SUPREME COURT OF THE UNITED STATES

Nos. 21–1484 and 22–51

ARIZONA, ET AL., PETITIONERS
21–1484 *v.*
NAVAJO NATION, ET AL.

DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS
22–51 *v.*
NAVAJO NATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 22, 2023]

JUSTICE THOMAS, concurring.

I join the Court's opinion in full, but write separately to highlight an additional and troubling aspect of this suit. For decades, this Court has referred to "a general trust relationship between the United States and the Indian people." *United States* v. *Mitchell*, 463 U. S. 206, 225 (1983); see also *Seminole Nation* v. *United States*, 316 U. S. 286, 296–297 (1942); *Haaland* v. *Brackeen*, 599 U. S. ___, ___ (2023) (slip op., at 12). Here, in allowing the Navajo Nation's "breach of trust" claim to go forward, the Ninth Circuit appears to have understood that language as recognizing a generic legal duty of the Federal Government toward Indian tribes or, at least, as placing a thumb on the scale in favor of declaring that legal duties are owed to tribes. See 26 F. 4th 794, 813 (2022). As the Court explains, the Nation has pointed to no source of legally enforceable duties supporting its claim in this suit. But the Ninth Circuit's reasoning reflects deeper problems with this Court's frequent

invocation of the Indian "trust relationship."

At the outset, it should be noted that our precedents' "trust" language can be understood in two different ways. In one sense, the term "trust" could refer merely to the trust that Indians have placed in the Federal Government. If that is all this language means, then I have no objection. Many citizens (and foreign nations) trust the Federal Government to do the right thing. Determining how to do right by the competing interests of the country's millions of citizens, however, is generally a job for the political branches, not courts.

By contrast, the term "trust" also has a well-understood meaning at law: a relationship in which a trustee has legally enforceable duties to manage a discrete trust corpus for certain beneficiaries. See Restatement (Third) of Trusts §2 (2001). At times, the Federal Government has expressly created such discrete legal trusts for Indians—by, for example, placing parcels of land or specified sums of money into trust. See, *e.g.*, *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U. S. 103, 106–107, 114 (1998) (describing statutory grants of authority to place lands in trust for Indians); *Seminole Nation*, 316 U. S., at 293–294 (describing "the Government's promise" in a particular treaty "to establish a $500,000 trust fund" for the Seminole Nation). But, when resolving disputes about those trusts, the Court's "trust" language has gone beyond the discrete terms of those trusts; for example, the Court has alluded generally to "the distinctive obligation of trust incumbent upon the Government in its dealings" with Indians and the Government's "moral obligations of the highest responsibility and trust." *Id.*, at 296–297. In those and other cases, the Court has accordingly blurred the lines between the political branches' general moral obligations to Indians, on the one hand, and specific fiduciary obligations of the Federal Government that might be enforceable in court, on the other. See, *e.g.*, *Mitchell*, 463 U. S., at 225; *Seminole Nation*, 316

U. S., at 296–297; see also *Cobell* v. *Norton*, 240 F. 3d 1081, 1086 (CADC 2001); *Shoshone Indian Tribe of Wind River Reservation* v. *United States*, 364 F. 3d 1339, 1348 (CA Fed. 2004).

In *United States* v. *Jicarilla Apache Nation*, 564 U. S. 162 (2011), the Court took steps to rectify this confusion. There, we explained that the Federal Government is "not a private trustee" but a "sovereign," *id.*, at 173–174, and that "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute," *id.*, at 177. Accordingly, any legal trusts established or duties self-imposed by the Government for a tribe's benefit are "defined and governed by statutes rather than the common law." *Id.*, at 174; see also *id.*, at 173 (emphasizing that "'[t]he *general* relationship between the United States and the Indian tribes is not comparable to a private trust relationship'"). The Court's opinion today represents a step in the same direction, making clear that tribes' legal claims against the Government must be based on specific provisions of positive law, not merely an amorphous "trust relationship."

However, the Court has also invoked the "trust relationship" to shape at least two other areas of its Indian-law jurisprudence—with questionable results. For example, the Court has identified "the unique trust relationship" with the Indians as the source of pro-Indian "canons of construction" that are supposedly "applicable [only] in Indian law." *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226, 247 (1985); see also *EEOC* v. *Karuk Tribe Housing Auth.*, 260 F. 3d 1071, 1081 (CA9 2001) (refusing to apply the Age Discrimination in Employment Act of 1967 to tribes in part because of those canons). But it is far from clear how such a trust relationship would support different interpretive tools. The first cases to apply those pro-Indian canons did not ground them in any "trust relationship," but in the more basic idea that ambiguous treaty provisions

should be construed against the drafting party. See, *e.g.*, *Patterson* v. *Jenks*, 2 Pet. 216, 229 (1829); *Worcester* v. *Georgia*, 6 Pet. 515, 552 (1832); *The Kansas Indians*, 5 Wall. 737, 760 (1867); Restatement (Second) of Contracts §206 (1979); Restatement (First) of Contracts §505 (1932). These canons then "jumped without discussion from the interpretation of treaties to the interpretation of statutes" in the 20th century. A. Barrett, Substantive Canons and Faithful Agency, 90 B. U. L. Rev. 109, 152 (2010). To this day, it remains unclear how the "trust relationship" could justify freestanding pro-Indian canons that authorize courts to depart from the ordinary rules of statutory interpretation.

Next, the Court has also suggested that the "trust relationship" provides the Federal Government with an additional power, not enumerated in the Constitution, to "do all that [is] required" to protect Indians. *Morton* v. *Mancari*, 417 U. S. 535, 552 (1974) (internal quotation marks omitted); see also *Board of County Comm'rs* v. *Seber*, 318 U. S. 705, 715–716 (1943). In doing so, the Court has apparently used the trust relationship to feed into the so-called plenary power that Congress supposedly enjoys over Indian affairs. But the Court has also approved the use of that power to, among other things, restrict tribal sovereignty and "eliminate tribal rights." See *South Dakota* v. *Yankton Sioux Tribe*, 522 U. S. 329, 343 (1998); *Washington* v. *Confederated Bands and Tribes of Yakima Nation*, 439 U. S. 463, 501 (1979); *Haaland*, 599 U. S., at ___ (THOMAS, J., dissenting) (slip op., at 35). Accordingly, it is difficult to see how such a plenary power could be rooted in a trust relationship with Indians. And it seems at least slightly incongruous to use Indians' trust in the Government as both the basis for a power that can restrict tribal rights and canons of interpretation that favor Indians.

The influence of the "trust relationship" idea on these doctrinal areas is troubling, as the trust relationship appears to lack any real support in our constitutional system.

See *id.*, at ___–___ (slip op., at 26–27). The text of the Constitution (which mentions Indians only in the contexts of commerce and apportionment) is completely silent on any such trust relationship. See Art. I, §§2, 8; Amdt. 14, §2. Further, the trust relationship does not have any historical basis. Its genesis is usually traced to this Court's statement in *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831), that the relation of the United States to Indians has "resembl[ed] that of a ward to his guardian," *id.*, at 17; see also F. Cohen, Handbook of Federal Indian Law §2.02[2], p. 117 (2012) (Cohen). However, that statement was dicta, see *Haaland*, 599 U. S., at ___–___ (THOMAS, J., dissenting) (slip op., at 25–27); and, in any event, the Indian Tribe in that case had a specific treaty calling for the Federal Government's "protection," *Cherokee Nation*, 5 Pet., at 17. Some treaties with tribes have contained similar provisions; others have not. Compare Treaty With the Wyandots, 7 Stat. 31, with Treaty With the Mohawks, 7 Stat. 61. And, of course, some tribes before and after the Founding engaged in warfare with the Federal Government. Cohen §1.03[2], at 36; *id.*, §1.03[3], at 40. In short, the idea of a generic trust relationship with all tribes—to say nothing of legally enforceable fiduciary duties—seems to lack a historical or constitutional basis.

In future cases, we should clarify the exact status of this amorphous and seemingly ungrounded "trust relationship." As a start, it would be helpful to acknowledge that many of this Court's statements about the trust relationship were mere dicta. *E.g.*, *Seminole Nation*, 316 U. S., at 293–294 (discrete trust); *Mancari*, 417 U. S., at 551–552 (equal protection challenge to Government hiring program); *Seber*, 318 U. S., at 707 (state taxes on Indian lands). In the meantime, however, the Court should take care to ensure that this confusion does not spill over into yet further areas of the law.