of Washington is the State's association of home builders and related companies that provide products and services for residential building construction and remodeling. It has 7500 members across the State.

The Montana Building Industry Association is a trade association founded in 1968 to promote and protect the building industry. It represents approximately 1500 builders and affiliated small business and nine local associations throughout Montana.

The Oregon Home Builders Association is the voice of Oregon's residential and light commercial construction industry. It has nearly 3000 member companies representing more than 196,000 jobs and over $3 billion in the Oregon economy.

The Master Builders Association of King and Snohomish Counties is a trade organization of professional home builders and related professionals. With nearly 2800 member companies from all facets of housing construction, it is the largest local home builders' association in the United States.

Washington REALTORS® is a trade association of approximately 20,000 licensed real-estate brokers. It represents their interests, and those of Washington's homeowners and businesses, on a variety of issues affecting residential and commercial real estate.

The Washington State Farm Bureau is a voluntary, grassroots advocacy organization representing the social and economic interests of farm and ranch families in Washington State. It includes more than 47,000 member families.

The Idaho Farm Bureau Federation is a non-profit organization representing approximately 76,000 Idaho families. Its members live and work in each of Idaho's 44 counties and represent all commodities grown in Idaho; it includes a substantial number of livestock producers who graze on public lands.

The Montana Farm Bureau Federation is the State's largest agricultural organization, representing 30 county farm bureaus. It provides a voice for agricultural producers in legislative, legal, and other areas affecting agriculture.

The Oregon Farm Bureau is a grassroots advocacy organization founded in 1919 to represent the social and economic interests of Oregon's farming and ranching families in the public policy arena. It has farming and ranching members in all 36 Oregon counties, with a total of 65,000 member families statewide.

The Association of Washington Cities is a private non-profit corporation that represents Washington's cities and towns before the State Legislature, the State Executive branch, and regulatory agencies. Membership is voluntary, but the association includes all of Washington's 281 cities and towns.

This case presents the question whether treaties providing Indians in the Pacific Northwest the "right of taking fish, at all usual and accustomed grounds and stations" also guarantee "that the number of fish [will] always be sufficient to provide a 'moderate living' to the Tribes." Pet. App. 94a (quoting *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979) (*Fishing Vessel*)). The Ninth Circuit answered that question in the affirmative. In so holding, it affirmed a sweeping injunction compelling the State of Washington to remove or replace highway culverts that allegedly impair salmon habitat and reduce the number of salmon available for tribal fishing. The court's reasoning is not confined to culverts but will affect land-use and water-allocation decisions throughout the West. Amici therefore have a significant interest in the resolution of this case.

SUMMARY OF ARGUMENT

The Ninth Circuit affirmed an injunction compelling the State of Washington to spend billions of dollars removing or altering highway culverts in order to facilitate the migration of salmon. It did so based on treaties that guarantee Indian tribes the "right of taking fish, at all usual and accustomed grounds and stations." Adopting an interpretation ungrounded in the text of the treaties, the court concluded that Indian tribes enjoy a guarantee "that the number of fish [will] always be sufficient to provide a 'moderate living' to the Tribes." Pet. App. 94a (quoting *Fishing Vessel*, 443 U.S. at 686).

The decision below is not only wrong but also extraordinarily important. Tribes in several other States enjoy treaty rights similar to those construed in this case. And while the decision below is nominally limited to highway culverts, its reasoning is far broader. If tribes have a right to ensure that States maintain a particular number of fish for tribal interests, then few activities in the West will escape judicial superintendence at the behest of tribes. Culverts, after all, are not the only human activity that can harm salmon. Almost all land-use decisions affect fish habitat directly or indirectly, as does the withdrawal of surface or underground water under state-law water rights regimes.

While some adverse effects of the Ninth Circuit's decision will become apparent only in future litigation, others will be felt immediately. The court ordered the removal or modification of culverts that have been in place for many years. Anyone undertaking development that might affect fish habitat must now confront

the possibility that the court's decision will be applied to require that the development be altered. The decision thus creates uncertainty that will inhibit development throughout the West. It warrants immediate review and correction by this Court.

ARGUMENT

A. The Ninth Circuit erred in holding that Washington's culverts impair the fishing right guaranteed by the treaties

This case involves the interpretation of treaties that Territorial Governor Isaac Stevens negotiated on behalf of the United States with Indian tribes in the Pacific Northwest in 1854 and 1855. See generally *Fishing Vessel*, 443 U.S. at 666-667. All of the treaties contain similar clauses providing that "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory." Treaty with the Nisqually, art. 3, Dec. 26, 1854, 10 Stat. 1133.

The Ninth Circuit held that "[t]he Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them." Pet. App. 92a. The court therefore "infer[red] a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." *Id.* at 94a (quoting *Fishing Vessel*, 443 U.S. at 686). Because the State's decision "to build and maintain barrier culverts under its roads" had "diminish[ed] the supply of fish," the court concluded that "in building and maintaining barrier culverts * * * Washington has violated, and is continuing to

violate, its obligation to the Tribes under the Treaties." *Id.* at 95a-96a. That conclusion is contrary to the language of the treaties, and it finds no support in this Court's decisions.

1. The Ninth Circuit's interpretation cannot be reconciled with the text of the treaties, which guarantee a "right of taking fish." In the 19th century, "take," as applied to wild animals, had the same meaning it does today: "to get possession of (as fish or game) by killing or capturing." *Webster's Third New International Dictionary of the English Language* 2330 (1976); see also *Geer* v. *Connecticut*, 161 U.S. 519, 523 (1896); 2 William Blackstone, *Commentaries* 411 (1766). The treaties thus protect the ability to engage in the act of catching fish, an act that necessarily occurs at a particular place. By protecting the right to fish in "all usual and accustomed grounds and stations," the treaties guarantee access to those places for the purposes of fishing. Treaty with the Nisqually, art. 3, 10 Stat. 1133. In doing so, they "impose[] a servitude upon every piece of land as though described therein," allowing Indians to access or occupy private property as necessary to fish at traditional fishing grounds, regardless of the ownership of those grounds. *United States* v. *Winans*, 198 U.S. 371, 381-382 (1905); see also *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 199 (1919). Nothing in that right, which is tied to particular locations, suggests a power to regulate the non-fishing activities of the State in other locations.

Notably, the language of the Stevens Treaties is similar to that of earlier international treaties guaranteeing fishing rights. For example, the 1783 Treaty of Paris provided "that the people of the United States

shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland." Treaty of Paris, art. 3, Sept. 3, 1783, 8 Stat. 82; see also Convention with Great Britain, art. 1, Oct. 20, 1818, 8 Stat. 248. Those provisions have not been construed to restrict British activities elsewhere.

If there were any doubt on the point, it would be resolved by examining Article I of the Stevens Treaties, under which the tribes "cede[d], relinquish[ed], and convey[ed] to the United States *all their right, title, and interest* in and to the lands and country occupied by them." Treaty with the Nisqually, art. 1, 10 Stat. 1132 (emphasis added). If the "right of taking fish" dictates how States are to manage road construction on State land, then the cession, relinquishment, and conveyance could not reasonably be said to include "all the right, title, and interest" the Indians had to the ceded lands.

2. The Ninth Circuit's interpretation also fails to take account of the treaties' language specifying that the right to fish is "in common with all citizens of the Territory." Treaty with the Nisqually, art. 3, 10 Stat. 1133. This Court has held that the common right of fishery is a public right, subject to the regulation of the State. See, *e.g.*, *Martin* v. *Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842); *Smith* v. *Maryland*, 59 U.S. (18 How.) 71 (1855); see also *Tarrant Reg'l Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2132 (2013) (noting that the "power to control navigation, fishing, and other public uses of water, 'is an essential attribute of sovereignty'") (quoting *United States* v. *Alaska*, 521 U.S. 1, 5 (1997)). Thus, the Court has "repeatedly reaffirmed

state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204-205 (1999).

This Court has interpreted the Stevens Treaties to permit States to regulate the off-reservation fishing activity of Indians in order to preserve fish resources. See *Puyallup Tribe* v. *Department of Game of Washington*, 391 U.S. 392, 399 (1968). In so holding, the Court stated that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Id.* at 398. More recently, in *Fishing Vessel*, the Court read the treaties to "secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas." 443 U.S. at 679. It ultimately concluded that the tribal share can be no more than 50%, subject to modification based on changing circumstances. *Id.* at 686-687.

Even in *Fishing Vessel*, however, the Court merely read the treaties to guarantee "a share of each run of fish." 443 U.S. at 679. It did not hold that the State must ensure that each run has a particular number of fish in it; still less did it interpret the treaty language to impose an obligation on the State to regulate activities unrelated to fishing in a certain manner because of effects on fishing. The treaty language does not permit such a construction.

3. The court of appeals made little effort to reconcile its interpretation with the text of the treaties. In-

stead, it emphasized that a court construing an Indian treaty must "look beyond the written words to the larger context that frames the [t]reaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties." Pet. App. 89a (quoting *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196); accord *Fishing Vessel*, 443 U.S. at 675-676 (Treaties are to "be construed * * * in the sense in which they would naturally be understood by the Indians.") (quoting *Jones* v. *Meehan*, 175 U.S. 1, 11 (1899)). But there are limits to how generously treaty language may be read. This Court has held that "even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation* v. *United States*, 318 U.S. 423, 432 (1943). The court of appeals erred by doing just that.

B. The Ninth Circuit's decision will have widespread and significant consequences

The Ninth Circuit panel stated its holding in superficially narrow terms: "[W]e conclude that in building and maintaining barrier culverts Washington has violated, and continues to violate, its obligation to the Tribes under the fishing clause of the Treaties." Pet. App. 126a. And in the order denying rehearing, two judges from the panel described the court's decision as "[c]abin[ed] * * * [by] a careful, detailed description of the facts presented." *Id.* at 12a (W. Fletcher, J., and Gould, J., concurring in the denial of rehearing en banc). But the court's reasoning is in no way limited to that factual context, and the consequences of the decision will extend far more broadly.

As an initial matter, the effect of the decision below is unlikely to be limited to Washington. Tribes located in Oregon and Idaho negotiated treaties with substantially the same language. See Treaty with the Indians in Middle Oregon, art. 1, June 25, 1855, 12 Stat. 964; Treaty with the Nez Percés, art. 3, June 11, 1855, 12 Stat. 957; Treaty with the Walla-Wallas, art. 1, June 9, 1855, 12 Stat. 946. In Montana, the Confederated Salish and Kootenai Tribes of the Flathead Reservation also reserved "the right of taking fish at all usual and accustomed places," as well as "the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." Treaty with the Flatheads, art. 3, July 16, 1855, 12 Stat. 976. The underlying principle of the decision below—that States cannot engage in (or fail to remediate) activities that have the effect of diminishing fish populations—will affect those States as well.

In the affected States, the Ninth Circuit's decision will affect far more than just culverts. The decision also threatens to displace state regulation of land use and water rights.

1. Land use

The Ninth Circuit focused on the role of barrier culverts in diminishing fish runs. Pet. App. 95a. Barrier culverts, however, are not the only obstacle to sustaining anadromous fish populations. Many human activities affect salmon runs. The U.S. Fish and Wildlife Service has determined that "[t]he biggest threat to salmon today is the loss and degradation of habitat." U.S. Fish & Wildlife Service, *Salmon of the West: Why are Salmon in Trouble?—Poor Habitat*, http://

www.fws.gov/salmonofthewest/poorhabitat.htm. The decision below will therefore have implications for every land use or development decision that could affect salmon habitat. That includes almost all development decisions, for as the Washington State Conservation Commission (WSCC) has explained, "[r]iparian zones are impacted by all types of land use practices." Carol J. Smith, Washington State Conservation Commission, *Salmon Habitat Limiting Factors in Washington State* 127 (2005), http://docs.streamnetlibrary.org/Washington/ConservationCommission/Statewide_LFA_Final_Report_2005.pdf. For example, the WSCC has determined that "[r]iparian functions are impaired by * * * direct removal of riparian vegetation, roads and dikes located adjacent to the stream channel, road crossings, agricultural/livestock crossings, unrestricted livestock grazing in the riparian zone, and development in the riparian corridor." *Ibid.* In addition, salmon can be harmed by "[h]uman-caused alterations in basin hydrology" resulting from "changes in soils, decreases in the amount of forest cover, wetlands, and riparian vegetation, and increases in impervious surfaces, sedimentation, and roads." *Id.* at 174. Thus, according to the WSCC, "[h]ydrologic impacts to stream channels can occur at relatively low levels of development." *Ibid.*

Federal, state, and local governments currently regulate development projects. During the permitting process, they require compliance with a host of environmental and land-use laws; thereafter, they require proper mitigation of environmental impacts. For example, the Clean Water Act prevents developers from dredging or filling navigable waters and wetlands

without a permit and requires them to obtain permits for their stormwater runoff. 33 U.S.C. 1342(p), 1344. Washington State requires local governments to make land-use decisions based on adopted policies aimed at preventing or reducing impacts to fish habitats from development in critical areas or along shorelines. See, *e.g.*, Wash. Rev. Code §§ 36.70A.030(5), 36.70A.060(2) (requiring counties and cities to develop policies and development regulations to protect critical areas, including fish habitat); *id.* § 90.58.080 (directing local governments to develop shoreline master programs to regulate shoreline use and modification); Wash. Admin. Code § 173-26-201(2)(c) (discussing importance of ecological functions of shorelines, particularly for anadromous fish, in development of shoreline master programs); *id.* § 173-26-231(2)(d) (requiring local governments to "assure that shoreline modifications individually and cumulatively do not result in a net loss of ecological functions," including fish habitat).

The Ninth Circuit's decision adds another layer of requirements—compliance with treaty rights—to the demands of federal and state law. Despite significant federal, state, and local regulation, the vast majority of land-development activities will affect stream flows, water quality, or salmon habitat to some extent by altering the natural state of the environment. Under the reasoning of the court below, those activities therefore have the potential to infringe a tribe's treaty right to enough fish to sustain a "moderate living," especially if they are assessed on a cumulative basis. Because the Ninth Circuit articulated no standards to limit the treaty right it identified, the extension of its decision to land-use regulation will be limited by little

but the creativity of regulators and tribal plaintiffs and the equitable discretion of the district court.

2. Water rights

The Ninth Circuit's decision will also affect the diversion of surface water and the withdrawal of groundwater. Salmon require sufficient streamflows for adults to locate their natal streams, pass to their upstream spawning grounds, and spawn, as well as for juveniles to migrate to the ocean. See *National Wildlife Fed'n* v. *Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935 (9th Cir. 2008); *Pacific Coast Fed'n of Fishermen's Ass'ns* v. *Gutierrez*, 606 F. Supp. 2d 1122, 1135 (E.D. Cal. 2008). Indeed, streamflow is one of the "critical drivers of juvenile salmonid growth, movement, survival, and reproduction." Annika W. Walters, et al., *Interactive Effects of Water Diversion and Climate Change for Juvenile Chinook Salmon in the Lemhi River Basin (U.S.A.)*, 27 Conservation Biology 1179, 1180 (2013). Human-caused diversion of water from rivers and streams can lead to declines in salmon populations and has been found to have "substantially interfer[ed] with salmonid migration in the Columbia River Basin since the nineteenth century." Nathan Baker, *Water, Water, Everywhere, and at Last A Drop for Salmon? NRDC v. Houston Heralds New Prospects Under Section 7 of the Endangered Species Act*, 29 Envtl. L. 607, 619 (1999).

Following the Ninth Circuit's logic, just as the presence of barrier culverts on Washington roads would render "the Tribes' right of access to their usual and accustomed fishing places * * * worthless without harvestable fish," so too might insufficient stream-

flows. Pet. App. 93a-94a. Tribes therefore would have a treaty-based guarantee of a flow in streams and rivers sufficient to support a salmon population that is large enough to provide treaty Indians a "moderate living."

This Court has held that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976); *Winters* v. *United States*, 207 U.S. 564, 576-577 (1908). "The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams." *Cappaert*, 426 U.S. at 138. But this Court has not applied the doctrine to infer a water right based on other treaty purposes not tied to reserved land. Applied to water rights, the Ninth Circuit's decision would extend beyond the narrow reserved-water-rights doctrine enunciated by this Court. It would instead establish a much broader implied water right that is appurtenant not to a tribe's reservation but to all usual and accustomed fishing grounds.

Applied in that context, the decision below would severely undermine Washington's water-rights regime. Like most western States, Washington follows the prior-appropriation doctrine and the "first in time, first in right" priority system. That system is "founded on the idea that at some point the water in a stream or lake will be insufficient to satisfy all potential users, and that the rights of those who have already appro-

priated water to a beneficial use will be superior to any later appropriators." *Swinomish Indian Tribal Cmty.* v. *Washington State Dep't of Ecology*, 311 P.3d 6, 15 (Wash. 2013). Under Washington law, a senior water right is "entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants." *Postema* v. *Pollution Control Hearings Bd.*, 11 P.3d 726, 734 (Wash. 2000) (quoting *Longmire* v. *Smith*, 67 P. 246, 249 (Wash. 1901)); see also Wash. Rev. Code § 90.03.010 (codifying the "first in time, first in right" principle).

The Ninth Circuit has previously ruled that a tribally held reserved water right for aboriginal fishing uses would have a priority date of time immemorial. *United States* v. *Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984). Such a priority date has the potential to displace every other water right lawfully created and recognized under Washington law. If tribes have an implied reserved water right for enough streamflow to support a quantity of fish that would provide for a "moderate living" for each tribe in each of the tribes' usual and accustomed places, there may be no surface water left in Washington to allocate to future users. Similarly, if there is not enough water to support the tribes' implied reserved water rights, then junior users whose rights infringe the tribes' water rights could see their perfected state-law water rights disappear.

C. This Court's review is needed now

In the Ninth Circuit's order denying rehearing, two judges from the panel expressed confidence that they had not "opened the floodgates to a host of future

suits." Pet. App. 11a (W. Fletcher, J., and Gould, J., concurring in the denial of rehearing en banc). That is so, they reasoned, because the Eleventh Amendment means that "a further suit against Washington State seeking enforcement of the Treaties cannot be brought by the Tribes." *Ibid.* In their view, the United States is "[t]he only possible plaintiff," and "[t]he United States is a responsible litigant and is not likely to burden the States without justification." *Ibid.*

That argument overlooks that the State is not the only possible defendant in further litigation seeking treaty enforcement. As explained above, a variety of land-use and water-allocation decisions can plausibly be alleged to infringe the expansive treaty right identified by the Ninth Circuit. Many of those decisions will be made by municipalities, which do not enjoy Eleventh Amendment immunity. See *Northern Ins. Co. of N.Y.* v. *Chatham Cnty.*, 547 U.S. 189 (2006). As for suits by the United States against the State, it may be that the United States is generally "a responsible litigant," but faith in its responsible litigation conduct is hardly a justification for adopting an unbounded treaty obligation. Washington should not be left "at the mercy of *noblesse oblige*." *United States* v. *Stevens*, 559 U.S. 460, 480 (2010).

This Court should not await further litigation before intervening to correct the Ninth Circuit's erroneous interpretation of the treaties. The decision below will have immediate harmful consequences. Regulators conducting agency proceedings must now attempt to incorporate the treaty right that the Ninth Circuit defined. And the decision will create ongoing uncertainty about the legal regime governing development

throughout the West. Significantly, the court of appeals did not merely block new development. Rather, brushing aside the State's laches argument, it ordered the removal or modification of culverts that had been in place for years. See Pet. 25-28. Anyone undertaking development that might affect salmon—essentially all development—will have to confront the possibility that the court's decision will be applied, years down the road, to require that the development be altered. Similarly, holders of water rights will face doubt about whether their state-law property rights will be impaired to satisfy the court's understanding of the treaty's obligations.

The uncertainty created by the decision will inhibit investment and development throughout the West. To prevent that result, this Court's review is needed now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2017