UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DAVID T. SILVA, *et al.*, Members of the Shinnecock Indian Nation,

Plaintiffs,

v.

BRIAN FARRISH, *et al.*,

Defendants.

Case No. 18-cv-03648-GRB-SIL

BRIEF OF UNITED SOUTH AND EASTERN TRIBES SOVEREIGNTY PROTECTION FUND AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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May 15, 2025

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. Civ. P. 7.1 and Loc. Civ. R. 7.1.1, I hereby certify that there is no parent corporation or publicly held corporation with a 10% or greater ownership interest in *Amicus*.

Dated: May 15, 2025

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INTEREST OF *AMICUS*

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is a non-profit, inter-Tribal organization advocating on behalf of 33 federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.[1] USET SPF is a sister non-profit organization to the United South and Eastern Tribes, Inc., established in 1969. USET SPF strives to protect, promote, and advance the ability of Tribal Nations to exercise inherent sovereign rights and authorities, and it works to elevate the voices of Tribal Nations to ensure the United States fully delivers on its trust and treaty obligations. USET SPF advocates within existing institutions to fight today's battles and simultaneously works to improve the foundations of Indian law and policy to create long-lasting impacts for Indian Country.

USET SPF has strong interests in this case. Our members are first-contact Tribal Nations, some of which have treaties with the United States, some with colonizing forces predating the United States, and some not operating under treaties at all—but all possessing inherent sovereign rights and authorities and Nation-to-Nation relationships with the United States that include trust and treaty obligations. The Shinnecock Indian Nation (Shinnecock) is a member Tribal Nation of USET SPF, and it has communicated to USET SPF its strong support for its citizens' litigation in this suit. USET SPF is grateful to the Plaintiff Shinnecock citizens for bringing this case for the benefit of all Tribal citizens who seek to exercise their Tribal Nations' aboriginal subsistence rights

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA), and Wampanoag Tribe of Gay Head (Aquinnah) (MA).

flowing from their inherent sovereignty as Tribal governments preexisting the arrival of colonizing forces.

USET SPF received permission from the Court on February 4, 2025, to submit this *Amicus Curiae* brief. This brief addresses issues not covered by the parties and will aid the Court in understanding how the position taken by the Defendant officials and offices of the State of New York (collectively, the State) has harmed and continues to harm *Amicus* and all of Indian Country.

ARGUMENT

The State's position flips Tribal Nations' inherent sovereignty on its head—wrongly framing the question presented as whether some agreement with Great Britain, the United States, New York, or another third party *affirmatively* reserved Shinnecock's aboriginal subsistence fishing rights. But such rights are *inherent* and *retained*, separate from any question of land ownership, and they are secured by virtue of Tribal Nations' inherent sovereignty and recognized by U.S. legal authorities including the Constitution. Aboriginal subsistence fishing rights require no *grant* from a colonizing force, and they may only be lost if Tribal Nations voluntarily and legally relinquish them or the so-called "discovering" sovereign unequivocally acts to abrogate them. *See, e.g.*, U.S. Dep't of Interior, Solic. Op. M-37045, *Reaffirmation of the United States' Unique Trust Relationship with Indian Tribes and Related Indian Law Principles*, at 3 (Jan. 18, 2017) ("This fundamental principle—that Indian tribes were not granted authorities or rights by the United States, but hold such powers inherently and prior to European contact—undergirds the entirety of federal Indian law.").

I. TRIBAL NATIONS ARE INHERENTLY SOVEREIGN GOVERNMENTS WITH ACCOMPANYING RIGHTS AND AUTHORITIES EXERCISED SINCE TIME IMMEMORIAL.

A. Tribal Nations' inherent rights and authorities predate the intrusion of colonizing forces.

Tribal Nations are and always have been inherently sovereign governments, a status that predates the arrival of colonizing forces and exists independently from the United States' affirmation, by treaty or otherwise.

Though not dependent on affirmation by any colonizer, it is significant that the United States embedded in its founding document recognition of Tribal Nations' status as sovereign governments. U.S. Const. art. I, § 8, cl. 3 (Indian Commerce Clause); *id.* art. II, § 2, cl. 2 (Treaty Clause); *id.* art. VI, cl. 2 (Supremacy Clause); *see also id.* art. IV, § 3, cl. 2 (Territory Clause); *id.* art. I, § 2, cl. 3 (Indians Not Taxed Clause). Further, the U.S. Supreme Court has early and consistently recognized Tribal Nations' inherent sovereignty. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55−56 (1978); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *Haaland v. Brackeen*, 599 U.S. 255, 308 (2023) (Gorsuch, J., concurring) (explaining Tribal Nations "existed as 'self-governing sovereign political communities'" that "d[id] not 'cease to be sovereign and independent'" after colonization (first quoting *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978), then quoting *Worcester v. Georgia*, 31 U.S. 515, 561 (1832))).

Strong evidence of the United States' and its colonial predecessors' understanding of Tribal Nations as sovereign governments at first contact was their eagerness to enter into treaties with Tribal Nations as they did with other sovereigns. *See United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876) ("From the commencement of its existence, the United States has negotiated with the Indians in their tribal condition as nations . . . capable of making treaties[,] . . . following the practice of Great Britain before the Revolution."); Matthew L.M.

Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 St. John's L. Rev. 153, 180 (2008).[2]

The U.S. Supreme Court in recognizing Tribal Nations' inherent sovereignty has always pointed to principles of international law, again comparing Tribal Nations to other sovereigns. *See, e.g.*, *Brackeen*, 599 U.S. at 308 (Gorsuch, J., concurring) (describing the concept of retained sovereignty, even after "military conquest," as "a long-held tenet of international law"); *Worcester*, 31 U.S. at 560–61 (explaining Tribal Nations' retained right to self-government and independence after becoming "associated with a stronger" colonizing power as "the settled doctrine of the law of nations"). In this way, the United States itself not only recognizes Tribal Nations' inherent sovereignty, but it also understands and has always understood Tribal Nations' *inherent* sovereign governmental status to be *acknowledged internationally*.

B. Shinnecock's aboriginal subsistence fishing rights flow from its inherent sovereignty as a Tribal Nation government.

The U.S. Supreme Court's early federal Indian law jurisprudence—despite many of its misguided moral underpinnings and inappropriate limitations on the exercise of Tribal sovereignty—recognized Tribal Nations' so-called "aboriginal" rights to use and occupy their homelands even after the arrival of colonizing forces that assumed authority over the land. *See Worcester*, 31 U.S. at 544; *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823); *Oneida Indian Nation of N.Y. v. Oneida Cnty.*, 414 U.S. 661, 667 (1974) ("It very early became accepted doctrine in this Court that . . . a right of occupancy in the Indian tribes was . . . recognized[,] . . . sometimes called Indian title. . . ."); *see also United States v. Abouselman*, 976 F.3d 1146, 1156 (10th Cir. 2020).

[2] We emphasize that, while treaty-making provides evidence of the United States' and its predecessors' understanding of Tribal Nations as sovereign governments, Tribal sovereignty is inherent and need not have been recognized via treaty in order to exist.

These aboriginal use and occupancy rights are a consequence of a Tribal Nation's inherent sovereignty and "need not be 'based upon a treaty, statute, or other formal government action.'" *Oneida*, 414 U.S. at 669 (citation omitted); *see also Abouselman*, 976 F.3d at 1155 ("Aboriginal title 'refers to land claimed by a tribe by virtue of its possession and exercise of sovereignty rather than by virtue of letters of patent or any formal conveyance.'" (quoting 1 Cohen's Handbook of Federal Indian Law § 15.04 (2019))); *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1162 (10th Cir. 2015); *Narragansett Tribe of Indians v. S. R.I. Land Dev. Corp.*, 418 F. Supp. 798, 807 (D.R.I. 1976) ("Indian title arises from the ancestral dominion of land . . . ." (citation omitted)).

The scope of aboriginal rights is shaped by a Tribal Nation's traditional and subsistence practices throughout its homelands, and thus aboriginal rights can extend to cover subsistence rights. *Mitchel v. United States*, 34 U.S. 711, 746 (1835) (explaining "Indian possession or occupation was considered with reference to [the Indians'] habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and from their own purposes were as much respected"); *Sac & Fox Tribe of Indians of Okla. v. United States*, 383 F.2d 991, 998 (Ct. Cl. 1967) (describing the "'use and occupancy' requirement of Indian title to mean use and occupancy in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers").

Aboriginal subsistence rights can include the right to use water for fishing, established by historical evidence of such fishing. *United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1983) (explaining a Tribal Nation's aboriginal rights to hunt and fish included, "by the same reasoning, an aboriginal right to the water used by the Tribe as it flowed through its homeland"); *United States v. Michigan*, 471 F. Supp. 192, 256 (W.D. Mich. 1979) ("The right to fish is one of the aboriginal

usufructuary rights within the totality of use and occupancy rights which Indian tribes might possess." (citations omitted)); Letter from Hilary C. Tompkins, Solic., U.S. Dep't of Interior, to Avi S. Garbow, Gen. Counsel, U.S. Envt'l Prot. Agency, *Re: Maine's WQS and Tribal Fishing Rights of Maine Tribes*, at 4–5 (Jan. 30, 2015) ("[E]xpress language in a statute or treaty is not necessary to establish the existence of a tribal fishing right.").

Plaintiffs provide a textured history showing that Shinnecock citizens have since time immemorial used the waters throughout their homelands for fishing, and that this practice is woven into the fabric of Shinnecock's cultural identity and is integral to the community's survival. *See* Pls.' Mem. of Law Supp. Mot. Summ. J., at 12–16 (Apr. 25, 2025). Thus, Shinnecock citizens' aboriginal rights to engage in fishing flow from Shinnecock's aboriginal subsistence fishing rights, which are themselves one of the many inherent sovereign rights and authorities Shinnecock possesses as a Tribal Nation government preexisting the arrival of colonizing forces.

II. TRIBAL NATIONS RETAIN RIGHTS AND AUTHORITIES UNLESS OR UNTIL THEY LAWFULLY RELINQUISH THEM OR THE DISCOVERING SOVEREIGN CLEARLY ABROGATES THEM.

A. Tribal Nations reserve and retain their rights and authorities, including their aboriginal subsistence fishing rights.

Tribal Nations reserve for themselves all of their sovereign rights and authorities not otherwise lawfully relinquished by them via treaty and not taken from them by the so-called "discovering" sovereign, now understood to be Congress for purposes of Indian affairs. *See United States v. Winans*, 198 U.S. 371, 381 (1905) (explaining a "treaty [i]s not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted"); *Michigan*, 471 F. Supp. at 257 ("Rights are reserved by implication if they are not expressly relinquished and a contrary conclusion is inconsistent with the use of the resource by the Indians at the time of the treaty." (collecting cases)). This reserved rights doctrine "requires the Court to view those rights

that were possessed by the tribes prior to the treaties and not specifically granted away as being reserved to the tribes." *United States v. Washington*, 129 F. Supp. 3d 1069, 1112 (W.D. Wash. 2015). Rights a Tribal Nation has retained or reserved can include its aboriginal fishing rights. *Michigan*, 471 F. Supp. at 255–58 (discussing aboriginal fishing rights implicitly reserved by treaty).

Although the reserved rights doctrine is often discussed in a treaty context where some rights were relinquished, most reserved rights cases actually discuss the status of underlying aboriginal rights. Courts have explained that non-treaty reserved rights "are essentially recognized aboriginal rights." *Abouselman*, 976 F.3d at 1152 (discussing *Winans*, 198 U.S. 371). Meaning, "[o]nce established, . . . aboriginal title remains until it is extinguished." *Id.* at 1156. A treaty need not be part of the story for a Tribal Nation to reserve and maintain its aboriginal rights.

B. Congress has so-called "plenary power" to abrogate Tribal Nations' rights and authorities.

By taking Tribal Nations' lands and resources through war and treaty-making, the United States assumed ongoing debt-based trust and treaty obligations to Tribal Nations and Tribal citizens and communities. *See Morton v. Mancari*, 417 U.S. 535, 551–52 (1974). The U.S. Supreme Court acknowledged these trust and treaty obligations early on, *see Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), and the United States embedded in the Constitution the authority needed to carry them out, *see id.* at 18–19; *Mancari*, 417 U.S. at 551–52; *see also United States v. Antelope*, 430 U.S. 641, 647 n.8 (1977) ("[L]egislation directed toward Indian tribes is a necessary and appropriate consequence of federal guardianship under the Constitution.").

Yet, these exclusive federal constitutional Indian affairs powers morphed over time into something insidious: a judicially-created doctrine that claims Congress has "plenary power" to unilaterally strip Tribal Nations of inherent and treaty-affirmed rights and authorities without

Tribal Nations' consent. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); *United States v. Kagama*, 118 U.S. 375, 383–84 (1886); *see also United States v. Sioux Nation*, 448 U.S. 371, 415 (1980) (affirming plenary power but concluding its exercise may nonetheless require compensation to the Tribal Nation).

The plenary power doctrine is informed by the colonial-era "doctrine of discovery," an outdated international principle that discovery of "countries then unknown to *Christian people*" gave exclusive authority to acquire title to the discoverer, thereby denying Tribal Nations' "power to dispose of the soil at their own will, to whomsoever they pleased." *M'Intosh*, 21 U.S. at 574, 576; *see also* 1 Op. Atty. Gen. 465, 466 (1821) (describing how, even two years prior to the foundational *M'Intosh* decision, "[t]he conquerors" claimed "the exclusive right of purchase from the Indians"). Thus, while a Tribal Nation's aboriginal rights, as discussed above, include the Tribal Nation's ability to continue to use and occupy its homelands, the doctrine of discovery and plenary power conclude these rights are "good against all but the sovereign" and can "be terminated [] by sovereign act." *Oneida*, 414 U.S. at 667.

Since the first federal Indian law cases were handed down, international norms have shifted. The doctrine of discovery has been repudiated.[3] Indigenous peoples' rights have been recognized in international agreements, including the U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 (Oct. 2, 2007), which the United States has now agreed to support.[4] It is time the United States part ways with the insidious and outdated doctrine of discovery upon

[3] Holy See Press Off., *Joint Statement of the Dicasteries for Culture and Education and for Promoting Integral Human Development on the "Doctrine of Discovery"* (Mar. 30, 2023) (repudiating "the concept referred to as the 'doctrine of discovery,'" that was "found in several papal documents, such as the Bulls *Dum Diversas* (1452), *Romanus Pontifex* (1455), and *Inter Caetera* (1493)").

[4] *See* U.S. Dep't of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples* (Jan. 12, 2011), https://2009-2017.state.gov/documents/organization/154782.pdf.

which so much of federal Indian law, including plenary power, is based, and instead keep up with the international community as international human rights standards evolve toward justice.

There is a clear moral imperative to move away from acceptance of a federal plenary power under which the United States believes itself to have authority to unilaterally and without consent remove Tribal Nations' inherent and treaty-based rights and authorities. Indeed, Justice Gorsuch recently made an eloquent case for why Congress's Indian affairs powers are not plenary and unbounded but are limited by Tribal Nations' retained, inherently sovereign rights and authorities as recognized in the Constitution. *Brackeen*, 599 U.S. at 318–19 (Gorsuch, J., concurring) (explaining the Constitution "does not include a plenary federal authority over Tribes," but rather enumerates "a bundle of federal authorities tailored to 'the regulation of the Nation's intercourse with the Indians,'" while all those powers "not expressly doled out by the Constitution 'remained the province of 'the sovereign Tribes'" (citations omitted)).

However, at present, federal Indian law still contains the plenary power doctrine—making it incumbent upon courts to utilize existing federal Indian law rules designed to temper that doctrine.

C. The clear statement rule tempers the inequity of the plenary power doctrine, requiring the discovering sovereign to act expressly if abrogating Tribal Nations' rights or authorities.

Congress is required to speak clearly and expressly when it unilaterally abrogates a Tribal Nation's rights or authorities. *United States v. Dion*, 476 U.S. 734, 738 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain." (citation omitted)). Under this standard, it "is essential" for there to be "clear evidence that Congress actually considered the conflict between its intended action" and a Tribal Nation's rights or authorities, and yet "chose to resolve that conflict by abrogating" those rights. *Id.* at 739–40.

This clear statement rule applies regardless of whether the Tribal Nation's underlying right or authority was recognized via treaty or was an aboriginal right. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353–54 (1941); *Abouselman*, 976 F.3d at 1156; *Pueblo of Jemez*, 790 F.3d at 1164–65. Courts have said, "[a]bsent clear and unambiguous intent by Congress to allow extinguishment of the aboriginal right[s]," they remain. *Pueblo of Jemez*, 790 F.3d at 1162–63; *see also Abouselman*, 976 F.3d at 1156 (requiring the colonizing sovereign's "intent to extinguish" aboriginal rights to be "clear and unambiguous"). The clear statement rule equally applies to subsistence rights, including fishing rights. *See Michigan*, 471 F. Supp. at 257–58.

Neither so-called practical considerations, nor courses of state or federal conduct, alter this clear statement rule—as the U.S. Supreme Court recently reaffirmed. *See McGirt v. Oklahoma*, 591 U.S. 894, 937–38 (2020) ("If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law.").

D. Shinnecock retains its aboriginal subsistence fishing rights, which have never been relinquished or abrogated.

Shinnecock has never relinquished its aboriginal subsistence fishing rights on its Tribal homelands on behalf of itself or its citizens, nor has Congress or any other discovering sovereign ever expressly abrogated these rights.[5] This is not in dispute.

Instead, the State has asserted that Shinnecock and its citizens lost their fishing rights because Shinnecock no longer holds title to, or no longer holds regulatory authority over, the lands

[5] Indeed, while not necessary to establish or preserve Shinnecock's aboriginal subsistence fishing rights, colonial-era agreements and deeds do acknowledge Shinnecock's continuing subsistence rights to fish in New York waterways. *See* Pls.' Mem. of Law Supp. Mot. for Summ. J., at 21–33. Further, the United States has recognized the invalidity of some of these patents and deeds—to the extent they purported to rescind any aboriginal rights—because they were not ratified by the federal government as required by the federal case law and statutes implementing the doctrine of discovery. *See* Letter from Bryan Newland, Assistant Sec'y – Indian Affs., Dep't of Interior, to Lisa Goree, Chairwoman, Shinnecock Indian Nation (Jan. 2, 2025).

or waters at issue. But even taking these assertions as true, none extinguish a Tribal Nation's non-exclusive subsistence fishing rights. Loss of title to or regulatory jurisdiction over lands or waters does not remove a Tribal Nation's and its citizens' subsistence rights associated with those lands or waters—nor are Plaintiffs' arguments tied to these other legal rights.

Subsistence fishing rights are not predicated on title, and Plaintiffs are not attempting in this litigation to secure title (or compensation for loss of title) on behalf of Shinnecock or themselves. Similarly, Shinnecock is not seeking redress from the federal government for failure to protect its title. Aboriginal rights persist even where a Tribal Nation has relinquished or otherwise lost fee title to underlying lands or waters. *See Pueblo of Jemez*, 790 F.3d at 1163–64. This is true whether or not aboriginal rights are expressly reserved in any conveyance document. *Santa Fe*, 314 U.S. at 347; *Pueblo of Jemez*, 790 U.S. at 1164. Aboriginal title can coexist with third-party fee title, even in cases of "simultaneous use and occupancy," because the traditional use of land by a Tribal Nation and its citizens "differ[s] significantly from the occupancy of settlers." *Pueblo of Jemez*, 790 U.S. at 1165. Indeed, literal ownership of land or waters is not necessary to establish aboriginal rights in the first place, including for subsistence rights. *United States v. Seminole Indians of Fla.*, 180 Ct. Cl. 375, 384–85 (1967) (affirming "the 'use and occupancy' essential to the recognition of Indian title does not demand *actual* possession of the land, but may derive through intermittent contacts" such as hunting and trade (citations omitted)).

Subsistence fishing rights also are not predicated on Shinnecock's governmental jurisdiction over the lands or waters, and Plaintiffs are not attempting in this litigation to oust New York's sovereignty, control, or jurisdiction—nor even to facilitate Shinnecock's exercise of concurrent control. Subsistence rights persist even where a Tribal Nation has relinquished or otherwise lost not just title but also governmental jurisdiction over lands or waters. *See Minnesota*

v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999) (explaining Tribal rights to "hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty" and "can coexist with state management of natural resources"); *Sac & Fox*, 383 F.2d at 997 (explaining the "right of use and occupancy by Indians . . . is not the same as sovereign or legal title"). Imposition of a colonizer's sovereign authority over land without any specific, affirmative act does not extinguish subsistence rights, including aboriginal water rights. *Abouselman*, 976 F.3d at 1160 (holding Spain's general implementation of its water administration system did not establish clear intent to extinguish Tribal Nations' aboriginal water rights).

Further, since Plaintiffs are not attempting to establish Shinnecock's jurisdiction through this case, the State's arguments regarding *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), are misplaced. *See* Defs.' Mem. of Law Supp. Mot. for Summ. J., at 32–34 (Apr. 25, 2025). In *Sherrill*, the U.S. Supreme Court concluded that a Tribal Nation could not assert "sovereign control" over fee land purchased within the boundaries of its reservation and over which the Tribal Nation held aboriginal rights—reasoning "the extraordinary passage of time" during which the land was subject to state regulatory control created "settled expectations" that called for use of the so-called equitable doctrine of laches to avoid the "disruptive remedy" of restoring Tribal sovereignty. 544 U.S. at 216–19. Any argument that a Tribal Nation could, via implicit divestiture or otherwise, lose its sovereign jurisdictional authority simply because a state successfully prevented that Tribal Nation from exercising it for a long enough period of time is inherently unjust. *See McGirt*, 591 U.S. at 937–38. Regardless, *Sherrill* is irrelevant here because Plaintiffs do not seek to reestablish Shinnecock's jurisdiction over the waters or lands in question. Rather than implicit divesture of jurisdiction, the case before this Court is about whether a discovering sovereign acted clearly enough to abrogate aboriginal subsistence rights. It did not.

Finally, it is worth emphasizing for the Court that, when New York became a state, it did not subsume Shinnecock's aboriginal fishing rights. Aboriginal subsistence rights persist even after a state enters the union, as a state receives from the federal government only the title to land that the federal government held—subject, of course, to Tribal Nations' underlying reserved and unabrogated aboriginal rights. *See Beecher v. Wetherby*, 95 U.S. 517, 525 (1877) (explaining land granted upon statehood would be held in "naked fee," and "could not disturb the occupancy of the Indians," which "could only be interfered with or determined by the United States"); *see also Mille Lacs*, 526 U.S. at 205 ("[S]tatehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries."). Similarly, it is a long-held principle that a colonizing sovereign's charter or grant of land to a third party does not extinguish aboriginal title. *See, e.g.*, *Worcester*, 31 U.S. at 546 (describing British colonial charters as grants that "asserted title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned"); *Pueblo of Jemez*, 790 F.3d at 1162 ("This concept, that federal land grants pass fee title to the grantees subject to aboriginal title, has repeatedly been upheld by the Supreme Court."). Indeed, the U.S. Supreme Court recently held that the Creek Reservation in Oklahoma—despite many years of treatment by the state and even federal government as disestablished following Oklahoma's statehood—still existed because Congress had not acted clearly to disestablish it. *See McGirt*, 591 U.S. at 937–38.

CONCLUSION

The Shinnecock Indian Nation is a sovereign government predating arrival of colonizing forces, and its citizens' aboriginal subsistence fishing rights bloom from its inherent sovereign rights and authorities. Shinnecock has never ceded its subsistence fishing rights for itself or its citizens, nor has a discovering sovereign expressly abrogated them. Instead, Shinnecock citizens

have always fished in the waters of their homelands. A Tribal Nation's loss of title or jurisdiction does not extinguish subsistence fishing rights, nor does statehood. For this reason and all the reasons stated herein, we respectfully ask this Court to grant Plaintiffs' Summary Judgement Motion so they may continue to exercise their Ancestors' established subsistence fishing rights and carry forward the Shinnecock traditional ways.

Respectfully submitted,

Dated: May 15, 2025

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type volume limitations of Loc. Civ. R. 7.1(c) and this Court's Order dated February 4, 2025, providing USET SPF permission to submit an *Amicus Curiae* brief not to exceed 15 pages, because this brief contains 4,398 words and is 14 pages long, excluding the parts of the brief exempted by Loc. Civ. R. 7.1(c). I certify that this brief complies with the typeface requirements of Loc. Civ. R. 7.1(b) because this brief has been prepared in 12-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Eastern District of New York by using the CM/ECF system, which will send notification of such filing to all counsel of record.

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