No. 17-269

In the Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

BRIEF AMICUS CURIAE FOR THE AMERICAN FOREST & PAPER ASSOCIATION AND NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, tissue, and wood products manufacturing industry through fact-based public policy and marketplace advocacy.[1] AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative, *Better Practices, Better Planet 2020*. The forest products industry accounts for approximately four percent of total U.S. manufacturing GDP, manufactures over $200 billion in products annually, and employs approximately 900,000 men and women.

The National Mining Association (NMA) is the national trade association of the mining industry. NMA's members include the producers of most of the Nation's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry.

Amici's members depend on their ability to use the land for productive purposes, and on the supply of quantities of water necessary for their operations. Frequently—and in the forestry industry in virtually all cases—they also are holders of Clean Water Act (CWA or Act) permits: either Section 404 "fill" per-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. All parties have provided written consents to the filing of this *amicus* brief.

mits, or Section 402 National Pollutant Dischange Elimination System (NPDES) permits that set forth permissible discharges to navigable waters from point sources based in part on water quality standards that "establish the desired condition of the waterway." *Arkansas* v. *Oklahoma*, 505 U.S. 91, 101 (1992). When a waterway fails to achieve water quality standards despite point source discharge limitations, the CWA may require that programs also address nonpoint sources of pollution, including various land uses.

Amici's interest in this case stems from the fact that the Ninth Circuit's invention of a treaty right to a sustenance quantity of fish, not merely a fair share of the available quantity of harvestable fish, threatens to ratchet up Clean Water Act and other environmental and land use restrictions on the operations of *amici*'s members. Guaranteeing a tribe the right to a quantity of harvestable fish sufficient to provide them with a "moderate living" has resulted in far reaching, arbitrary and unjustified changes to Washington's proposed statewide water quality standards. In particular, tribal fishing rights have become the basis for the U.S. Environmental Protection Agency's (EPA) imposition of Human Health Water Quality Criteria (HHWQC) based on hypothesized historical tribal fish consumption at exceptionally high and unrealistic levels—levels far beyond any genuinely anticipated fish consumption rate for the State. See, *e.g.*, EPA, *Revision of Certain Federal Water Quality Criteria Applicable to Washington*, 81 Fed. Reg. 85,417, 85,423 (Nov. 28, 2016) (imposing HHWQC standards on Washington based on the assertion that "the Stevens-Palmer treaties provide tribes the right to exercise subsistence fishing practices on waters throughout the State"). These strin-

gent criteria deprive the States of authority to manage their waterways as Congress intended and impose severe burdens on businesses and landowners.

The Ninth Circuit's reasoning is not limited to fishing rights; it can be extended to embed into federal law fixed-quantity hunting, gathering, pasturing, and similar rights that by the same reasoning must be secured to tribes through environmental and other land use requirements. Treaty language, under this interpretation, establishes a broad new "right to protection from environmental degradation." Kathryn A. Bilodeau, *The Implied Water Right for Fish: Do Off-Reservation Instream Water Rights Exist to Support Indian Treaty Fishing Rights?*, 48 Idaho L. Rev. 515, 545 (2012). As *amici* States have properly complained, it imposes a wide-ranging and free-floating "environmental servitude" on all the actions of the States and regulated communities. Br. *Am. Cur.* of Idaho et al. at 14. See Pet. App. 19a (the opinion below "fails to articulate a limiting legal principle that will prevent its holding from being used to attack a variety of development, construction, and farming practices").

Amici submit this brief to ensure that this Court is informed of these non-obvious but far-reaching—indeed revolutionary—consequences of the Ninth Circuit's misreading of the Stevens Treaties, which threaten State authority and every business and municipality that depends on a Clean Water Act permit or that uses the land in the Pacific Northwest and beyond.

SUMMARY OF ARGUMENT

This Court should reject the Ninth Circuit's interpretation of the Stevens Treaties because it is un-

supported by the language of the Treaties or by this Court's precedents. The proper reading of the Treaties is one that gives meaning to the limitation on the tribal "right of taking fish" that it exists "*in common with all citizens of the territory*." Treaty of Nisqually (Treaty of Medicine Creek), art. III, 10 Stat. 1132, 1133 (Dec. 26, 1854) (emphasis added). The Ninth Circuit's reading granting tribes rights to certain harvestable quantities of fish instead of the fair share of available fish is flatly inconsistent with this Court's holding in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979) (*Fishing Vessel*), and renders that limitation clause utterly meaningless.

In this brief, however, *amici* focus not on the Federal Indian canons of treaty interpretation and precedents of this Court that require reversal, but on the extraordinarily disruptive and harmful consequences of the Ninth Circuit's incorrect reading of the Stevens Treaties. We detail how the Ninth Circuit's mistaken reading converts tribal fishing rights into the driver for new and extremely stringent federal environmental regulations that are inappropriately designed with the sole goal of preserving, in perpetuity, sustenance quantities of harvestable fish for tribe members. Those consequences, which destroy the cooperative federalist scheme Congress established in the Clean Water Act and impose substantial burdens on "all citizens" that the Treaty parties could not conceivably have intended, show that the lower court's reading cannot possibly be correct.

ARGUMENT

Amici agree with petitioner the State of Washington that the language and intent of the Stevens Treaties, read in light of the Federal Indian canons

developed in this Court's jurisprudence, require reversal. *Fishing Vessel* requires not a fixed subsistence level of fish, but a fair share of available fish. Nothing in the Stevens Treaties—which grant the Tribes "[t]he right of taking fish * * * in common with all citizens"—requires that "all citizens" instead, and regardless of circumstances, ensure by all necessary means and at all times that the Tribes have a subsistence level of fish available to them.

Fishing Vessel is controlling here. It held that the Tribes' and citizens' rights of taking fish "in common" means that "[b]oth sides have a right, secured by treaty, to take a fair share of the available fish," which the Court construed as equal shares unless a tribe did not need fifty percent of available fish in order to make a "moderate living," in which case the Tribe's equal share might be reduced. 443 U.S. at 684-686.

The "moderate living" or subsistence standard that the courts below elevated to a minimum guarantee is therefore nothing of the sort. It is a cap that may lead to a reduction of a Tribe's share when fish are abundant. But when fish are scarce the controlling principle of division is a "fair share" of equal quantities. That, indeed, was the position urged by the United States in *Fishing Vessel*: the Tribes were entitled "to a 50% share of the 'harvestable' fish * * * or to their needs, *whichever was less*." *Id.* at 670 (emphasis added). In accepting that argument, this Court *rejected* the Tribes' contrary contention that they had the right to "as many fish as their commercial and subsistence needs dictated." *Ibid.* Accordingly, the issue presented here was already decided in *Fishing Vessel*, which requires reversal. That decision recognizes no ambiguity in the Stevens Treaties

that would authorize looking to the extraneous evidence on which the Ninth Circuit relied. See *Choctaw Nation* v. *United States*, 318 U.S. 423, 432 (1943) (Indian treaties "cannot be re-written or expanded beyond their clear terms"). Cf. *CNH Industrial N.V.* v. *Reese*, No. 17-515 (Feb. 20, 2018) (summarily reversing a decision that relied on extrinsic evidence to interpret a contract after finding ambiguities that this Court's precedent foreclosed).

The State of Washington has set forth additional and compelling textual, historical, and precedential reasons why the Ninth Circuit's interpretation of the Treaties must be reversed. Rather than repeat those arguments, *amici* address here what the *consequences* of the Ninth Circuit's untethered and uncontained reading would be. Those consequences, we explain, are already in evidence in draconian federal regulations that destroy States rights and interfere with economic activity in the name of securing for Tribes subsistence fishing harvests.

THE NINTH CIRCUIT'S INCORRECT INTERPRETATION OF THE STEVENS TREATIES IS INCOMPATIBLE WITH THE CLEAN WATER ACT'S FEDERALIST STRUCTURE AND HARMS THE NATION'S ECONOMY

A. The Ninth Circuit's Misreading Of The Stevens Treaties Has Led To Stringent Clean Water Act Requirements That Destroy States' Rights And Burden Economic Activity

The Ninth Circuit's misinterpretation of tribal fishing rights under the Stevens Treaties leads to a serious distortion of the Clean Water Act that strips States of their rights and imposes huge burdens on

regulated parties. A description of the relevant portions of the Act is necessary to understand why.

1. The Clean Water Act aims to protect the Nation's waters through an elaborate "program of cooperative federalism." *New York* v. *United States*, 505 U.S. 144, 168 (1992). See 33 U.S.C. § 1251(a), (g). Although EPA has an important role in achieving the CWA's goals, Congress made clear its policy "to recognize, preserve, and protect the *primary* responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "plan the development and use" of "land and water resources." *Id.* § 1251(b) (emphasis added).

Of particular importance here, States are responsible under the CWA for establishing water quality standards for waters within their borders. 33 U.S.C. § 1313(c)(1), (2)(A). Water quality standards "establish the desired condition of the waterway." *Arkansas*, 503 U.S. at 101. First, they identify the designated uses of the particular waterway, such as for industry, agriculture, silviculture, recreation, or public water supply, and "wherever attainable," should "provide water quality for the protection and propagation of fish, shellfish and wildlife." 40 C.F.R. §§ 130.3. Second, they specify water quality criteria necessary to serve those uses. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 130.3, 131.10. The "primary role" in "establishing water quality standards" belongs to the States. *City of Albuquerque* v. *Browner*, 97 F.3d 415, 425 (10th Cir. 1996). Only if EPA disapproves a State's standards as being contrary to the Act may EPA promulgate standards for that State. 40 C.F.R. § 131.22.

2. The CWA's principal regulatory tool for achieving water quality standards is Section 402's NPDES

permit program, which applies to "point sources" of pollution. Subject to statutory and regulatory exceptions, a person who "discharges" a pollutant from a point source into "navigable waters" must have an NPDES or other Clean Water Act permit. 33 U.S.C. §§ 1311(a), 1342(f), (k), 1344(a). An NPDES permit imposes technology-based limits on effluent discharges from a point source. *Id.* §§ 1311(b)(1), 1342(a)(3). Where technology-based limits are insufficient to achieve water quality standards, permits must impose any more stringent limits necessary to implement those standards. *Id.* § 1311(b)(1)(C); *Arkansas*, 503 U.S. at 101. Most States are approved to administer the NPDES program within their borders. But EPA plays a supervisory role, with the ability to veto a State-issued permit. *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 194 (1980) (per curiam).

3. Non-point source pollution is all pollution that does not result from a discharge from a point source into a navigable water, such as unchanneled rainwater from agricultural sites that reaches a navigable water and contains chemical residue or sediment. The CWA does not authorize EPA to regulate nonpoint source pollution. *E.g.*, *Defenders of Wildlife* v. *EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005). Instead, State programs required by the CWA address nonpoint source pollution to achieve water quality standards.

The Act requires States to establish a process to "identify, if appropriate, agriculturally and silviculturally related nonpoint sources" and to "set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288(b)(2)(F), (f). More general-

ly, States must identify any nonpoint sources that significantly contribute to a failure to meet water quality standards and develop best management practices to "reduce, to the maximum extent practicable," pollution from those nonpoint sources, subject to EPA approval or disapproval. *Id.* § 1329(b)(2)(C), (e)(h).

4. CWA Section 303(d) requires each State to identify those waters for which technology-based NPDES limits are insufficient to achieve water quality standards ("impaired waters"). 33 U.S.C. § 1313(d)(1)(A). The State must establish a "total maximum daily load" or TMDL for those pollutants causing the impairment. 33 U.S.C. § 1313(d)(1)(C). A TMDL defines the maximum level of pollutant loading from all combined sources, including natural background, point sources, and nonpoint sources, necessary to implement the applicable water quality standards. States have the responsibility for establishing TMDLs, which EPA must approve or disapprove. If EPA disapproves a State TMDL it must establish the TMDL itself. *Id.* § 1313(d)(2).

5. NPDES permit limits, nonpoint source best management practices, TMDLs—indeed the entire gamut of water pollution controls—thus stem from water quality standards established by the States under EPA supervision. But in one area, as we further elaborate in Part B, *infra*, EPA has been especially heavy handed in enforcing federally-mandated WQS, and doing so based on its view of tribal fishing rights.

EPA issues national recommended HHWQC under Section 304(a) of the CWA, which States use to develop their own human health-based criteria. States "are not required to adopt the national crite-

ria or use the identical default values that the EPA included in the equations to derive them. * * * [But if] EPA disapproves state criteria or determines that revised criteria are necessary, it can issue federal criteria for the state." Jerry Schwartz, *BNA Insights: Human Health Criteria, Fish Consumption Rates—More Important Policy Implications Than Clean Water Rule?*, 96 BNA Daily Environment Report 1, 2 (May 18, 2016) (citing, *inter alia*, 40 C.F.R. § 131.11(b)).

EPA establishes national recommended HHWQC "so that fish in the affected water body have levels of regulated pollutants low enough that when they are consumed by people * * * or are consumed by people who are also drinking the water * * *, they do not pose unacceptable health risks to those individuals." Schwartz, *supra*, at 2. These criteria, therefore, are based on assumptions about how much contaminated fish and water humans consume, and the risks that consumption at that level imposes. EPA's "formula includes several very conservative default values, including the fish consumption rate and the excess lifetime cancer risk (ELCR) level." *Ibid.* Specifically (and leaving aside EPA's extremely conservative ELCR assumptions), EPA's *base* criteria assume that everyone in the Nation:

- is of average weight;
- drinks 2.4 liters of unfiltered and untreated water from rivers, lakes, and streams every day for 70 years; *and*
- eats 22 grams of fish every day (including fish not from the waterbody for which the standard is being developed, such as store

> bought fish) for 70 years, all of which are contaminated at the criteria level.

Schwartz, *supra*, at 4. Twenty two grams of fish per day is more fish than is eaten by ninety percent of the U.S. population. *Ibid.*

But, as *amici* explain below, EPA has deemed even these conservative criteria insufficient to protect the health of members of Indian Tribes with fishing rights. In EPA's hands, the Ninth Circuit's interpretation of the Stevens Treaties to guarantee Tribes a subsistence level of fish operates through the CWA's complex system of water quality regulation to displace State authority to identify and achieve water quality standards. The end result is a set of unlawfully stringent HHWQC that drive point and nonpoint source regulation and TMDLs to levels that threaten the Nation's economic activity.

B. EPA Has Used Nonexistent Tribal Rights To Sustenance Levels Of Fish To Impose Stringent HHWQC On Unwilling States

The scheme of regulation described above means that higher WQS lead to more stringent NPDES discharge restrictions, greater nonpoint source controls, and more demanding TMDLs. Because of EPA's highly conservative HHWQC standards, fish consumption already is an especially potent factor in driving more demanding regulation. And elevated tribal fish consumption levels that EPA associates with sustenance fishing rights drive HHWQC to even more stringent levels.

1. In the State of Washington, EPA interpreted eight treaties (including the Stevens treaties at issue here) that govern 24 Tribes and "[t]he majority of waters under the jurisdiction of the State" to guaran-

tee the Tribes sustenance levels of fish. See 81 Fed. Reg. at 85,423. EPA disapproved 143 of Washington's HHWQC, substituting federal standards designed to "allow for the consumption of fish from local waters that could sustain and be protective of members of the [Tribes] practicing a subsistence lifestyle." *Id.* at 85,425. Those federal standards assume fish consumption by each Tribe member of 175 grams of inland fish per day (6.2 ounces every day for 70 years). *Id.* at 85,426.[2]

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[2] In February 2015, EPA also disapproved Maine's HHWQC for an unspecified set of tribal waters on the theory that Maine's criteria failed to protect a new EPA-created CWA tribal "sustenance fishing" designated use that EPA imposed on Maine in all tribal waters. See EPA, *Proposal of Certain Federal Water Quality Standards Applicable to Maine*, 81 Fed. Reg. 23,239, 23,241-42, 23,244-45 (Apr. 20, 2016) (describing EPA's February 2015 action). In subsequent rulemaking in response to those disapprovals, EPA promulgated new replacement HHWQC to implement its new "sustenance fishing" use in Maine's tribal waters. EPA derived those new HHWQC using an elevated fish consumption rate of 286 grams of inland fish per day (10.1 ounces every day for 70 years) based on historical estimates, which EPA postulated represents "present day sustenance-level fish consumption, unsuppressed by pollution concerns." *Id.* at 23,245-47. See also EPA, *Promulgation of Certain Federal Water Quality Standards Applicable to Maine*, 81 Fed. Reg. 92,466, 92,473, 92,480-81 (Dec. 19, 2016); *id.* at 92,479-80 (citing the Ninth Circuit decision in this case as support for EPA's new "sustenance fishing" protections and HHWQC in Maine).

Maine itself, however, has never adopted or submitted to EPA for review any such CWA "sustenance fishing" designated use for any waters or group, and is currently challenging EPA's February 2015 action. *Maine v. Pruitt*, No. 14-cv-264 (D. Me.). *Amici* support that appeal and disagree with EPA's imposition of a new CWA designated use of "sustenance fishing" on Maine, see 33 U.S.C. § 1251(b), and EPA's new interpretations of the

2. The State of Idaho, in establishing its HHWQC,

> chose a fish consumption rate of 66.5 g/d. That number represents the 70th percentile of the Nez Perce tribal consumption * * *. Idaho also only counted certain fish species, excluding most market fish from the rate based on information about Idahoans fish consumption. As Idaho DEQ stated in a presentation on its human health criteria, "it is reasonable to conclude that nearly all fish purchased in the market are marine fish or estuarine fish from outside of Idaho and that Idaho water quality standards will have little or no effect on their contaminant burden and risks to health in Idaho."

Schwartz, *supra*, at 5. Despite Idaho's careful analysis, EPA has not approved its criteria and has raised

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unique legal framework under Maine's state and federal Indian settlement acts. Maine's acts, however, are readily distinguishable from the Stevens Treaties here. Enacted in 1980, Maine's settlement acts reflect a comprehensive negotiated settlement of tribal claims to nearly two thirds of the State of Maine and resulted in the federal recognition of Maine's tribes, significant tribal funding, the extinguishment of all existing tribal land claims, and the redefinition of Maine's tribal-State relationship based entirely on the unique terms of those modern-day acts. See 81 Fed. Reg. at 23,241; *Maine* v. *Johnson*, 498 F.3d 37, 41-42 (1st Cir. 2007); *Aroostook Band of Micmacs* v. *Ryan*, 484 F.3d 41, 44-45 (1st Cir. 2007). Unlike in Washington, Maine has statewide environmental regulatory jurisdiction over all waters, including those in Indian lands. 81 Fed. Reg. at 23,241. In addition, EPA's new standards for Maine are limited to waters in or adjacent to Indian Lands, while the Washington WQS rule applies to waters under the State of Washington's jurisdiction, but not to any waters within Indian Lands.

a number of concerns with Idaho's HHWQC based primarily on EPA's tribal treaties theory.

3. The Ninth Circuit's flawed interpretation of treaty rights could have nationwide impact, for "at least 10 states have tribes with treaties similar to those at issue in Washington, and in total, 40 states are home to tribes with treaties." Schwartz, *supra*, at 4. Based on this misreading of the treaties, EPA has used HHWQCs to override State authority over the most basic local matters, such as the determination of a Tribe's realistic fish consumption rates, whether the Tribe's consumption has been suppressed by pollution, and whether Tribal members or other populations are the appropriate target population to use to assess HHWQCs. An EPA finding that denies States the freedom to address such site-specific issues leaves little substance behind the CWA's guarantee of State primacy, and even less behind the "cooperative" element of federalism upon which the statute was built.

4. In addition to this assault on State sovereignty, EPA acknowledges that "industries, stormwater management districts, [and] publicly owned treatment works" are all affected by the heightened discharge and other restrictions that flow from more stringent HHWQC. *E.g.*, 81 Fed. Reg. at 85,418. An expert analysis of HHWQC at the 175 grams per day consumption level used by the EPA in Washington State showed that the technology does not exist in the case of some pollutants to meet EPA's criteria (*e.g.*, for PCBs and arsenic), and that the cost of trying to implement HHWQC would run to hundreds of millions of dollars for Washington wastewater treatment facilities alone. HDR Engineering, *Treat-*

ment and Technology Revew and Cost Assessment (Dec. 2013).

Costs not involving treatment technology also will be immense, as attested to by the $1 billion plus bill that Washington taxpayers would face to satisfy the Ninth Circuit's injunction to replace culverts. And the non-point source and TMDL requirements and associated costs related to EPA's restrictive HHWQCs have not even been developed or analyzed. The expense and disruption of nonpoint source land use controls and TMDL limitations threatens to be enormous, not only for landowners but for communities trying to plan land use development and enhance tax revenues.

5. As if that were not enough, the Ninth Circuit's analysis is uncabined. EPA's ratcheting of WQS is almost certainly just the tip of the iceberg of new regulation and litigation designed to protect Indian subsistence rights. As Judge O'Scannlain recognized, if "any surface physical activity, wherever found, that negatively affects fish habitat [is] an automatic Treaty violation," then "the panel's opinion could open the door to a whole host of future suits." Pet. App. 28a (dissenting from denial of en banc review). Judge O'Scannlain observed that this "is already occurring," with threats to "logging, grazing and construction" to the fore. *Id.* at 28a-29a (citing Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 Wash. L. Rev. 1, 29-31 (2017)).

Other programs in which federal regulators determine acceptable pollution levels, such as Superfund clean-ups of contaminated sites under the Comprehensive Environmental Response, Compensation and Liability Act, also are prime candidates for more

stringent regulation. And since animals and birds hunted on tribal lands are mobile, it is by no means farfetched to think that treaties as interpreted by the Ninth Circuit and EPA require States and landowners to protect their habitats and numbers outside of Indian lands as well. See, *e.g.*, Treaty of Nisqually, *supra*, Art III (granting Tribe "the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed land"). The potential repercussions of the Ninth Circuit's faulty ruling across the Nation are little short of astounding.

None of this, however, should occur, for the simple reason that the Stevens Treaties, and the many treaties like them, do not promise Tribes a perpetual supply of fish at a sustenance level, but instead a share of available fish in common with other citizens. The practical consequences we have outlined show why that narrower interpretation, as this Court held in *Fishing Vessel*, must certainly be the correct one. Treaty parties could not possibly have imagined that they were imposing an environmental servitude on the Nation's non-Indian citizens that guaranteed Tribes fixed quantities of fish and other resources forever and regardless of circumstances, common sense, and the costs to our national economy.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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