No. 18-35867, 18-35932, 18-35933

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DESCHUTES RIVER ALLIANCE,
an Oregon nonprofit corporation

Plaintiff–Appellant/Cross Appellees

vs.

PORTLAND GENERAL ELECTRIC COMPANY,
an Oregon corporation, and

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON, a federally-recognized Indian tribe

Defendants–Appellees/Cross Appellants,

On Appeals from the United States District Court
for the District of Oregon
No. 3:16-cv-1644-SI
The Honorable Michael H. Simon, Judge

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS, CROW TRIBE OF INDIANS, CONFEDERATED SALISH AND KOOTENAI TRIBES, FORT BELKNAP INDIAN COMMUNITY AND NAVAJO NATION AS *AMICI CURIAE* IN SUPPORT OF CROSS-APPELLANTS

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

The National Congress of American Indians ("NCAI"), founded in 1944, is the Nation's oldest and largest organization of American Indian and Alaska Native tribal governments and their citizens. NCAI represents these governments' collective interests and serves as a consensus-based forum for policy development among its member tribes from each region of Indian Country. NCAI's mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and federal policy issues affecting tribal governments.

Amici Curiae Crow Tribe of Indians, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community and Navajo Nation are each federally-recognized tribal governments with distinct interests in protecting their inherent sovereign rights, including particularly their sovereign immunity from suit. Even more so with respect to the natural resource management, economic development, energy and utility interests that extend from these Tribes' treaty rights and overwhelmingly contribute to the Tribes' governmental budgets. *Amici curiae*

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[1] *Amici* seek leave to file this brief in accordance with Federal Rule of Appellate Procedure 29.). All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* make the following attestation: none among them has any parent corporation and none issues any stock. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting this brief; and no person other than the *amici* contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(e).

responsibly manage both on and off-reservation natural resources and regulate and operate numerous economic enterprises, including hydroelectric and other utilities, in order to fund necessary government services that benefit tribal citizens, including emergency response, law enforcement, education, healthcare, courts, food distribution and other vital services. *Amici curiae* all reside within the Ninth Circuit.

This case involves an issue of great importance for tribal economic welfare, self-government, and self-sufficiency: the extent to which a tribal government may be hailed into unconsented litigation by non-Indian individuals alleging citizen suit claims. Such claims endanger already overburdened tribal budgets, and interfere with tribal self-determination, including tribal rights to make their own governmental decisions and to manage their natural resources for the benefit of their citizens. This significant issue implicates the very basis of federal Indian law. *Amici curiae* submit this brief to provide a greater understanding of the historical and interpretive context of tribal sovereign immunity, and to protect that bedrock legal principle from degradation.

SUMMARY OF ARGUMENT

As "separate sovereigns pre-existing the Constitution," Indian tribes possess immunity from suit, absent tribal waiver or congressional abrogation. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). Congress may limit tribes' common law immunity, as traditionally enjoyed by sovereign powers, but to do so,

Congress must "unequivocally" express that purpose. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). However the starting point, "[the Supreme Court has] often held, is tribal immunity …" *Bay Mills*, 572 U.S. at 790 (discussing *Santa Clara Pueblo*, 436 U.S. at 58). Tribes possess this "core aspect" of sovereignty unless and until Congress "unequivocally" expresses a contrary intent. *Id*. at 788, 790.

This case asks whether Congress unequivocally expressed such intent in the Clean Water Act ("CWA"). The District Court erroneously ascribed such intent to Congress based on the fact that Congress permitted citizen suits against any "person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of … an effluent standard or limitation under [the CWA])." 33 U.S. C. §1365(a)(1). Clearly Congress understood "governments" to be distinct from "persons." Nonetheless, the District Court held that Indian tribes' inclusion in a separate provision of the statute three steps removed from the citizen suit provision constituted "unequivocal" congressional intent to waive tribes' immunity from suit. That is quite a stretch and directly contrary to federal law's presumption that the word "person" does not impliedly include sovereign entities. *Vt. Agency of Natural Res. v. United States el rel Stevens*, 529 U.S. 765, 780-81 (2000); *Fayed v. CIA*, 229 F.3d 272, 275 (D.C. Cir. 2000). The District Court's

decision is likewise wholly inconsistent with both specifically the "unequivocal" expression of congressional intent required by both Supreme Court and Circuit precedent, and more generally with federal law's stalwart adherence to the doctrine of sovereign immunity and the enduring solemn respect the United States affords tribal sovereign governments.

ARGUMENT

I. TRIBAL SOVEREIGN IMMUNITY IS AN INHERENT SOVEREIGN RIGHT THAT ONLY CONGRESS CAN DIVEST.

"Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Bay Mills*, 572 U.S. at 788 (quoting *Santa Clara Pueblo*, 436 U.S. at 58). Therefore, tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Bay Mills*, 572 U.S at 789 (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877 (1986) (other internal citations omitted); *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016-17 (9th Cir. 2016) (echoing *Bay Mills*). "[T]he qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity…in Congress's hands." *Bay Mills*, 572 U.S. at 789 (internal citations omitted). Thus, time and again, the Court has treated the tribal sovereign immunity as settled law and dismissed any suit against a tribe absent congressional authorization or waiver. *See Bay Mills*, 572 U.S. at 789 (citing *Kiowa Tribe of Okla.*

v. *Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998)); *Kiowa Tribe*, 523 U.S. at 754 ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity") (citing *Three Affiliated Tribes,* 476 U.S. at 890; *Santa Clara Pueblo,* 436 U.S. at 58; *United States* v. *United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512 (1940) ("*USF&GI*")).

Like other sovereigns, tribal governments enjoy sovereign immunity from suit to help protect government functions, such as capturing necessary revenue. Because tribes have limited practical ability to raise revenues via taxes, Congress has encouraged reliance on tribal economic activities to fill the gap. As a result, revenues generated by tribal economic activity are critical to furthering tribes' abilities to provide essential services, fund public programs, and preserve autonomy and self-government. Although modest, the partnership between Portland General Electric and the Confederated Tribes of the Warm Springs Reservation has provided "enough emissions-free hydropower to power more than 150,000 homes." *See*, *Portland General Electric*, 'Our Story,' https://www.portlandgeneral.com/corporate-responsibility/environmental-stewardship/water-quality-habitat-protection/deschutes-river/our-story. This type of tribal self-governance and cooperative stewardship is precisely the government activity sovereign immunity is presumed to protect.

For such reasons, this Circuit employs a strong presumption against the waiver of tribal sovereign immunity. *See Bodi*, 832 F.3d at 1016 (quoting *Demontiney v. U.S. ex rel. Dep't of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 811) (9th Cir. 2001)). This presumption against waiver can only be overcome by an act of Congress and the intent to waive immunity "must be clear." *Bay Mills*, 572 U.S. at 790; *see also Bodi*, 832 F.3d at 1016.[2]

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[2] This is in addition to the federal law presumption against finding "sovereign" subsumed within "person" in statutory definitions absent express language, even in the absence of sovereign immunity or comity concerns. *Stevens*, 529 U.S. at 780-81. For example, the Supreme Court has applied the presumption even in cases in which the sovereign was the *plaintiff*. *See, e.g.*, *Inyo County v. Paiute-Shoshone of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003) (holding that tribes are not "person[s]" entitled to sue under 42 U.S.C. § 1983); *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam) (holding that foreign nations are not "person[s]" entitled to sue under § 1983); *United States v. Cooper Corp.*, 312 U.S. 600, 614 (1941)(holding that the United States is not a "person" entitled to seek treble damages under the Sherman Act). It has also applied the presumption in other cases in which no sovereign immunity concerns were implicated. *See, e.g.*, *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72 (1991) (holding that a government agency is not a "person" with removal authority). This Court has done the same. *See United States v. Errol D.*, 292 F.3d 1159, 1162-63 (9th Cir. 2002)(excluding government property from a criminal statute punishing offenses committed "against the person or property" of a "person").

This Circuit has steadfastly followed *Stevens'* logic. *Cain v. Salish Kootenai College*, 862 F.3d 939 (2017) (declining to treat an Indian tribes as a "person" under the False Claims Act); *Stoner v. Santa Clara County Office of Education*, 502 F.3d 1116, 1121-22 (9th Cir. 2007) (state agency not a "person" following sovereign immunity statutory canons of construction).

The *Stevens* presumption is concerned about consequences for the sovereign, and typically applies whenever, as here in the context of the CWA claim asserted against the Warm Springs Tribes, "the statute imposes a burden or limitation, as

This deference flows from the Constitution's clear separation of powers as applied to Indian affairs; "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty." *Bay Mills*, 572 U.S. at 803 (citing *Santa Clara Pueblo*, 436 U.S., at 60 ("[A] proper respect…for the plenary authority of Congress in this area cautions that [the courts] tread lightly")); F. Cohen, Handbook of Federal Indian Law §2.01[1], at 110 (2012) ("Judicial deference to the paramount authority of Congress in matters concerning Indian policy remains a central and indispensable principle of the field of Indian law") (other internal citations omitted). And "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 572 U.S. 790 (internal citations omitted).

Likewise, "[s]ince Congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress' intent toward them is benevolent and have developed canons of construction that treaties and other federal action should, when possible, be read as protecting Indian rights and in a manner favorable to Indians." *Kerr-Mcgee Corp. v. Kee Tom Farley*, 915 F.Supp. 273, 277 (D.N.M. 1995) (citing Cohen, *Handbook on Federal Indian Law* at 221). Since powers of

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distinguished from conferring a benefit or advantage." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979).

tribal self-government or other Indian rights are pervasive, subsequent federal action which may possibly abridge them is construed narrowly in favor of retaining Indian rights. *Id*. (citing Cohen, *Handbook on Federal Indian Law* at 224). Similarly, any ambiguity must be interpreted in favor of sovereign immunity. *See e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence"); *Dolan v. United States Postal Serv.*, 546 U.S. 481, 498 (2006)(stating that a waiver of sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign and that this settled legal principle applies not only to the interpretation of the scope of a waiver of immunity, but also to the interpretation of the scope of any exceptions to that waiver); *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 824 (7th Cir. 2016)("Any ambiguity must be interpreted in favor of sovereign immunity").

It is within this unambiguous methodical framework that courts must review tribal sovereign immunity. The District Court failed to do so.

II. ANY CONGRESSIONAL WAIVER OF TRIBAL SOVEREIGN IMMUNITY MUST BE CLEAR AND UNEQUIVOCAL.

The Supreme Court has consistently instructed that if it is Congress' intent to abrogate tribal immunity, Congress must clearly and unequivocally express that purpose. *See e.g., Bay Mills*, 572 U.S. at 790; *C & L Enters. v. Citizen Band*

Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001); *United States v. Dion*, 476 U.S. 734, 738-39 (1986); *Santa Clara Pueblo*, 436 U.S. at 58; *see also Meyers*, 836 F.3d at 823-24; *Mitchel v. Tulalip Tribes of Wash.*, 740 F.App'x 600, 601 (9th Cir. 2018). "It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotations and citation omitted); *see also Idaho v. Couer D'Alene Tribe*, 794 F.3d 1039, 1042-43 (9th Cir. 2015) ("To abrogate immunity by statute, Congress must unequivocally express its intent to do so")(citing *C & L Enters.*, 532 U.S. at 418). Congress has demonstrated that it is well-equipped and able to construct statutory language that unequivocally abrogates immunity for Indian tribes, and it has done so in limited instances. *See Kiowa*, 523 U.S. at 758-59 (listing as unique examples 25 U.S.C. § 450f(c)(3) (discussing mandatory liability insurance), and 25 U.S.C. §2710(d)(7)(A)(ii) (addressing gaming activities)).

In comparison, there are many instances where Congress has not waived tribal sovereign immunity. *White v. Univ. of Cal.*, 765 F.3d 1010, 1024 (9th Cir. 2014) (finding no waiver of sovereign immunity in the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq*., because the statute "does not contain an 'unequivocal expression' of abrogation"). Context also matters because "Indian tribes are entitled to immunity from suit, particularly on matters integral to sovereignty and self-governance." *Id.* at 1023-24 (citing *Santa Clara Pueblo*, 436

at 55-58). Further, "[a]ny ambiguities in the statutory language are to be construed in favor of immunity." *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 774 (9th Cir. 2018)(citing *FAA v. Cooper*, 566 U.S. 284, 290 (2012)); *see also Bryan v. Itasca County, Minn.*, 426 U.S. 373, 392 (1976) (stating that "an eminently sound and vital canon" dictates that any doubt about waiver of tribal sovereign immunity is to be resolved in favor of Indian tribes).

Thus, when it comes to sovereign immunity, a court cannot and ought not strain to string together bits and pieces of a statute—as the District Court did—to piecemeal together a waiver of tribal sovereign immunity. *See Meyers*, 836 F.3d at 827 (rejecting credit card customer's attempt to shoehorn the express and unequivocal term "Indian tribe" into a statute's citizen suit provision authorizing suit against "any government"); *see also Daniel*, 891 F.3d at 774 (recognizing and applying the Seventh Circuit's *Meyers* logic regarding tribal sovereign immunity and that the same should apply equally to the United States). "**Congress' words must fit like a glove in their unequivocality**." *Meyers*, 836 F.3d at 826-27. (emphasis supplied; citing *Bay Mills*, 572 U.S. at 788-90; *C & L Enters.*, 532 U.S. at 418); *see also Buchwald Capital Advisors v. Sault Ste. Marie Tribe of Chippewa Indians* (*In re Greektown Holdings, LLC*), 917 F.3d 451 (6th Cir. 2019) (embracing "unequivocality" and the Seventh Circuit's *Meyers* reasoning as more persuasive than this Court's holding in *Krystal Energy v. Navajo Nation*, 357 F.3d 1055 (9th

Cir. 2004), in light of this Court's later positive treatment of *Meyers* in *Daniel*). "It must be said with 'perfect confidence' that Congress intended to abrogate sovereign immunity and 'imperfect confidence will not suffice.'" *Meyers*, 835 F.3d at 827 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 231, (1989), superseded by statute on other grounds as recognized in *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 45, n.14 (1992)). "In order to abrogate tribal sovereign immunity, Congress must leave *no doubt* about its intent." *Buchwald Capital Advisors*, 917 F.3d at 457.

Having to craft such a statutory patchwork quilt—as the District Court did—demonstrates that Congress was neither unambiguous nor unequivocal nor remotely glove-like about any waiver of tribal sovereign immunity in the CWA.

Per the Supreme Court, "[t]he special brand of sovereignty the tribes retain—both the nature and its extent—rests in the hands of Congress." *Bay Mills*, 572 U.S. at 800 (internal citations omitted). "While Congress may not have to utter 'magic words,' Supreme Court precedent clearly dictates that it utter words that beyond equivocation or the slightest shred of doubt…" *Meyers*, 836 F.3d at 825 (finding that Congress did not waive tribal sovereign immunity in sections 106(a) and 101(27) of the Bankruptcy Code because the court could not "say with 'perfect confidence'" that the applicable statutory language "**unambiguously, clearly, unequivocally and unmistakably**" effectuated a Congressional abrogation) (emphasis supplied); *see also Daniel*, 891 F.3d at 774 ("we cannot say with 'perfect

confidence' that Congress meant to abrogate the federal government's sovereign immunity").

Here, the Court cannot say with perfect confidence that Congress intended, clearly and unequivocally, to waive tribal sovereign immunity in 33 U.S.C. § 1365. That provision does not mention tribes or tribal sovereign immunity at all. Nor does it include any other uncertain terms that would demonstrate any Congressional intent to abrogate tribal sovereign immunity with respect to CWA citizen suits.

The District Court's circuitous route to incorrectly determine that Congress waived tribal sovereign immunity by referencing the definition of "person" to include the CWA's definition of "municipality," which inexplicably includes "Indian tribe" despite the fact that Indian tribes have never been commonly understood as municipalities. *See* Appellee/Cross Appellant's Second Br. On Cross-Appeal (ECF No. 41), pp. 30-34 (Sept. 28, 2020). Similarly, the District Court read too much into out-of-Circuit decisions where proximate statutory language defined "person" to include "tribes," and allowed citizen suits against "persons." *Deschutes River All. v. Portland GE*, 323 F.Supp.3d 1171, 1185 (D. Or. 2018) (discussing *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) and *Osage Tribal Council v. Dep't. of Labor*, 187 F.3d 1174 (10th Cir. 1999). These authorities predate *Kiowa Tribe* and/or *Bay Mills* and *Bodi* and are readily distinguishable because they addressed statutes where "persons" authorized to be

sued expressly included "Indian tribes." Neither *Blue Legs* nor *Osage Tribal Council* involved a progressive tour of the underlying statute, looking to a definition within a definition within a definition. In short, relying on language housed in a different section of the CWA, and that is three-steps removed from the provision that the District Court deemed to be the waiver of tribal sovereign immunity, does not represent an unequivocal expression of Congressional intent.

The District Court acknowledged the ambiguity in the CWA citizen suit provision: "[i]nterpreting Section 1365 to abrogate the sovereign immunity of Indian tribes and the United States, but not of individual states does raise the question of why Congress would have expressly provided that the citizen suit provision did not abrogate state sovereignty under the Eleventh Amendment, but not done the same for tribal sovereign immunity." *Deschutes River All.*, 323 F.Supp.3d at 1185. The District Court recognized that, "[a]t first glance, this presents some incongruity," but reasoned that "[a]ny meaning that could be gleaned from this apparent mismatch, however, is lessened by the fact that Congress *did* clearly intend to differentiate between states and the federal government—providing for citizen suits against the latter but not the former—negating the potential concern that this mismatch suggests it was not Congress' intent to treat Indian tribes differently from states." *Id*. (emphasis in original).

That reasoning is infirm. The fact that Congress chose different results as between the federal government and state governments says nothing about Congressional intent as to tribal governments. In the decision below, the District Court substituted a story for a statute, a path deemed perilous by the Supreme Court. *McGirt v. Okla*., 140 S.Ct. 2452, 2470 (2020). The District Court's observation of "incongruity," "question[s]," "mismatch," and "concern that this mismatch suggests it was not Congress' intent to treat Indian tribes differently from states" should have ended the District Court's analysis, triggering application of the canon of construction holding that any ambiguity be construed in the light favorable to Indian tribes. *Chickasaw Nation v. United States*, 534 U.S. 84, 93-94 (2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)); *see also Choate v. Trapp*, 224 U.S. 665, 675 (1912); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729-30 (9th Cir. 2003).

Second, as Defendant-Appellants point out in their Second Brief on Cross-Appeal, the legislative history for the CWA is absent of any Congressional statements or considerations seeking to abrogate tribal sovereign immunity for citizen suit purposes. *See* Appellee/Cross Appellant's Second Br. On Cross-Appeal (ECF No. 41), pp. 31-35 (Sept. 28, 2020). The silence of the Congressional record on this point further demonstrates ambiguity.

And "[w]aivers cannot contain an ambiguity." *Robinson v. United States Dep't of Educ.*, 917 F.3d 799, 801-02 (4th Cir. 2019)(citing *Cooper*, 566 U.S. at 290-91). Sovereign immunity is sacrosanct unless and until Congress or the tribe expressly says otherwise. *Id.* at 801-02. Courts are to "presume congressional familiarity" with the need for waivers of sovereign immunity to be unambiguous and unequivocal. *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992). Here, Congress did not offer statutory language that is beyond equivocation or the slightest shred of doubt that it intended to waive tribal sovereign immunity. The contrast between the CWA's preservation of state immunity, abrogation of federal immunity, and oblique reference to Indian tribes through tangential definitions illustrates the ambiguous nature of the citizen suit provision, triggering the presumption against waiver. In sum, federal law prohibits finding a waiver of sovereign immunity when the statutory language shows, at most, only a clumsy accident.

III. THIS CIRCUIT HAS RECOGNIZED THAT COURTS MUST HAVE PERFECT CONFIDENCE IN AN EXPLICIT WAIVER OF SOVEREIGN IMMUNITY OF "PERSONS."

This Circuit holds that Congressional intent to waive sovereign immunity in a provision otherwise applying to "persons" cannot rest on general terms included within the definition; the language must be specific. *Daniel*, 891 F.3d at 772 . In *Daniel*, this Court found that the Fair Credit Reporting Act ("FCRA") does not waive sovereign immunity for damages against the federal government. *Id*. at 776. The

FCRA broadly defines a "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, *government or governmental subdivision or agency*, or other entity." *Id*. at 760 (quoting 15 U.S.C. § 1681a(b) (emphasis in original). The sovereign immunity question at issue in *Daniel* was whether the inclusion of "governmental…agency" in the FCRA's definition of "person" constitutes an unequivocal waiver of the federal government's immunity from money damages and subjects the United States to the various provisions directed at "any person" who violates the law. *Id*.

Construing the FCRA as a whole—including the different contexts in which "person" was used, and the inclusion of a clear waiver of sovereign immunity elsewhere in the statute, which made it unlikely that Congress obliquely intended to waive sovereign immunity in the liability provision—the Court viewed the statute as ambiguous with respect to immunity waiver. *See id*. The Court observed, "'it is useful to benchmark the statutory language against other explicit waivers of sovereign immunity' when determining whether an unequivocal waiver of sovereign immunity exists." *Id*. at 772 (quoting *Al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 851 (9th Cir. 2012)). The Court reasoned that "[t]he fact that Congress explicitly named the United States in the remedial provisions found at § 1681u(j) [of the FCRA] but not in the remedial provisions found at §§ 1681n and 1681o [of the FCRA] demonstrate[d] the equivocal nature of any purported waiver of sovereign

immunity in the latter sections." *Id*. "Because Congress knew how to explicitly waive sovereign immunity in the FCRA, it could have used that same language when enacting subsequent enforcement provisions." *Id*. It was telling that Congress subjected "person[s]" to liability in certain statutory provisions, and the United States itself or any of its departments or agencies in the clear waiver of sovereign immunity elsewhere in the statute. *See id*.

The Court also cited Supreme Court precedent that "courts have been 'reluctant to read 'person' to mean the sovereign where ... such a reading is decidedly awkward.'" *Id.* at 770 (quoting *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 83 (1991). This Court also noted that the legislative history made no reference to such a broad waiver of sovereign immunity. *Id.* at 774-75. "During passage of the FCRA and every amendment, Congress never considered subjecting the federal government to liability in suits like the one filed by [the appellant]." *Id*. at 774. Accordingly, the Court concluded that it could not say with "perfect confidence" that Congress meant to waive sovereign immunity for civil liability even though for some provisions of the FCRA "person" includes the federal government. *Id*. at 774. Because "any ambiguities in the statutory language are to be construed in favor of immunity," the Court lacked jurisdiction. *Id*. (quoting *Cooper*, 566 U.S. at 290).

IV. TRIBES, LIKE STATES, MAY EXERCISE THEIR GOVERNMENTAL PREROGATIVES TO ENGAGE IN NATURAL

RESOURCE MANAGEMENT AND DEVELOPMENT AND ECONOMIC DEVELOPMENT BROADLY, INCLUDING SPECIFICALLY THE RIGHT TO CARRY OUT PUBLIC UTILITY ACTIVITIES.

Like their sister sovereigns, states, which Congress expressly carved out from the CWA citizen suit provisions subject to Eleventh Amendment immunity, tribes should also have the ability to freely exercise their rights and responsibilities in providing public utility services without the threat of lawsuits.

Congress has encouraged tribal enterprises not for their own sake, or even for the economic development they foster, but because they provide revenues essential to tribal self-government. Congress has acted because tribes' other options are often unworkable. To begin, many tribes lack an economic base on which to assess taxes. *See* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. Rev. 759, 771 & n.84 (2004). Tribal members are often unemployed or economically disadvantaged, so Indian income taxes are not practical for raising significant revenues. Indeed, on almost any measure, economic conditions in Indian country fall far below the national average. Thus, "[w]hile tribal governments operate many of the same public services as other levels of government, they must operate without the usual tax revenue other levels of government rely on." Montana Budget & Policy Center, *Policy Basics: Taxes in Indian Country, Part 2: Tribal Governments*, at 4 (2017).

Moreover, courts have allowed states and localities to tax economic activity on tribal lands. *See id.* That means tribes, unlike states, often cannot rely on taxation: Such an additive tribal tax would create double taxation, which would "stifle[] economic activity on Indian reservations," "discourage[e] private investment in Indian country," and chill the expansion of businesses whose leaders are already worried about the lack of infrastructure on reservations. Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 Pitt. Tax Rev. 93, 95–96 (2005); *see also Bay Mills*, 572 U.S. at 811 (Sotomayor, J., concurring).

Given the limited utility of tribal income taxes and the perils of double taxation, Congress has contemplated that tribes will look to tribal enterprises to fill the gap. As a result, tribal enterprises are functionally akin to tax regimes for state governments. Aside from federal grants, tribal enterprises are the primary means for raising revenue to support tribal governmental functions, programs, and services for tribal citizens—and for tribes' participation in and contributions to regional economies. *Policy Basics*, *supra,* at 4 ("[M]any tribes must rely on their natural resources and tribally owned business enterprises as their only source of revenue outside federal dollars."). Hence, "[i]f Tribes are ever to become more self-sufficient, and fund a more substantial portion of their own governmental functions,

commercial enterprises will likely be a central means of achieving that goal." *Bay Mills*, 572 U.S. at 807 (Sotomayor, J., concurring).

In recent years, many tribes—following the lead of state and local governments[3]—have worked to diversify their revenue sources by expanding their commercial activity into new industries. These efforts at diversification are intended to protect tribal governments against undue reliance on any one stream of income. *See generally* Alan P. Meister, et al., *Indian Gaming and Beyond: Tribal Economic Development and Diversification*, 54 S.D. L. Rev. 375 (2009). Such diversification has been especially important for tribes in rural areas that lack the population density to support large gaming operations. *See* Dwanna L. Robertson, *The Myth of Indian Casino Riches*, Indian Country Today (Apr. 19, 2017), https://bit.ly/2LndILh. For these tribes and others, recent forays into industries such as manufacturing, energy development, medical services, tourism, forestry, lending, retail, construction, and professional services have often provided positive results. *See* Shane Plumer, *Turning Gaming Dollars into Non-Gaming Revenue: Hedging for the Seventh Generation*, 34 Sua Sponte: Law & Inequality 515 (2016); *see also* Mark Fogarty, *The Growing Economic Might of Indian Country*, Indian Country Today (Mar. 15,

[3] *See* Muhammad Ali Hanif, *An Analysis of Tax-Revenue Diversification of State Governments (2000–2011)*, at ii (2014), http://www.mhsl.uab.edu/dt/2014/Hanif_uab_0005M_11431.pdf.

2013), https://bit.ly/2H0r1Q8. Apart from gaming (with gross annual revenues over $32 billion[4]) and federal government contracting (with gross annual revenues over $6 billion[5]), tribal commercial activities are the largest drivers of revenue for tribes.[6] And tribal economic activities often arise from tribes' exercise of their treaty rights. *See generally Wash. State Dep't of Licensing v. Cougar Den, Inc*. 139 S.Ct. 1000 (2019) (rejecting non-tribal infringement on Yakama Nation's treaty-based exercise of rights to trade and travel). For the foreseeable future, tribal economic activities of all shapes and sizes, including natural resources management and development, will remain essential to tribes' capacity to fund their governmental services, especially as federal assistance to tribes remains static or declining in nearly every instance.

Tribal economic activities like the Warm Springs Tribes' management of the utility project here are of pivotal importance to tribal governments and thus, the

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[4] National Indian Gaming Commission, *FY2013 – FY 2017 Report on Gross Gaming Revenue* (2018), https://www.nigc.gov/commission/gamingrevenue-reports.

[5] Jonathan B. Taylor, Native American Contracting Ass'n, *A Report on the Economic, Social and Cultural Impacts of the Native 8(a) Program* 1 (2012).

[6] *See* Steven Peterson, *Tribal Economic Impacts: The Economic Impacts of the Five Idaho Tribes on the Economy of Idaho* 5 (2014) (estimating tribal enterprise revenues); Jonathan B. Taylor, *The Economic and Fiscal Impacts of Indian Tribes in Washington* 4–5 (2012) ("[T]oday self-determined economic activity provides the bulk of tribal government funding. Statewide, enterprise profits, taxes, leases, and natural resources support more than two-thirds of tribal government budgets").

contours of tribal sovereign immunity attendant to those activities are "a grave question; the answer will affect all tribes, not just the one before us." *Upper Skagit Indian Tribe v. Lundgren*, 138 S.Ct. 1649, 1654 (2018) (declining to ascribe waiver of tribal sovereign immunity with respect to an *in rem* quiet title action). In the context of CWA citizen suits and other litigation, the gravity is clear.

As compared with States protected by the Eleventh Amendment, tribes are far more resource-constrained. Especially for smaller and rural tribes, the use of scarce resources and employee time is essentially a zero-sum game in which every dollar or moment spent dealing with motion practice, pretrial discovery, etc., necessarily detracts from the tribe's ability to offer essential services to its citizens. It is no wonder, then, that federal law requires that outsiders not be able to impose litigation cost burdens on tribes, putting dollars at stake in a way that could literally be a matter of life and death for tribal citizens, absent "no doubt" that result was intended by Congress.

V. TRIBAL SOVEREIGNS ARE NO LESS DESERVING OF SOVEREIGN DIGNITY THAN STATES, WHOSE SOVEREIGN IMMUNITY HAS EXPERIENCED A RECENT RENAISSANCE AT THE SUPREME COURT.

The U.S. Supreme Court's reflections on state sovereign immunity in *Franchise Tax Board of California v. Hyatt* ("*Hyatt III*"), 139 S.Ct. 1485 (2019), bring tribal sovereign immunity into sharper relief by revealing the historical roots of sovereign immunity as understood by the framers of the Constitution. In *Hyatt*

III,[7] a 5-4 majority overruled a 1979 case, *Nevada v. Hall*, 440 U.S. 410 (1979), and held that the Constitution does not permit a state to be sued by a private party without its consent in the courts of another state. The case goes back to 1998, when Hyatt sued California's state taxing authority in Nevada state court for torts he alleged the agency committed during an audit. The *Hall* Court had interpreted one state court's regard for another state's sovereign immunity as entirely a matter of comity, rather than a Constitutional requirement.

In *Hyatt III*, the Court returned to first principles and asked the foundational question: When and how did the petitioner state government yield its sovereignty to another? After answering its own question—never—the Court gives a history lesson. 139 S. Ct. at 1493-95. Writing for the majority, Justice Thomas reminds us that "[a]fter independence, the States considered themselves fully sovereign nations. As the Colonies proclaimed in 1776, they were 'Free and Independent States' with 'full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which independent States may of right do.'" *Id.* at 1493. The Court confirmed that "'[a]n integral component' of the States' sovereignty was 'their immunity from private suits.'" *Id.* (quoting *Federal Maritime*

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[7] Mr. Hyatt's tax audit torts claims came before the Court previously in *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) ("Hyatt I") and *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. __ (2016) ("*Hyatt II*"), thus making the 2019 opinion *Hyatt III*.

Comm'n v. South Carolina Ports Authority, 535 U.S. 743, 751-752 (2002) and citing additionally to *Alden v. Maine*, 527 U.S. 706, 713 (1999)). The Court further explained that the founders' understanding of the centrality of state sovereign immunity found strong support in *The Federalist Papers* Nos. 39 and 81 and in tomes of historical recitations of both common law sovereign immunity and international law. *Id*. at 1493. The Court concluded, "The founding generation thus took as given that States could not be haled involuntarily before each other's courts." *Id*. at 1494. This universally-understood historic reverence for state sovereign immunity was likewise evidenced in contemporaneous cases reviewed by the *Hyatt III* Court and in debates and writings from the time of the Constitution's ratification. *Id*. at 1495-96.

The *Hyatt III* Court further explained that states' surrender of portions of their sovereignty via the Constitution was narrow, as repeatedly contemporaneously confirmed. *Id*. at 1495 (citing *Alden*'s string citations to the arguments of Hamilton, Madison and John Marshall, i.e. "It is not in the power of individuals to call any state into court" and noting that any notion of states being hailed into the courts of another by a private citizen was met with "unusual vehemence"). Even as members of the Union, state governments "'maintain certain attributes of sovereignty, including sovereign immunity.'" *Id*. at 1496 (quoting *Puerto Rico Aqueduct and Sewer Auth.*

v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)). The Court found sovereign immunity from suit is an essential stick in the bundle of sovereign rights:

> [T]he Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns. Each State's equal dignity and sovereignty under the Constitution implies certain constitutional "limitation[s] on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 293 (1980). One such limitation is the inability of one State to hale another into its courts without the latter's consent. The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design.[8]

While the *Hyatt III* Court recognized that the Constitution also reflects voluntary limitations on states' former existence as fully independent sovereign nations, such as their acquiescence of the ability to decide border disputes, those limitations relate to inter-state relationships and not as diminishments of the equal sovereignty among states that would serve to open any door to suit against a state in the courts of another state. *Id*. at 1497-99.

There is every reason to believe that Justice Thomas's reasoning recognizing the central importance of state sovereign immunity in our federalism in *Hyatt III*

[8] *Id*. at 1497.

applies with equal force to Indian tribes and nations.[9] First, it is hornbook law that tribes may not be sued unless and until either the tribe or Congress expressly says so. *Bay Mills*, 572 U.S. at 790 (citing to the same expression of the founders' understanding contained in *The Federalist* No. 81 cited in *Hyatt III*).

Second, just as states considered themselves fully sovereign nations before ratifying the Constitution, so too did Indian tribes consider themselves full sovereigns—and were treated as such by the federal government at the time of the framing as reflected in both the Indian Commerce Clause of Article I, Section 8 and the Treaty-Making Clause of Article II, Section 2. Just as states, tribes too held powers of war and peace and commerce. The difference is that tribes ceded no sovereignty in the Constitution. Instead, tribes remain "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo*, 436 U.S. at 56.

Third, and as noted by the Court in *Hyatt III* as to states (*see Hyatt III*, 139 S. Ct. at 1497), the Constitution defined the relationship between tribes and the United States, so that they no longer related to each other solely as foreign sovereigns. Instead, as interpreted by the Court beginning with Chief Justice John Marshall, the Constitution established the government-to-government relationship between tribes

[9] The common origin stories of federal, state and tribal sovereign immunity are recounted in William Wood, *It Wasn't An Accident: The Tribal Sovereign Immunity Story*, 62 Am. U. L. Rev. 1567 (2013).

and the United States as a domestic one, vesting Congress with plenary power in Indian affairs. U.S. CONST. art. I, §8. As a Revolutionary War veteran who played a key role in the framing of the Constitution, Marshall was well aware of the problems created by the Articles of Confederation, which—in sharp contrast to the Constitution—left tribal affairs to the several states.

Fourth, sovereign immunity is no less integral to tribal nations as participants in our federalism than it is to states.

The thrust of *Hyatt III* is clear: sovereign immunity is sacrosanct in our constitutional democracy and must not lightly be deconstructed by the courts. And this symmetry between state and tribal sovereign immunity is further supported in the CWA itself. Section 518(e)'s authorization to treat tribes as states for purposes of implementing the CWA includes issuing water quality standards. The CWA also accommodates states' Eleventh Amendment immunity. 33 U.S.C. §1365(a)(1). There is no reason to create asymmetry by finding tribes subject to suit when tribes are expressly authorized to be treated as states which may not be sued. The Supreme Court eschews such asymmetry, *Bay Mills*, 572 U.S. at 806-08 (Sotomayor, J., concurring), and Congress, too, seems to prefer state-tribal symmetry and parity. *See* Kristen M. Carlson, *Congress and Indians*, 86 UNIV. OF COLO. L. REV. 101, 175 (2014) (indicating that review of extensive recent Congressional records indicates

that Congress's treatment of tribal governments as state governments in general legislation extends back to at least the 100th Congress).

CONCLUSION

Tribal sovereign immunity governs this case. Congress has not explicitly abrogated tribal sovereign immunity in the CWA citizen suit provision through clear, unambiguous, and unequivocal terms. Therefore, the decision below must be reversed.

Date: October 5, 2020

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UNITED STATES COURT OF APPEALS
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