

[ORAL ARGUMENT NOT SCHEDULED]

No. 26-5306

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

TOHONO O'ODHAM NATION,
Plaintiff/Appellant,

v.

MARKWAYNE MULLIN, et al.,
Defendants/Appellees.

On Appeal from the United States District Court
for the District of Columbia
Case No. 4:26-cv-2127-RJL (Hon. Richard J. Leon)

**AMICI CURIAE BRIEF OF NATIONAL CONGRESS OF
AMERICAN INDIANS AND INTER TRIBAL ASSOCIATION OF
ARIZONA, INC. IN SUPPORT OF APPELLANT
TOHONO O'ODHAM NATION**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1), undersigned counsel provides the following information:

I. PARTIES AND AMICI

All parties appearing before the district court and in this Court are listed in the Brief of Appellant Tohono O’odham Nation.

II. RULINGS UNDER REVIEW

All references to the rulings at issue appear in the Brief of Appellant Tohono O’odham Nation.

III. RELATED CASES

This case has not previously been before this Court or any other court other than the district court. Counsel is not aware of any other related cases. *See* Circuit Rule 28(a)(1)(C).

/s/ Mitchell H. Forbes

Mitchell H. Forbes

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), undersigned counsel certifies that *amicus curiae* National Congress of American Indians and *amicus curiae* Inter Tribal Association of Arizona, Inc. are non-profit organizations with no parent corporations and neither issues stock.

/s/ Mitchell H. Forbes

Mitchell H. Forbes

NATIVE AMERICAN RIGHTS FUND

**STATEMENT OF *AMICI CURIAE*'S IDENTITY, INTEREST IN
CASE, AND SOURCE OF AUTHORITY TO FILE¹**

Amicus curiae National Congress of American Indians (“NCAI”), founded in 1944 and based in Washington, D.C., is the oldest and largest national organization comprised of American Indian and Alaska Native governments and their citizens. NCAI advises and educates the public, state governments, and the federal government on a broad range of issues involving Tribal sovereignty, self-government, treaty rights, and policies affecting Tribal Nations. NCAI’s primary focus is protecting the inherent sovereign legal rights of Tribal Nations through positions directed by consensus-based resolutions. These resolutions are promulgated at NCAI national conventions by the organization’s entire membership. NCAI’s membership is comprised of approximately 300 Tribal Nations and is renewed annually.

Amicus curiae the Inter Tribal Association of Arizona, Inc. (ITAA) is a non-profit, inter-tribal consortium of 21 federally recognized Indian

¹ No counsel for any party authored this brief in whole or in part, no party or party’s counsel contributed money intended to fund preparation or submission of this brief, and no other person or entity other than *Amici*, their members, and their counsel provided any monetary contribution to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

Tribes with lands located across the State of Arizona, as well as in California, Nevada, and New Mexico. ITAA is governed by the highest elected officials from each Tribe, including chairpersons, governors, and presidents. Since 1952, ITAA's member Tribes have worked together to advocate on regional, state, and national issues affecting matters of Tribal sovereignty, self-determination, and other matters of common interest.

Trespass on Tribal lands is a long-standing, persistent issue in Indian country. Trespass undermines the sovereignty that Tribal Nations wield over their lands, and instances of trespass often burden Tribal natural resources and sacred places. This is made worse when, as here, the trespasser is the trustee charged with protecting Tribal lands and resources. The federal government's actions, if allowed to proceed, will permanently alter the landscape of the Nation's reservation. Lands such as these are sacred to Tribal Nations, and are a key part of their spiritual and cultural practices. The Nation must be allowed to protect its lands from federal invasion and destruction.

This brief is filed without leave of the Court because the parties have consented to its filing. Fed. R. App. P. 29(a)(2).

SUMMARY OF ARGUMENT

This appeal raises grave questions of the United States’ legal authority over the lands of Tribal Nations, and the availability of relief from the courts in circumstances where the federal government is disregarding a Tribal Nation’s sovereignty over its lands. While Tribal Nations often face many types of trespassers, the Tohono O’odham Nation (“the Nation”) faces a unique trespasser—the very trustee charged with safeguarding the Nation’s lands.

Tribal Nations are “separate sovereigns pre-existing the Constitution.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Core to Tribal Nations’ inherent sovereignty is the “power to exclude nonmembers entirely or to condition their presence on the reservation.” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983). When Tribal Nations’ lands and their members’ allotments are subject to trespass, Tribal Nations often must turn to the courts to vindicate their property rights. The Nation must be able to do the same to address the trespass by the federal government. The Nation’s homelands, ways of life, and spiritual and religious practices are imperiled by the federal government’s activities related to the construction of the border wall, and

it must be allowed to seek relief to protect its interests. *See Appellants Br.* at 51–54.

The District Court’s decision below disregards the well-settled sovereign authority that Tribal Nations possess over their lands, which can be altered only by a clear statement of Congress. The District Court’s determination that the Nation’s claims of trespass are likely shielded by sovereign immunity is wrong and contrary to the core characteristics of the unique trust relationship the federal government has with Tribal Nations. Allowing this decision to stand would not only imperil the lands of the Tohono O’odham Nation, but would open the door to the federal trustee running roughshod over Tribal land rights rather than hueing to its duty of protection.

Worse yet, the District Court’s decision leaves the Nation in the precarious position of its federal trustee refusing to protect the Nation’s land base, while that same trustee is the trespasser harming the Nation and its sovereignty over its lands. The District Court’s decision cannot be allowed to stand, and this Court must reverse.

ARGUMENT

I. The United States' Actions Constitute Trespass on the Nation's Reservation and Undermine the Nation's Sovereignty.

Tribal Nations “once were, and remain still, independent political societies.” *Vann v. Kempthorne*, 534 F.3d 741, 746 (D.C. Cir. 2008). This status allows them to exercise powers that “are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.” *Id.* (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a], at 206 (Nell Jessup Newton ed., 2005)). This inherent authority predates the Constitution and continues unless Congress expressly withdraws it. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). While Tribal Nations’ inherent sovereign authority has been somewhat limited “[d]ue to their incorporation into the United States,” *United States v. Cooley*, 593 U.S. 345, 349 (2021), their “inherent power . . . to exclude others from tribal lands” endures. *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000); accord *Cooley*, 593 U.S. at 349; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982).

The recognition by federal courts of Tribal Nations’ retained sovereignty over their lands stretches back nearly two centuries. For example, in *Worcester v. Georgia*, the Supreme Court held that “the citizens of Georgia have no right to enter” the lands of the Cherokee Nation, “but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.” 31 U.S. 515, 561 (1832). In the years following, the Supreme Court has continued to affirm the foundational principle of federal Indian law that Tribal Nations have the authority to exclude nonmembers from their lands. *See, e.g., Merrion*, 455 U.S. at 141 (“[A] hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands”); *Mescalero Apache*, 462 U.S. at 333 (“A tribe’s power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established”); *Cooley*, 593 U.S. at 349 (“Indian tribes may . . . exclude others from entering tribal land”).

Trespass on Indian lands – both those held by Tribal Nations and by individuals – is a long-running, persistent problem. Encroachment on Indian lands prompted the King of England to place the acquisition of Indian land solely in the hands of the Crown. Royal Proclamation, Oct. 7, 1763, *reprinted in* British Royal Proclamations Relating to America,

1603-1783, 212 (Clarence S. Brigham ed. 1911). Protection of Tribal lands was likewise the subject of one of United States' earliest laws and United States Supreme Court decisions. *See, e.g.*, An Act to Regulate Trade and Intercourse with the Indian Tribes, July 22, 1790, 1 Stat. 137, (codified as amended at 25 U.S.C. §§ 177, 261-265; 18 U.S.C. § 1152); *Worcester*, 31 U.S. at 517 (“The king purchased [Tribal] lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them.”); *see also id.* at 545.

The authority that a Tribal Nation exercises over its land, including the power to exclude nonmembers, is not “merely the power possessed by any individual landowner” but rather “a sovereign power.” *Merrion*, 455 U.S. at 146. In *Merrion*, the Court stressed the distinction between a Tribal Nation’s “role as commercial partner” and “its role as sovereign.” *Id.* at 145. A Tribal Nation has “the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty” over its lands. *Id.* at 146 n.12 (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 143 (1941) (emphasis omitted)).

Federal courts of appeals have also long recognized the authority Tribal Nations possess over their lands, and the right to eject trespassers.

In *Water Wheel Camp Recreational Area, Inc. v. LaRance*, the United States Court of Appeals for the Ninth Circuit affirmed a Tribal Nation's authority to eject a nonmember whose lease on Tribal lands had expired. 642 F.3d 802, 811 (9th Cir. 2011). The court observed that the Tribal Nation "had power to exclude" the former leaseholders, "who were trespassers on the tribe's land and had violated the conditions of their entry." *Id.* at 811. The United States Court of Appeals for the Seventh Circuit held similarly in *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Co., Inc.*, noting that Tribal Nations "possess inherent sovereign authority to determine who may enter the reservation; to define the conditions upon which they may enter; to prescribe rules of conduct; and to expel those who enter the reservation without proper authority." 184 F.4th 874, 890-91 (7th Cir. 2026) (quoting *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1153 (9th Cir. 2020)); *see also Norton v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, 862 F.3d 1236, 1245 (10th Cir. 2017) (recognizing the Supreme Court's "repeated confirmation of tribes' right to exclude nonmembers from tribal lands").

A necessary element of Tribal Nation's exclusionary authority is the power "to expel those who enter their reservation without proper authority." *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976). When a Tribal Nation allows nonmembers to enter its lands, "the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry." *Merrion*, 455 U.S. at 144. If the nonmember party does not comply with those conditions of entry, or enters the Tribal Nation's lands without permission, the Tribal Nation retains the right and authority to expel that party. *See, e.g., Water Wheel*, 642 F.3d at 811.

Two recent cases illustrate the brazen nature of the conduct by trespassers, and federal courts' willingness to grant injunctive relief to Tribal Nations seeking to eject trespassers. After declining to renew a pipeline operator's right-of-way running through several Tribally owned parcels of its reservation, the Bad River Band of Lake Superior Tribe of Chippewa Indians (the "Band") initiated a trespass action to eject the oil company and its pipeline, which no longer had a legal right to occupy the Band's reservation. *Bad River Band*, 184 F.4th at 885. The district court entered summary judgment for the Band on its trespass and unjust

enrichment claims, concluding “that the company has no legal right to operate” the pipeline across the Band’s reservation. *Id.* at 885-86. The Seventh Circuit agreed, determining that the Band’s “sovereign authority extends to the Allotted Parcels,” through which the pipeline ran. *Id.* 891.

Another case involved trespass on the Swinomish reservation by a railway operator. The case brought by the Swinomish Indian Tribal Community (“Tribe”) against BNSF Railway Company (“BNSF”) had its origins in BNSF’s predecessor’s construction of a railroad across the Tribe’s reservation without its consent. *Swinomish Indian Tribal Cmty.*, 951 F.3d at 1146, 1151. Litigation brought by the Tribe and the United States in the 1970s ultimately resulted in a settlement and an easement agreement under which BNSF obtained a right-of-way across the reservation subject to specified operating restrictions, i.e. limiting rail traffic across the reservation to one train in each direction per day, with no more than twenty-five rail cars per train, and submission to the Tribe of annual reports identifying the cargo being transported. *Id.* at 1147-49. However, BNSF violated the terms of the right-of-way by running more trains and cars across the Reservation than permitted and failing to

submit required reports. *Id.* at 1146. After the Tribe requested that BNSF comply with the terms of the easement and BNSF refused, the Tribe sued. *Id.* at 1146, 1149-51. The district court held that BNSF was in trespass and that injunctive relief was available and the Ninth Circuit affirmed. *Id.* at 1151, 1161.

Similarly, in this case the Department of Homeland Security has not obtained the Nation's consent to enter its lands and its trespass should be enjoined by this Court. This is consistent with longstanding principles of Tribal sovereignty and the way in which courts deal with trespassers on Tribal lands.

II. Tribal Nations' Right to Sue the Federal Government for Trespass Is Imperative to Protecting Their Sovereignty.

Trespass against Tribal Nations is nothing less than a theft of Tribal land and an affront to their sovereign prerogatives to manage Tribal property. This is even more egregious when the trespasser is the government trustee charged with safeguarding Tribal lands. Given the deeply rooted nature of the trust relationship, the ease with which the Department of Homeland Security has ignored the Nation's rights and the United States' obligations to Tribal Nations is alarming. A trespass is no more acceptable when it is perpetrated by the United States and

should not be sanctioned by this Court. *See, e.g., Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1104 (10th Cir. 2017) (“[F]ederal law does not permit condemnation of tribal land”).

The United States owes “substantial trust responsibilities toward Native Americans . . . [s]uch duties are grounded in the very nature of the government-Indian relationship.” *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001). It is against this backdrop that this Court must look at the gravity of the United States’ actions. Congress has not unambiguously expressed its intent to limit the rights of the Nation over its reservation as it pertains to the construction of the border wall, and the United States has a responsibility to protect the Nation’s reservation. The unique relationship that the federal government has with Tribal Nations is rooted in respect of Tribal Nations’ status as sovereigns, and the Supreme Court recognizes Congress’s “desire not to intrude needlessly on tribal self-government.” *Santa Clara Pueblo*, 436 U.S. at 71. The United States owes the Nation respect for its sovereignty, not destruction and trespass of its reservation.

Tribal Nations can pursue federal common law causes of action to enforce their property rights. For example, the Supreme Court in *Oneida*

Indian Nation recognized that Tribal Nations “have a federal common-law right to sue to enforce their aboriginal land rights.” *Oneida Cnty. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 235 (1985). And this Court has recognized that federal courts “can enjoin ... the actions of a government official” for a common-law tort, so long as his actions “conflict with the terms of his valid statutory authority” and thus are not “an act ... ‘of the sovereign.’” *Leopold v. Manger*, 102 F.4th 491, 496 (D.C. Cir. 2024) (quoting *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689 (1949)).

The United States’ trespass on the Nation’s reservation is unprecedented in the modern era of federal Indian law. This invasion is a direct encroachment on the Nation’s status as a separate, sovereign Tribal Nation—an encroachment that is only permitted through an “unequivocal[]” expression of intent by Congress to do so. *Santa Clara Pueblo*, 436 U.S. at 58. Nothing indicates that Congress considered the sovereign rights of Tribal Nations in this legislation, let alone unequivocally expressed its intent to curtail their rights.

Finally, trespass deprives the Tribe of its right to control access to and use of its lands, interferes with the Tribe’s sovereign authority over

its territory, and may cause ongoing injury to cultural, environmental, and other interests that cannot be fully restored or valued through an award of damages. Federal courts uniformly recognize that trespass to a Tribal Nation's lands threatens the political integrity of the Tribal Nation, including its exercise of self-government and territorial management and, therefore, monetary damages for trespass on Tribal Nations' lands is an inadequate remedy for the harm inflicted on Tribal Nations. *See, e.g., Lexington Ins. Co. v. Smith*, 117 F.4th 1106, 1112 (9th Cir. 2024) (quoting *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 335 (2008) (“[T]ribal sovereignty over territory is implicated when nonmember behavior regarding that territory ‘sufficiently affect[s] the tribe as to justify tribal oversight’”); *cf. Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (“Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty”). Further, federal courts often grant Tribal Nations equitable remedies for trespass on their lands because injuries to their sovereignty “cannot be satisfied through a monetary award.” *United States v. Osage Wind, LLC*, No. 4:14-cv-00704-JCG-JFJ, 2024 WL 5158188, at *24 (N.D. Okla. Dec. 18, 2024) (citation omitted); *see also Prairie Band of Potawatomi Indians v. Pierce*,

253 F.3d 1234, 1250-51 (10th Cir. 2001) (finding harm to Tribal sovereignty is irreparable harm).

At bottom these are not ordinary lands. This is an area set aside as a permanent homeland for Tohono O’odham people and as governmental territory for the Tribal government. Accordingly, there is no measure of damages that can compensate the Nation for its loss of sovereign authority and affront to its dignity interests as a sovereign resulting from this trespass. Moreover, depravation of the full homelands set aside for the Nation and the permanent alteration of the reservation’s landscape, including geographic features that are sacred to the Nation and its citizens, is not compensable. This is precisely the type of unlawful conduct that the Court’s equitable powers exist to remediate.

III. Federal Courts Do Not Presume that Congress Has Acted to Impair Tribal Sovereignty.

While Congress’ power to legislate with respect to Tribal Nations has been described as plenary and exclusive, *Haaland v. Brackeen*, 599 U.S. 255, 272 (2023), “the United States’ trust responsibility to Tribal Nations requires the preservation of Tribal rights unless Congress’s contrary intent is clear and unambiguous.” *Shoshone-Bannock Tribes of Fort Hall Rsrv. v. U.S. Dep’t of the Interior*, 153 F.4th 748, 765 (9th Cir.

2025). This Court has recognized that “a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty.” *San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306, 1311 (D.C. Cir. 2007). The burden is on those attacking tribal sovereignty to show Congressional intent to divest a Tribal Nation of sovereign power and mere silence is not sufficient to establish that intent. *See, e.g., N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1195 (10th Cir. 2002) (“We therefore do not lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress has made its intent clear that we do so”); *see also Kelsey v. Pope*, 809 F.3d 849, 862-863 (6th Cir. 2016).

The Supreme Court has also recognized the important value that land provides Tribal Nations and has worked from the presumption that it is the “policy of the United States ‘from the beginning to respect the Indian right of occupancy[.]’” *Oneida Cnty.*, 470 U.S. at 248 (quoting *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339,345 (1941)).

While Congress has delegated to the Secretary of Homeland Security “the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens,” 8 U.S.C.

§ 1103(a)(5), this statute does not give the Secretary the authority to trespass on the Nation's reservation, as it lacks "clear indications of legislative intent" to infringe upon Tribal sovereignty. *Santa Clara Pueblo*, 436 U.S. at 60. As the Supreme Court noted in *Michigan v. Bay Mills Indian Community*, "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." 572 U.S. at 790. Evidence of that intent is entirely absent here.

CONCLUSION

For the foregoing reasons, the Court must reverse the District Court's denial of the Nation's request for a preliminary injunction.

Respectfully submitted this 23rd day of September 2026.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE
REQUIREMENTS**

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(4) and (5), Fed. R. App. P. 32(a)(7)(B)(i), and Circuit Rule 32(e)(3) because this brief contains 3,353 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 29(a)(4) and Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 29(a)(4) and 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point, Century Schoolbook text.

/s/ Mitchell H. Forbes

Mitchell H. Forbes

NATIVE AMERICAN RIGHTS FUND

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2026, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system.

/s/ Mitchell H. Forbes

Mitchell H. Forbes

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