NOTE

'Cornerstone Upon Which Rest All Others': Utilizing Canons of Statutory Interpretation to Confirm an Enforceable Trust Duty for Native American Health Care*

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ABSTRACT

In 1976, the federal government passed the Indian Health Care Improvement Act ("IHCIA") in furtherance of its special trust responsibility owed to Native Americans. Through the IHCIA, Congress created the Indian Health Service, which provides health care to five million members of federally recognized tribes. In recent years, however, the Indian Health Service's quality of care has suffered. And yet, circuit courts are split as to whether tribal members are able to legally enforce the quality of care that the IHCIA promised. The Ninth Circuit held that no fiduciary duty to provide health care exists. The

* The title is derived from the Committee Reports of the House and Senate Committees on Interior and Insular Affairs, published as a supplement to the IHCIA. S. REP. NO. 94-133, at 23 (1975); H.R. REP. NO. 94-1026, pt. 1, at 13 (1976).

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Eighth Circuit found the duty located in ancient treaty language. The Supreme Court has yet to provide clarification.

This Note argues that statutory schemes such as the IHCIA alone create a trust duty to provide quality health care to tribal members, and the duty is enforceable against the federal government. Although courts could use unabrogated treaty language to create the trust duty, this framework is unsustainable because the nature and history of treaty negotiations gift different tribes with more rights than others. Regardless, such an analysis remains unnecessary because proper statutory interpretation confirms that the IHCIA created a fiduciary duty to provide adequate health care.

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INTRODUCTION

Three days. Two hospitals. Another life claimed by the novel coronavirus. In April 2020, Matalynn Lee Tsosie, a forty-year-old school secretary and member of the Navajo Nation, visited the local Indian Health Service ("IHS") Hospital in Gallup, New Mexico complaining of labored breathing.[1] Strapped for resources, health care providers prescribed an inhaler, oxygen, and orders to rest at home.[2] When these remedies failed to supply relief, Ms. Tsosie returned to the hospital.[3] The Gallup IHS hospital, however, transferred Ms. Tsosie to another facility more than two hours away because they could not address severe COVID-19 cases.[4] Reliant on a ventilator in this unfamiliar facility, Ms. Tsosie succumbed to the virus with no one by her side.[5]

Two months later and one thousand miles away in central Mississippi, the Choctaw Health Center was reeling. The virus had claimed at least four staff members, while beds, ventilators, and protective equipment eluded the health care providers left behind.[6] In desperation, the chairman of the Choctaw Tribe appealed to the federal government for additional assistance.[7] IHS responded with a "critical care response team," but the team—comprised of only one physician, two critical care nurses, and a single respiratory therapist—could not keep pace with the medical need: by January 2021, eighty-one Choctaw members were gone.[8]

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1 *See* Mark Walker, *Pandemic Highlights Deep-Rooted Problems in Indian Health Service*, N.Y. TIMES (May 21, 2021), https://www.nytimes.com/2020/09/29/us/politics/coronavirus-indian-health-service.html [https://perma.cc/7DN4-MNEZ].

2 *See id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *See* Mark Walker, *'A Devastating Blow': Virus Kills 81 Members of Native American Tribe*, N.Y. TIMES (Jan. 3, 2021), https://www.nytimes.com/2020/10/08/us/choctaw-indians-coronavirus.html [https://perma.cc/UBS2-FTGL].

7 *See id.*

8 *See id.*

These tragedies are not unique. In the final weeks of 2020, the Standing Rock Sioux lost four tribal elders and with them a wealth of tradition and culture.[9] In small town Kayenta, Arizona, nurses with the Navajo Public Health Nursing Program pooled their own money to purchase masks, food, and medications for suffering patients following supply shortages.[10] And in North Dakota, IHS's failure to develop testing sites and manage hospital admissions forced many members to rely on a community-organized shuttle service or walk many miles to simply be diagnosed or receive treatment.[11]

The data is equally illustrative. The Centers for Disease Control and Prevention estimated that the incidence of confirmed cases in Native Americans was 3.5 times more than non-Hispanic whites.[12] In New Mexico, tribal members accounted for nearly 40% of all coronavirus cases, despite only accounting for 9% of the population.[13] Similarly, in Spring 2020, the Navajo Nation had the third highest infection rate behind only New York and New Jersey, early epicenters of the pandemic.[14]

Unfortunately, the pandemic's devastation has not occurred in a vacuum. Native American communities continue to combat multiple health challenges. Opioids, notably, have caused significant damage, as Native Americans have overdosed and died at a rate paralleling those in Appalachia.[15] Diabetes is also pervasive, affecting nearly 16%

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9 *See* Jack Healy, *Tribal Elders Are Dying from the Pandemic, Causing a Cultural Crisis for American Indians*, N.Y. TIMES (Jan. 19, 2021), https://www.nytimes.com/2021/01/12/us/tribal-elders-native-americans-coronavirus.html [https://perma.cc/Y8NZ-KN8K].

10 *See* Walker, *supra* note 1.

11 *See* Healy, *supra* note 9.

12 *See* Press Release, Ctrs. for Disease Control & Prevention, CDC Data Show Disproportionate COVID-19 Impact in American Indian/Alaska Native Populations (Aug. 19, 2020, 1:00 PM), https://www.cdc.gov/media/releases/2020/p0819-covid-19-impact-american-indian-alaska-native.html [https://perma.cc/SL7N-CQM9].

13 Kate Conger, Robert Gebeloff & Richard A. Oppel Jr., *Native Americans Feel Devastated by the Virus Yet Overlooked in the Data*, N.Y. TIMES (Jan. 3, 2021), https://www.nytimes.com/2020/07/30/us/native-americans-coronavirus-data.html [https://perma.cc/3A68-C79P].

14 Laurel Morales, *Navajo Nation Sees High Rate of COVID-19 and Contact Tracing Is a Challenge*, NPR (Apr. 24, 2020, 5:00 AM), https://www.npr.org/2020/04/24/842945050/navajo-nation-sees-high-rate-of-covid-19-and-contact-tracing-is-a-challenge [https://perma.cc/6ASW-2PEC].

15 *See* Sari Horwitz, Debbie Cenziper & Steven Rich, *As Opioids Flooded Tribal Lands Across the U.S., Overdose Deaths Skyrocketed*, WASH. POST (June 29, 2020), https://www.washingtonpost.com/graphics/2020/national/investigations/native-american-opioid-overdose-deaths/ [https://perma.cc/NB2K-5HMK] (noting that Native Americans are 50% more likely to "die of an opioid overdose than non-natives"); *see also 'To Walk in the Beauty Way': Treating Opioid Use Disorder in Native Communities*, NAT'L INSTS. OF HEALTH, https://

of the tribal population, twice the prevalence in whites.[16] Heart disease similarly occurs in Native Americans on a scale 50% higher than in white Americans.[17] Additionally, there are numerous other health complications that claim Native lives at rates higher than other Americans, including "chronic liver disease and cirrhosis . . . unintentional injuries, assault/homicide, intentional self-harm/suicide, and chronic lower respiratory diseases."[18]

The federal government has created a mechanism to address each of these medical emergencies. Since the early interactions between the United States and tribes, the government has provided some form of health care: from vaccine distribution, to the provision of physicians via treaties and to statutory schemes such as the Snyder Act of 1921[19] and the Indian Health Care Improvement Act ("IHCIA") of 1977,[20] which created the modern-day IHS.[21] The quality of health care, however, has varied throughout the decades[22] and is perennially plagued by lack of resources and deficient Congressional appropriations.[23] As

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heal.nih.gov/news/stories/native-cultures [https://perma.cc/T4LK-3MXH] (detailing that in 2017, Native Americans had the second-highest rate of opioid overdose and heroin overdose among racial and ethnic groups).

16 *Native Americans with Diabetes*, CDC (Jan. 10, 2017), https://www.cdc.gov/vitalsigns/aian-diabetes/index.html [https://perma.cc/5ZTM-YB3J]; *Diabetes Still Highest Among AI/AN*, Nat'l Indian Council on Aging (Jan. 14, 2019), https://www.nicoa.org/diabetes-still-highest-among-ai-an/ [https://perma.cc/6EX5-Y2V7] (alerting health officials that unless trends change, one-in-two native persons born in 2000 will be diagnosed with type 2 diabetes in their lifetime).

17 *Heart Disease, Diabetes Rates Higher for American Indians, Alaska Natives*, Am. Heart Ass'n News (May 28, 2020), https://www.heart.org/en/news/2020/05/28/heart-disease-diabetes-rates-higher-for-american-indians-alaska-natives [https://perma.cc/SB3J-DVLP].

18 *Disparities*, Indian Health Serv. (Oct. 2019), https://www.ihs.gov/newsroom/factsheets/disparities/ [https://perma.cc/35LM-GQ2P].

19 Snyder Act of 1921, Pub. L. No. 67-85, 42 Stat. 208 (codified at 25 U.S.C. § 13).

20 Indian Health Care Improvement Act of 1976, Pub. L. No. 94–437, 90 Stat. 1400 (codified as amended in 25 U.S.C. §§ 1601–1683).

21 *See infra* Section I.C.

22 *See* Holly E. Cerasano, Note, *The Indian Health Service: Barriers to Health Care and Strategies for Improvement*, 24 Geo. J. Poverty L. & Pol'y 421, 431–33 (2017) (describing the limits on quality health care including geographic remoteness, inadequate equipment, lack of beds or outpatient services, difficulty retaining staff, and sociocultural barriers). A comprehensive audit of federal programs intended for Native Americans unearthed more specific examples, including occurrences of "agency staff responsible for administering health services lack[ing] important information about the care that patients received and facilities' compliance with Federal requirements." Council of the Inspectors Gen. on Integrity & Efficiency, Vulnerabilities and Resulting Breakdowns: A Review of Audits, Evaluations, and Investigations Focused on Services and Funding for American Indians and Alaska Natives 12 (2017) [hereinafter 2017 CIGIE Audit].

23 *See* U.S. Comm'n on C.R., Broken Promises: Continuing Federal Funding Shortfall for Native Americans 66–69 (2018) (detailing that IHS health care expenditures per person are one-third of the federal health care spending nationwide and noting that "when

detailed by other scholars, this shortcoming leaves gaping holes in the provision of tribal health care.[24]

Equally complicit is the legal landscape wherein tribal members might vindicate their rights and secure greater quality health care. Although the governing statute,[25] advocacy organizations,[26] and IHS[27] all proclaim that the federal government owes a fiduciary duty to provide health care to Native Americans, the case law has yet to firmly recognize a federal right. At present, only the Eighth Circuit has found that treaty language alone creates a legally enforceable duty against the government.[28] The Ninth Circuit, meanwhile, continually declines to create the fiduciary duty out of the governing statutes—the IHCIA and the Snyder Act.[29] This circuit split leaves tribal members in one geographical area with no legally enforceable rights, and therefore less quality, federally provided health care than similarly situated tribal members residing in a separate circuit.

This Note argues that statutory schemes like the IHCIA alone create a duty to provide quality health care to tribal members. While courts could, and do, acknowledge unabrogated treaty language to

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adjusted for inflation and population growth, the IHS budget has remained static in recent decades, with little additional funding available to target the chronic heath disparities"). Recent scholarship has proposed the creation of an IHS-specific trust fund fully appropriated by Congress which would "permit tribes to develop the IHS facilities they need, thereby improving tribal health . . . and increasing the quality of life on reservations." Anna Lindrooth, Note, *Discretionary Deaths in Indian Country: Ensuring Full Funding for Tribal Health*, 26 FED. CIR. BAR J. 277, 297–301 (2017). Recent audits of IHS facilities have also uncovered instances of waste, fraud, and abuse, further depleting the reserve of health-related funds already malapportioned by Congress. *See* 2017 CIGIE AUDIT, *supra* note 22, at 9.

24 *See* Donald Warne & Linda Bane Frizzell, *American Indian Health Policy: Historical Trends and Contemporary Issues*, 104 AM. J. PUB. HEALTH S263 (2014) (describing structural deficiencies in IHS and lack of funding from Congress); Mary Smith, *Native Americans: A Crisis in Health Equity*, HUM. RTS. MAG., Aug. 2018, at 14, 14–15 (discussing the impact of underfunding, the lack of trained health care professionals, and pressures from other federal programs on provision of quality health care via IHS).

25 *See* 25 U.S.C. § 1602 ("[I]n fulfillment of [the] special trust responsibilities and legal obligations to Indians . . . .").

26 *See Indian Health Care 101*, NAT'L COUNCIL URB. INDIAN HEALTH, https://www.ncuih.org/indian_health_care_101 [https://perma.cc/3JEY-ANVM] ("The trust responsibility means that the government has a fiduciary duty to act in the best interest of Tribes . . . and it includes issues related to health care.").

27 *See About IHS*, INDIAN HEALTH SERV., https://www.ihs.gov/aboutihs/ [https://perma.cc/AX49-VC2Q] ("The provision of health services to members of federally-recognized tribes grew out of the special government-to-government relationship between the federal government and Indian tribes.").

28 *See* Rosebud Sioux Tribe v. United States, 9 F.4th 1018 (8th Cir. 2021).

29 *See, e.g.*, Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States, 599 F. App'x 698 (9th Cir. 2015).

create the trust duty, this framework is unsustainable because the history of treaty negotiations and volatile nature of treaty interpretation gifts different tribes with more rights than others. Regardless, such an analysis remains unnecessary because proper statutory interpretation confirms that the IHCIA created a fiduciary duty to provide adequate health care.

Part I outlines the relationship between the United States and tribes, discusses the history of both treaty ratification and of the IHCIA, and details the current state of Indian-healthcare-fiduciary-duty jurisprudence. Part II critiques the current approach of using treaties to create the fiduciary duty by demonstrating the shortcomings of such a framework. Part III applies canons of statutory interpretation and provides instructive analogues in Supreme Court jurisprudence to confirm the fiduciary duty for Indian health care under the IHCIA.

I. The Tragic History of Indian Relations and the Provision of Health Care

The federal government's relationship with tribal nations generally, and in health care specifically, is a desperate tale. To provide a better understanding of the landscape in which the government owes a fiduciary duty to provide quality health care to tribes, this Part describes the Court's fiduciary duty jurisprudence, the history of treaty negotiations, and the history of Indian health care. Finally, this Part outlines the circuit split regarding the health care Indian trust duty.

A. A Simple Test: Creating a Fiduciary Relationship for the Tribes

The Supreme Court recognizes a general trust relationship between the federal government and tribes, derived from the long history and nature of the relationship between the two entities.[30] Although a general trust relationship exists, a specific duty must be

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30 *See, e.g.*, Seminole Nation v. United States, 316 U.S. 286, 296 (1942) ("[T]he distinctive obligation of trust [is] incumbent upon the Government in its dealings with these dependent and sometimes exploited people."). The general trust responsibility is a term of art representing the obligations owed by the United States to the tribes that is borne out of their relationship. *See id.* at 296–97. Similar to the common law of trusts, the trust responsibility is governed by statute. *See* United States v. Jicarilla Apache Nation, 564 U.S. 162, 174 (2011). The general trust responsibility is "undisputed" and has "long dominated the Government's dealings with Indians," since as early as 1831. United States v. Mitchell, 463 U.S. 206, 225 (1983). In other words, in dealing with Native tribes, the federal government *generally* should act in accordance with their duty to responsibly manage Native affairs.

created and governed by statutory grant for tribal members to bring suit against the government for breach of fiduciary duty.[31]

At present, there are two separate but parallel tests controlling breach of fiduciary duty challenges brought by tribes against the government.[32] One governs suits for damages, the other governs suits seeking equitable relief. In a suit seeking money damages, "a Tribe must identify a *substantive* source of law that establishes *specific* fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties."[33] The test for establishing a trust duty in suits seeking equitable relief is less explicitly defined by the courts, but is synonymous with the damages test.[34] Here, again, courts require the tribe to point to a substantive source of law that creates or imposes a duty, and to allege that the Government has breached such a responsibility.[35]

Both tests essentially require the tribes to satisfy two questions: (1) Does a substantive source of law require the government to perform a specific fiduciary duty? and (2) Has the government failed to

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31 *See Jicarilla Apache Nation*, 564 U.S. at 173–74. The specific trust duty is a related term of art meaning: when a source of law explicitly requires the government to manage Native affairs in a specific arena, such as management of pecuniary interests or tribal lands, the government must act responsibly to manage these Native affairs *specifically*. *See id.*

32 For a comprehensive review of the trust responsibility doctrine from post-contact, pre-revolution to the present day, see Lauren E. Schneider, Comment, *Trust Betrayed: The Reluctance to Recognize Judicially Enforceable Trust Obligations Under the Indian Health Care Improvement Act (IHCIA)*, 52 LOY. U. CHI. L.J. 1099, 1107–21 (2021). The condensed description of the current trust responsibility jurisprudence is sufficient for the purposes of this Note.

33 United States v. Navajo Nation, 537 U.S. 488, 506 (2003) (emphasis added).

34 Recent scholarship argues that the Supreme Court has severely restricted the trust responsibility equitable relief test by continually "undermin[ing] the foundational principles of tribal sovereignty and self-government in the federal trust doctrine's original common law articulation." Schneider, *supra* note 32, at 1115. In fact, Schneider uses *Quechan Tribe* to illustrate the court's inability to differentiate between suits seeking money damages and those seeking equitable relief. *Id.* at 1151. Schneider proposes that a return to the common law origins of the federal trust doctrine will require the Court to clearly define an equitable relief doctrine and provide tribes with an avenue for securing declaratory judgements. *Id.* at 1167–70. This author agrees with Schneider that the Court has slowly sculpted the trust responsibility doctrine into something it was not, but the doctrine now exists at common law in its present form. The Court could alter its jurisprudence again, and perhaps should, to provide clarity. This, however, is both difficult—because of the strictures of *stare decisis*—and unnecessary, because, as discussed *infra*, the Court, using regular tools of statutory interpretation, should find the statutorily created trust duty in the IHCIA.

35 *See, e.g.*, Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d 986, 995 (D.S.D. 2020) (citing Blue Legs v. U.S. Bureau of Indian Affs., 867 F.2d 1094, 1100 (8th Cir. 1989) (finding trust duty requiring the Bureau of Indian Affairs to maintain and clean garbage landfills on reservation)).

perform those duties as required? This Note focuses exclusively on answering the first question.

The first inquiry also requires an understanding of several terms of art and clarification of relevant case law. First, the expression of the duty must be contained in "a substantive source of law."[36] These expressions can be located in many different sources, including statutes,[37] executive agency regulations,[38] and treaties.[39] Second, the substantive source need not explicitly use magic language like "trust," "duty," or "fiduciary," in order to establish a duty.[40] Instead, the creation of the duty may be implied from the nature of the substantive source if the law has provided for the comprehensive control of Indian affairs by the government and expressly invested the government with the exclusive power to manage the same.[41] Finally, when conducting the trust-creating inquiry, the Court has acknowledged that the express creation of a trust relationship in a source of substantive law may be informed and reinforced by the general trust relationship recognized between the government and the tribes.[42]

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36 *Navajo Nation*, 537 U.S. at 506. This stands to reason, for the government can only be a member of a fiduciary relationship if they have consented to such. *See Jicarilla Apache Nation*, 564 U.S. at 177 ("The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.").

37 *See, e.g.*, Cobell v. Norton, 240 F.3d 1081, 1100 (D.C. Cir. 2001) (confirming that trust duty regarding management of tribal member's financial holdings exists in Indian Trust Fund Management Reform Act).

38 *See, e.g.*, United States v. Mitchell, 463 U.S. 206, 223 (1983) (finding trust duty concerning management of rights-of-way on timbering lands under complex series of promulgated regulations).

39 *See, e.g.*, United States v. Shoshone Tribe of Indians, 304 U.S. 111, 114 (1938) (finding trust duty concerning timber and foresting lands under 1868 treaty).

40 *See Mitchell*, 463 U.S. at 225 ("[T]he fiduciary relationship normally exists . . . even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." (quoting Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980))).

41 *See id.* at 224–25 (finding trust duty concerning management of timbering lands because the "Government assumes such elaborate control" and statutes gave "the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians"); United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003) (finding trust duty requiring the Government to repair dilapidated historical site on reservation because statute "invest[ed] the United States with discretionary authority" and conferred broad authority to Secretary of Interior to manage trust corpus). *But see Navajo Nation*, 537 U.S. at 508 (finding trust duty did not exist because statute did not confer managerial control over coal leasing to Secretary).

42 *See, e.g.*, *Mitchell*, 463 U.S. at 225.

B. Treaty Making with Tribes: Influence, Luck, and Incongruous Results

To fully comprehend the shortcomings of relying upon treaties to create an enforceable health care trust responsibility, it is instructive to review the unique practice of United States-tribal nations treaties. This Section briefly discusses the fraught history of treaty making generally, the circumstances surrounding the Treaty of Fort Laramie specifically, and the special statutory tools reserved for treaty interpretation.

1. History of Treaty Making

The federal government and tribal nations have a complicated history of treaty negotiations. The treaty era began in 1777, and the next century was continually marred by undue influence.[43] This coercion is most exemplified by the treaties ratified during the period of Indian Removal (1828–1887). Beginning with President Andrew Jackson and his Administration, the government was "free to persuade, bribe, and threaten tribes into signing removal treaties and leaving the Southeast."[44] Over the next forty years, the United States entered hundreds of treaties with various tribal nations across the country, but ultimately prohibited the practice of treaty making in 1871, and did so without soliciting Native input.[45] Since then, the government has abandoned treaties via abrogation, particularly during two distinct periods of federal Indian policy: the Allotment & Assimilation Era (1887–1934) and the Termination Era (1953–1967).[46] The fact that the

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43 *See* Kevin Gover, *Nation to Nation: Treaties Between the United States and American Indian Nations*, AM. INDIAN, Summer/Fall 2014, at 36, https://www.americanindianmagazine.org/story/nation-nation-treaties-between-united-states-and-american-indian-nations [https://perma.cc/TT8J-ZQQF]. *But see* Alexandra Harmon, *Indian Treaty History: A Subject for Agile Minds*, 106 OR. HIST. Q. 358, 361–62 (2005) (noting that balance of power at most treaty negotiations favored United States, but arguing this imbalance did not necessarily result in unfavorable terms for tribes).

44 *Indian Treaties and the Removal Act of 1830*, DEP'T OF STATE: OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1830-1860/indian-treaties [https://perma.cc/U87B-WTSS].

45 *See* Mark Hirsch, *1871: The End of Indian Treaty-Making*, AM. INDIAN, Summer/Fall 2014, at 40, https://www.americanindianmagazine.org/story/1871-end-indian-treaty-making [https://perma.cc/BCE4-WPH8].

46 *See* NICHOLAS CHRISTOS ZAFERATOS, PLANNING THE AMERICAN INDIAN RESERVATION 23–25, 27–28 (2015); Kenneth R. Philp, *Dillon S. Myer and the Advent of Termination: 1950-1953*, 19 W. HIST. Q. 37, 42–53 (1988) (describing Commissioner of Indian Affairs' disregard for previously solicited Indian input when promulgating policy and drafting 1953 Indian Termination Act that abrogated tribal treaties and federal obligations).

government has the ability to abrogate by congressional action renders the practice even more troubling.[47]

2. *Treaty of Fort Laramie*

The 1868 Treaty of Fort Laramie[48] was the second treaty agreement between the federal government and the several Lakota Sioux Tribes residing in the vast lands around eastern Wyoming along the North Platte and Missouri Rivers.[49] The 1868 Treaty was intended to address the perceived shortcomings of the first Treaty of Fort Laramie, signed seventeen years earlier, by introducing efforts to create a more permanent federal government presence on Indigenous lands.[50] Further, the 1868 Treaty created the Great Sioux Reservation.[51] In addition, it negotiated terms for agriculture,[52] education of native children,[53] and the provision of certain professionals, including teachers, engineers, carpenters, and blacksmiths.[54] Regarding health care, the 1868 Treaty simply provided that "[t]he United States hereby agrees to furnish annually to the Indians [a] physician."[55]

3. *Indigenous Canons: The Special Rules of Statutory Interpretation*

There are several rules of construction that courts apply which are unique to Indian treaty interpretation. These "indigenous canons"[56] are borne out of the general trust relationship between the

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47 *See* Mike Townsend, Note, *Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 YALE L.J. 793, 797 (1989) (comparing and contrasting U.S. treaties with tribal nations and foreign nations and discussing challenges in applying foreign treaty principles to Indian treaties).

48 In analyzing the Eighth Circuit case, discussed *infra* Section I.D, this Note focuses particularly on the Treaty of Fort Laramie to both describe the practice of treaty making and to illuminate the problems with relying on treaties to create a fiduciary duty.

49 *See* JILL ST. GERMAIN, BROKEN TREATIES: UNITED STATES AND CANADIAN RELATIONS WITH THE LAKOTA AND THE PLAINS CREE, 1868–1885, at 73–74 (2009).

50 *See* Robert A. Bell, *The Fort Laramie Treaty of 1868 and the Sioux: Is the United States Honoring the Agreements it Made?*, INDIGENOUS POL'Y J., Winter 2018, at 1, 1. For the text of the 1851 treaty, see Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749.

51 *See* Alan L. Neville & Alyssa Kaye Anderson, *The Diminishment of the Great Sioux Reservation: Treaties, Tricks, and Time*, 33 GREAT PLAINS Q. 237, 238–39 (2013).

52 *See* Treaty with the Sioux art. VIII, Apr. 29, 1868, 15 Stat. 635.

53 *See id.* art. VII.

54 *See id.* art. XIII.

55 *Id.* The treaty also provides for "appropriations . . . sufficient to employ" the physician, *id.*, and sets aside funds to erect a "residence for the physician." *Id.* art. IV.

56 This Note adopts the practice of calling federal Indian canons the "Indigenous canons" from author Ian Falefuafua Tapu. *See* Ian Falefuafua Tapu, *How to Say Sorry: Fulfilling the*

government and the tribes.[57] First, Indian treaties are construed liberally in favor of the tribes.[58] Second, ambiguous language is interpreted to the tribe's benefit.[59] Third, treaty language is to be interpreted as it would have been understood by the tribes at the time the treaties were negotiated.[60] Finally, when undertaking this liberal construction, courts may look beyond the treaty language and rely upon the historical record of the treaty and the negotiations.[61]

C. An Honest Attempt at Acknowledging the Failures of Providing Indian Health Care

As discussed *infra*, the federal government has provided some form of health care to Native Americans since the provision of vaccines in the early nineteenth century. Over the next century, however, the provision of medical care was piecemeal across the continent, mostly accomplished through treaties providing physicians or, in limited cases, a hospital. Ultimately, the government standardized its provision of health care to Native Americans at the turn of the twentieth century.

The first attempt was the Snyder Act of 1921 which appropriated funds "for the benefit, care, and assistance of the Indians throughout the United States for the . . . relief of distress and conservation of health."[62] Over the next five decades, the Bureau of Indian Health accounted for "significant progress made . . . in elevating the health status of Indian people" as occurrences of infant mortality, gastrointestinal-related death, and terminal pneumonia/influenza plummeted.[63] Even still, health metrics confirmed the "continuing plight of[] Indian health" caused primarily by "inadequate and understaffed health facilities, improper or nonexistent waste disposal and water

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United States' Trust Obligation to Native Hawaiians by Using the Canons of Construction to Interpret the Apology Resolution, 44 N.Y.U. REV. L. & SOC. CHANGE 445 (2020).

57 *See* Cnty. of Oneida v. Oneida Indian Nation of N.Y. State, 470 U.S. 226, 247 (1985). *See generally* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (2012) (describing the various Indigenous canons).

58 *See, e.g.*, Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–32 (1943) ("Of course, treaties are constructed more liberally than private agreements . . . . Especially is this true in interpreting treaties and agreements with the Indians . . . .").

59 *See* Carpenter v. Shaw, 280 U.S. 363, 367 (1930) ("Doubtful expressions are to be resolved in favor" of tribes); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) ("The language used in treaties with the Indians should never be construed to their prejudice.").

60 *See, e.g.*, Minnesota v. Millie Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999).

61 *See id.* (quoting *Choctaw Nation*, 318 U.S. at 432).

62 25 U.S.C. § 13.

63 S. REP. NO. 94-133, at 35–36 (1975).

supply systems, and continuing dangers of deadly or disabling diseases."[64]

In response, Congress passed the IHCIA,[65] an extensive portion of the U.S. Code that outlines the policy of Indian health care, authorizes the activities of IHS, and establishes the relationship between IHS and other government health programs.[66] The seven titles of the IHCIA cover a breadth of topics including training tribal members as health care professionals (Title I), authorizing health services (Title II), designating health care facilities (Title III), and providing accessible health services to urban Indians (Title V).[67] Congress first adopted the IHCIA in 1976, reauthorized it in 1987, 1992, and 2001, and permanently authorized in it 2010 as part of the Affordable Care Act.[68]

IHS is the conduit through which a majority of tribal members receive health care.[69] Although there is no statutorily defined package of covered services, IHS typically provides inpatient, ambulatory, emergency, dental, public health nursing, and preventative health care programs to eligible members.[70] More recently, IHS has expanded telehealth services to reach remote beneficiaries,[71] and focused resources on behavioral health care, including mental health and alcohol and substance abuse.[72] At present, IHS is the "comprehensive health service delivery system" for nearly 2.6 million members of the 574 federally recognized American Indian and Alaska Native Tribes.[73]

Although the IHCIA occupies volumes of the U.S. Code, the duty-creating language is located in § 1602, which provides in relevant part:

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64 *Id.* at 36.

65 *See* S. REP. NO. 94-133, at 25, 37 (1975).

66 25 U.S.C. §§ 1601–1683; *see* ELAYNE J. HEISLER, CONG. RSCH. SERV., R41630, THE INDIAN HEALTH CARE IMPROVEMENT ACT REAUTHORIZATION AND EXTENSION AS ENACTED BY THE ACA: DETAILED SUMMARY AND TIMELINE 2 (2014).

67 For an overview of the IHCIA's separate provisions, as amended and permanently authorized in 2010 as part of the Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119, see generally ELAYNE J. HEISLER, CONG. RSCH. SERV., R41152, INDIAN HEALTH CARE: IMPACT OF THE AFFORDABLE CARE ACT (2014).

68 *See* HEISLER, *supra* note 67, at 3.

69 *See Quick Look*, INDIAN HEALTH SERV., https://www.ihs.gov/newsroom/factsheets/quicklook/ [https://perma.cc/LJ8G-KYMD].

70 *See* ELAYNE J. HEISLER, CONG. RSCH. SERV., R43330, THE INDIAN HEALTH SERVICE (IHS): AN OVERVIEW 10 (2016).

71 *See id.*

72 *See id.* at 13–14.

73 *About IHS*, *supra* note 27.

> Congress declares that it is the policy of this Nation, *in fulfillment of its special trust responsibilities and legal obligations to Indians*—(1) to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy; (2) to raise the health status of Indians and urban Indians . . . .[74]

D. Two Divergent Approaches—The Current State of Indian Health Care Jurisprudence

The courts of appeals are split on the question of whether the federal government has a fiduciary duty to provide health care to Native Americans. The Eighth Circuit held such a duty exists under both treaties and the IHCIA.[75] The Ninth Circuit, however, held a duty does not exist under the IHCIA.[76] The issue is a question of first impression for the Supreme Court.

1. The Eighth Circuit

Rosebud Sioux Tribe v. United States[77] is the most illustrative example among health care trust duty cases. The case concerns Rosebud IHS Hospital and its troubled history of noncompliance with IHS and Center for Medicare and Medicaid Services ("CMS") standards.[78] Tribal members sued because IHS failed to provide adequate and compliant services and facilities, which required CMS to place the hospital emergency department on "divert status."[79] This forced members left without emergency services and urgent care to travel over fifty miles to other IHS facilities in times of crisis.[80]

In addressing the first inquiry, the *Rosebud* court identified three potential sources of duty-creating law—the Snyder Act, the IHCIA,

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74 25 U.S.C. § 1602 (emphasis added).

75 *See* Rosebud Sioux Tribe v. United States, 9 F.4th 1018 (8th Cir. 2021); White v. Califano, 581 F.2d 697, 698 (8th Cir. 1978), *aff'g* 437 F. Supp. 543, 555 (D.S.D. 1977).

76 *See* Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States, 599 F. App'x 698 (9th Cir. 2015), *aff'g* No. CIV 10-02261, 2011 WL 1211574, at *4 (D. Ariz. Mar. 31, 2011); Gila River Indian Community v. Burwell, No. CV-14-00943, 2015 WL 997857, at *6 (D. Ariz. Mar. 6, 2015).

77 9 F.4th 1018 (8th Cir. 2021).

78 *See* Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d 986, 990–92, 994–95 (D.S.D. 2020). *See generally* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., ROSEBUD HOSPITAL: INDIAN HEALTH SERVICE MANAGEMENT OF EMERGENCY DEPARTMENT CLOSURE AND REOPENING: A CASE STUDY 6–29 (2019) (discussing deficiencies of Rosebud Hospital Emergency Department).

79 *See Rosebud Sioux Tribe*, 450 F. Supp. 3d at 989.

80 *See id.* at 992.

and the Treaty of Fort Laramie.[81] The court concluded that the treaty language created a trust duty to provide "competent physician-led health care."[82] Analyzing the dual statutes, the Eighth Circuit determined that the Snyder Act and IHCIA "reinforced a prior existing duty and relationship between the Tribe and the Government."[83] This acknowledgement of the statute's duty-creating language as additional evidence of the Treaty's duty-creating language mirrors the district court's statement, in dicta, that the two statutory provisions also generated *some* duty.[84]

In reaching its conclusions, the *Rosebud* court relied upon *White v. Califano*,[85] the leading health care fiduciary-duty case in the Eighth Circuit.[86] In *White*, the court announced that

> Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians . . . stem[ming] from the "unique relationship" between Indians and the federal government, a relationship . . . made obvious by the fact that one bulging volume of the U.S. Code pertains only to Indians.[87]

2. The Ninth Circuit

The controlling case in the Ninth Circuit concerned a less explicit violation than *Rosebud*, but the effects were just as detrimental to the

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81 *Rosebud Sioux Tribe*, 9 F.4th at 1024–25.

82 *Id.* at 1024 ("[T]he language of the Treaty and the conduct of the Government under its terms reflect an expectation on the part of the Tribe that the Government would provide them with healthcare.").

83 *Id.* at 1025.

84 The district court did not provide much clarity on the extent of that duty because they had already answered the question under the treaty analysis. *See Rosebud Sioux Tribe*, 450 F. Supp. 3d at 999. The *Rosebud* court distinguished between the general language of the ICHIA, 25 U.S.C. § 1601, which merely "express[es] Congress's goals," and other provisions of the ICHIA that do "place affirmative duties" that "are more limited in scope." *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 1002. The court declined to entertain the scope of those provisions because the Tribe only asserted breach of § 1602. *See id.* at 1002–03. The Snyder Act received even less attention during the court's deliberations. Although the court did not address the Snyder Act explicitly, it implicitly accepted that the Act created some "legal responsibilit[ies]." *See id.* at 999 (citing White v. Califano, 581 F.2d 697, 698 (8th Cir. 1978)) (applying *White*, Eighth Circuit's only other health care fiduciary case); *id.* at 998 (distinguishing Eighth Circuit's jurisprudence from Ninth Circuit's, which holds Snyder Act only discusses general terms, not language necessary to erect trust duty).

85 581 F.2d 697 (8th Cir. 1978) (adopting the trial court's reasoning that legal duty to pay for "emergency inpatient mental health care" provided to indigent tribal member rested with the federal government, not state).

86 *Rosebud Sioux Tribe*, 9 F.4th at 1024.

87 *White*, 581 F.2d at 698 (quoting White v. Califano, 437 F. Supp. 543, 555 (D.S.D. 1977)).

health of tribal members.[88] In *Quechan Tribe of the Fort Yuma Indian Reservation v. United States*,[89] the Tribe alleged violations to the duty of care under the Snyder Act and the IHCIA because of "unsafe" medical facilities falling into "disrepair" that lacked adequate stores of "basic medical equipment."[90] This resulted in alleged improper treatment, including one instance of tribal patients being exposed to blood-borne pathogens during otherwise routine wound care.[91]

The *Quechan* court determined that neither statute created a trust duty to provide health care. First, the court quickly discarded the Snyder Act because its sweeping language does not even "refer to a specific standard of care," but is merely "a matter of grace."[92] Turning to the IHCIA, the court noted that the statutory requirements were more demanding, but still does not create a duty "to provide a certain level of health care . . . or be a health care provider."[93] In reaching this conclusion, the court was not persuaded by the 2010 IHCIA Amendment that affirmatively declared the provision of health care as a portion of the government's trust duty, and further held that imposing a trust duty would interfere with the principle of self-determination and the tribe's ability to self-govern.[94] Finally, reading the trust duty jurisprudence as requiring the holding of physical property in trust, the court decided that a duty could not exist because the physical medical facilities were not held by the government.[95]

The Ninth Circuit affirmed the district court's findings and, in a memorandum opinion, endorsed the district court's reasoning that neither the Snyder Act nor the IHCIA required "the United States to provide a specific standard of medical care."[96] Although the court "acknowledge[d] the challenges faced by the Tribe in ensuring" adequate health care, the "solution lies in Congress and the executive branch, not the courts."[97] The most recent Ninth Circuit case addressing health care trust duties also declined to acknowledge a duty in the

88 *See* Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States, 599 F. App'x 698 (9th Cir. 2015), *aff'g* No. CIV 10-02261, 2011 WL 1211574, at *1 (D. Ariz. Mar. 31, 2011).

89 599 F. App'x 698 (9th Cir. 2015).

90 *See* Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States, No. CIV 10-02261, 2011 WL 1211574, at *1 (D. Ariz. Mar. 31, 2011).

91 *See id.*

92 *Id.* at *2.

93 *Id.* at *3.

94 *Id.* at *4.

95 *See id.*

96 Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States, 599 F. App'x 698, 699 (9th Cir. 2015).

97 *Id.* at 699–700.

IHCIA.[98] The district court, however, did not apply *Quechan* in reaching their decision.[99]

3. The Supreme Court

The question of the federal government's trust duty to provide adequate health care to tribal members is a question of first impression for the Supreme Court. One previous case, *Lincoln v. Vigil*,[100] did briefly discuss the trust responsibility as it relates to health care. In *Vigil*, the Court considered a challenge brought by tribal parents to IHS's decision to discontinue a demonstration project in the American Southwest that provided residential mental health treatment to Native children with disabilities.[101] Although the Court noted that "both the Snyder Act and the Improvement Act [IHCIA] likewise speak about Indian health only in general terms,"[102] this statement occurred during the Court's discussion about the availability of judicial review of IHS's decision under the Administrative Procedure Act.[103] Ultimately, the Court never opined about the breadth or depth of the trust duty under either of these statutory schemes, and only held that the trust relationship question did not affect the agency's discretion in reallocating funding.[104]

Despite this narrow discussion about the trust duty to provide health care, both the Eighth and Ninth Circuits relied upon the *Vigil* Court's "general terms" statement to reach their disparate decisions.[105] The Eighth Circuit more explicitly applied and distinguished *Vigil*, noting that the Court "did not address whether the United

98 *See* Gila River Indian Cmty. v. Burwell, No. CV-14-00943, 2015 WL 997857, at *1 (D. Ariz. Mar. 6, 2015).

99 *See id.* at *5 (declining to "conclude that the statutes and regulations relied on" by tribes, including 25 U.S.C. § 1602 (a portion of the IHCIA), creates a trust duty for the provision of health care, focusing instead on a traditional corpus of trust law analysis).

100 508 U.S. 182 (1993).

101 *See id.* at 188.

102 *Id.* at 194.

103 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C).

104 *See Vigil*, 508 U.S. at 195 ("Whatever the contours of that relationship, though, it could not limit the Service's discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide.").

105 *Compare* Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States, 599 F. App'x 698, 699 (9th Cir. 2015) ("Neither [statute] contains sufficient trust-creating language . . . ." (citing *Vigil*, 508 U.S. at 194)), *with* Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d 986, 998 (D.S.D. 2020) ("Although the Court noted that the Snyder Act and the IHCIA 'speak about Indian health only in general terms,' it still referenced IHS's 'statutory mandate to provide health care to Indian people.'" (quoting *Vigil*, 508 U.S. at 194)).

States had a duty to provide health care to tribal members or the scope of that duty."[106] Regardless of the *Vigil* Court's discussion on the statutory schemes that are the focus of this Note, the Supreme Court has not resolved the circuit split by definitively determining whether an enforceable trust responsibility to provide Native American health care exists.

II. Relying Upon Treaty Provisions Creates Disparate Results

This Note concurs with the Eighth Circuit's holding that an enforceable trust duty to provide health care exists and endorses the court's treaty focused rationale. Certainly, the Treaty of Fort Laramie (1868)[107] is a substantive source that creates a fiduciary duty, both by its plain language and when applying the Indigenous canons. There are inherent problems, however, in relying upon treaty language: primarily that the cumulative impact of the disparate use of treaty interpretation techniques and nature of treaty negotiations (and subsequent abrogation) leaves only a few tribes, and thus few Native Americans, with the right to enforce the fiduciary duty for health care.

A. The Treaty Analysis Is Susceptible to Illogical Interpretations

The Eighth Circuit was correct in determining that a fiduciary duty existed through the treaty language. Under the fiduciary duty test, the Treaty of Fort Laramie is a recognized substantive source of law and the plain language dictates the provision of health care to the tribes.[108] Nevertheless, the court's reliance on the treaty is problematic. First, the treaty analysis is limited by strict textualism. In *Rosebud*, the court implies that the duty is limited to the four-corners of the treaty and only requires the government to provide physicians.[109] The government, in fact, argued for an even more literal reading of the 1868 Treaty, requesting the court limit the duty as only requiring

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106 *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 1000–01.

107 Although this Note focuses on the governing treaty of the Rosebud Sioux, numerous other treaties might also establish this duty to provide health care for other tribal nations. *See* Maria K. John, *The Violence of Abandonment: Urban Indigenous Health and the Settler-Colonial Politics of Nonrecognition in the United State and Australia*, 7 J. Native Am. & Indigenous Stud. Ass'n 87, 116 n.28 (2020).

108 *See* Rosebud Sioux Tribe v. United States, 9 F.4th 1018, 1024 (8th Cir. 2021).

109 *See id.*; *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 1001 ("The United States does owe the Tribe some duty to provide health care to its members, even if the fiduciary duty judicially enforceable is just competent physician-led health care based on the construction of the 1868 Treaty of Fort Laramie as explained above.").

the supplication of only *one* physician.[110] However, this narrow reading of "physician" neglects to apply the Indigenous canons and to consider how tribes would have understood this phrase to have been used in 1868.

At the time of the 1868 Treaty, Indian health care had evolved to include physicians and field nurses that provided emergency services and home visits on the reservation.[111] By 1873, the Bureau of Indian Affairs furnished medical facilities on reservations, staffed with physicians and staff bearing medical college degrees.[112] Similarly, other health care services were administered in conjunction with Indian schools superintended by the Bureau's education arm.[113] Thus, at the time of the 1868 Treaty, Indian health care was a modestly robust, albeit incongruous, set of services including house-call medical staff, some medical facilities, and early iterations of public health. Given this fact, the Sioux tribes at Fort Laramie in 1868 would have understood health care provided by the government to include at least something more than a singular "physician."

The Congress that ratified the 1868 Treaty also understood Indian health care to be more comprehensive than one physician.[114] When appropriating funds to fulfill the 1868 Treaty, the Senate Committee on Indian Affairs interpreted the Treaty liberally.[115] Likewise, Senator James Harlan noted the foolishness of interpreting the 1868 Treaty literally as only requiring the furnishing of *one* physician.[116] The newly created Great Sioux Reservation stretched for hundreds of miles across the Mountain West; one physician providing adequate health care to the Indians living across this broad swath of land would be impracticable.[117] Although the House and Senate failed to reconcile their separate appropriation bills, the accompanying deliberations

110 *See id.* at 1000.

111 *See* Betty Pfefferbaum, Rennard Strickland, Everett R. Rhoades & Rose L. Pfefferbaum, *Learning How to Heal: An Analysis of the History, Policy, and Framework of Indian Health Care*, 20 AM. INDIAN L. REV. 365, 371 (1995).

112 *See* TASK FORCE SIX: INDIAN HEALTH, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 29 (1976), https://ufdc.ufl.edu/AA00025870/00001/37j [https://perma.cc/5UJZ-R63X].

113 *See* S. LYMAN TYLER, U.S. DEP'T OF THE INTERIOR, A HISTORY OF INDIAN POLICY 90 (1973), https://files.eric.ed.gov/fulltext/ED092279.pdf [https://perma.cc/6B97-K8PK].

114 Although congressional understanding of treaty terms is not a separate Indigenous canon, congressional intent would alternatively resolve any ambiguities in the treaty language.

115 *See* ST. GERMAIN, *supra* note 49, at 82–87.

116 *See id.* at 83–84.

117 *See id.* ("There is a district of country laid off for these various bands of Sioux, but they are to be located in three different parts of the district of country some hundreds of miles apart. . . . [W]e learned that [the negotiating Commissioners] intended to have shaped the phra-

provide a view of how the assenting Congress read their own treaty provisions and their intention to uphold their assumed treaty obligations.[118]

Yet, this historical evidence is not the only historical evidence available. And thus, the treaty approach is also unsatisfactory because the history relied upon by litigants and jurists to justify their interpretations is susceptible to selectivity. One need not look further than the *Rosebud* decision itself. Here, the Eighth Circuit relied upon contemporary annual reports prepared by the Commissioner of Indian Affairs to demonstrate that the local agencies provided the Lakota Sioux with various treatments and medicines, and that the demand was so great that the government requested additional assistants and the construction of a hospital.[119] According to the Eighth Circuit, the Sioux expected "persistently delivered healthcare throughout the region" and the court was willing to graft that historical understanding into the Treaty provision of a physician.[120]

In response, dissenting Judge Jonathan A. Kobes, relied upon the structure of the Treaty, and the same annual reports utilized by the majority, to demonstrate that the Lakota Sioux understood that the provision of a physician was not intended to be synonymous with the provision of health care services, but was strictly limited to a physician who would "teach the Sioux until they could reasonably take up the professions themselves."[121] In other words, Judge Kobes's historical interpretation suggests that the Sioux actually did only anticipate a single physician teacher who was disassociated from the provision of health care.

The Eighth Circuit demonstrates the capricious nature of dealing with historical sources in the interpretation of treaty language: the same material can lead separate jurists to adverse results.[122] Reliance on historical sources is further problematic because the historical record is lacking. As the *Rosebud* dissent points out, "Sioux-authored

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seology so as to include what we have here; and it being necessary, the committee concluded to make the amendment conform with the necessity." (quoting Sen. James Harlan)).

118 *See id.* at 86–87.

119 Rosebud Sioux Tribe v. United States, 9 F.4th 1018, 1020–21 (8th Cir. 2021).

120 *Id.* at 1024.

121 *Id.* at 1027–32 (Kobes, J., dissenting).

122 What is more, the annual reports relied upon by the dual opinions in the Eighth Circuit are not the only historical evidence one could use to understand the Treaty's language. This author already provided additional historical evidence above, and yet another commentator bolstered their interpretation with secondary sources describing the archeological record. *See* Schneider, *supra* note 32, at 1121–28.

records . . . are rare."[123] Not only are jurists then tasked with using a limited historical record in deciphering treaty language, they are left to rely heavily on a record devoid of indigenous voices but filled instead with the voices of government agents, including their opinions, and more detrimental, their biases.[124]

In total, the reliance on the historical record as evidence in understanding treaty language leaves much room for error. The limited number of historical sources, the incomplete nature of the record, and the malleable use of historical documents to arrive at disparate ends demonstrate that the treaty approach lauded by the Eighth Circuit is ripe for abuse.

B. The Treaty Analysis Causes "Checkerboarding"

Although the 1868 Treaty creates a duty incumbent on the government to provide some health care to the Lakota Sioux, the exercise exposes the inadequacy of treaties to create Indian trust duties in health care. First, this duty inquiry can only be raised by those tribes who had the foresight—or more bluntly, the luck—to include health care provisions in their treaties. Analysis of the nearly 400 Indian treaties ratified by the United States reveals that only eight percent contained some health care provisions.[125]

Second, this sliver of treaties is filled with incongruent language and subject to the aforementioned treaty interpretation. A recent analysis notes that of the thirty-one treaties containing health care provisions, twenty-eight provide for the supplication of physicians, while nine explicitly mention hospitals.[126] Other studies of treaty language discovered that in addition to these thirty-one treaties, there are roughly another thirty that include even more ambiguous clauses promising to care for the "poor" or "infirm."[127] Subject to judicial in-

123 *Rosebud Sioux Tribe*, 9 F.4th at 1029.

124 *See id.* at 1029–30. This is also problematic in the context of Indigenous canons, one of which described above requires courts to interpret treaties in favor of how the consenting tribes would have understood the language. It is difficult to comprehend how effectively courts today can discern the consenting tribe's understanding without a historical record produced by the tribes.

125 John, *supra* note 107, at 95 (noting that only 31 of 382 ratified treaties contain medical care provisions). Professor John's analysis is more tribal-friendly than other estimates that place the percentage of treaties with health care provisions closer to seven percent. However, this is likely because Professor John's figures recognize fewer ratified treaties. TASK FORCE SIX: INDIAN HEALTH, *supra* note 112, at 28 (noting that 30 of 400 treaties made during treaty period (1776–1858) included some provision for medical care).

126 John, *supra* note 107, at 95.

127 *See* TASK FORCE SIX: INDIAN HEALTH, *supra* note 112, at 28.

terpretation, courts can easily import varying meanings to these separate clauses.[128] This leaves tribes with different enforceable rights against the government.

Furthermore, these treaties are the product of a vast history of suspect treaty negotiations, marred by undue influence and a subsequent history of congressional abrogation in equally troubling circumstances.[129] The tribes that do have treaties with potential language imposing health care duties are the lucky few whose treaties remain effective to the present day.[130]

Ultimately, the number of treaties, their varying language, and the nature in which they were constructed—and potentially abrogated—leave a hodgepodge of government obligations for the provision of health care. This "checkerboard"[131] allows lucky tribes to have duty-guaranteed care and leaves a greater number of tribes without such enforcement power. There are twenty-eight federal Indian treaties that provide for some health care, similar to the Treaty of Fort Laramie.[132] Assuming all twenty-eight are still in effect today,[133] only seventy-eight federally recognized tribes are parties to these treaties.[134] Thus only 14% of all federally recognized tribes can benefit from the treaty approach.[135] Similarly, the total population of these seventy-eight tribes is less than a quarter of all Native Americans eli-

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128 *See supra* Section II.A.

129 *See supra* Section I.B.1.

130 Note that treaty viability is still highly contested and the subject of recent litigation. *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 1259 (2020) (holding that Congress has not statutorily abrogated the 1832 Creek Treaty that created the Creek Reservation in Eastern Oklahoma).

131 The Court largely disfavors "checkerboarding," typically referring to the nature of reservation lands following a long history of creating reservations by treaty, breaking up the reservations through allotment, and the subsequent divestment of Indian land to non-Indians, resulting in reservations with an assortment of jurisdictions, laws, and property rights. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193 n.1 (1978) (discussing disparate ownership of land, resident populations, and criminal jurisdiction on the Madison Indian Reservation in Washington).

132 This author arrived at twenty-eight treaties after conducting a key word search for "physician" of all federal Indian treaties in 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES (1904), digitized and searchable at https://dc.library.okstate.edu/digital/collection/kapplers/id/26940/rec/2 [https://perma.cc/89EG-YYQL].

133 Unlike bilateral treaties with foreign nations, an exhaustive list of every Federal Indian treaty presently in effect does not exist. The working assumption is that all treaties remain in effect unless superseded by acts of Congress. Therefore, compiling such a list would be futile because it would require the courts to determine on a provision-by-provision basis which treaties have been abrogated by statute and which have not.

134 2 KAPPLER, *supra* note 132.

135 To arrive at these figures, this author determined the historical tribes that were parties to the twenty-eight treaties, then used *Indigenous Digital Archive Treaties Explorer*, MUSEUM OF INDIAN ARTS & CULTURE, N.M., https://digitreaties.org/treaties/tribes/ [https://perma.cc/52QS-

gible to receive IHS services.[136] If courts rely exclusively on the treaty approach, only 22% of Native Americans could take advantage of the fiduciary duty. Therefore, the Court should affirmatively recognize duty-imposing language in the IHCIA, which applies to all federally recognized tribes, in order to provide equal enforcement power and equal health care, for all tribes and members.

III. Proper Statutory Interpretation of the IHCIA Reveals that a Duty Already Exists for All Federally Recognized Tribes

As discussed above, the treaty approach results in fractured rights amongst the tribes. The Court, therefore, in resolving the circuit split, should affirmatively acknowledge a duty from the text of the IHCIA. Although the lower courts are split on this issue,[137] the use of canons of statutory interpretation and the current Justices' own federal Indian law decisions require the Court to confirm that the IHCIA creates a fiduciary responsibility to provide quality tribal health care.

A. Apply the Canons of Statutory Interpretation

The statutory language alone creates a fiduciary duty under the "plain meaning rule." If courts, however, determine ambiguity exists,

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R6T8], to determine the modern-day successors to the historical tribes. There are seventy-eight modern-day successors and 574 federally recognized tribes.

136 This author collected population data for all seventy-eight tribes using 2010 population data estimates published in Off. of the Assistant Sec'y–Indian Affs., U.S. Dep't of the Interior, 2013 American Indian Population and Labor Force Report 20–22 tbl.3, 24–29 tbl.4, 74–90 app. tbl.2 (2014). This "treaty population" totaled 664,163 which is only 22.84% of the 2,907,272 federally recognized Indians. *See Tribal Population*, CDC (Dec. 21, 2018), https://www.cdc.gov/tribal/tribes-organizations-health/tribes/state-population.html [https://perma.cc/LN8D-YZ7J]. The Census Bureau has not yet publicly released updated population data for tribal members compiled during the 2020 decennial census. Preliminary reports, however, suggest that roughly 9.7 million persons identified as American Indian or Native Alaskan, either alone or in combination with another race, which is an increase of 86.5% from 5.2 million persons in 2010. *See 2020 Census: Native Population Increased by 86.5 Percent*, Indian Country Today (Aug. 13, 2021), https://indiancountrytoday.com/news/2020-census-native-population-increased-by-86-5-percent [https://perma.cc/SM8K-88GW]. Although this count does not accurately enumerate the number of "federally recognized Indians"—a condition for eligibility of IHS services—with the total population nearly doubling, it is easily assumed that the number of eligible persons will increase as well. While the degree of this increase is yet to be seen, this snapshot of population data suggests that the calculations made in this Note are likely already underestimates.

137 *Compare* Rosebud Sioux Tribe v. United States, 9 F.4th 1018 (8th Cir. 2021) (granting legally enforceable right to healthcare to tribal members), *with* Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States, 599 F. App'x 698, 699–700 (9th Cir. 2015) (denying the same rights).

then the ambiguity is resolved by applying the "whole act rule," the "title of the act rule," and the "common law meaning" canon.[138]

1. *Plain Meaning Rule*

Standing alone, the text of the IHCIA substantively creates a duty for health care. The opening "Declaration of national Indian health policy" provides that Congress authorizes the IHCIA "in fulfillment of its special trust responsibilities and legal obligations to Indians."[139] Enlisting the textualist-favorite plain meaning rule,[140] the inquiry need not go further. Having declared the IHCIA to be a response to the federal trust duty, Congress should be held to its words. Supplemented by the knowledge of the historical relationship between the government and the tribes,[141] it is difficult to comprehend or perceive any ambiguity in the terms "special trust responsibility" and "legal obligation to Indians."

2. *Whole Act Rule*

Assuming the Court is unwilling to accept the plain meaning of § 1602, the whole act rule provides further clarity. This canon requires jurists to read § 1602 in conjunction with the entire act.[142] Substantively, § 1602 is buttressed by 165 statutes wherein the government

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138 Legislative history is a labyrinth which many, including this author, are wary to enter. Even still, legislative history is itself a canon of interpretation when used to validate the plain meaning of the statute. *See* Samantar v. Yousuf, 560 U.S. 305, 316 n.9 (2010) (relying on legislative history to "confirm [the] reading of the statutory text"). Although unnecessary here, the legislative history supports the creation of a fiduciary duty. Dual reports in the Senate and the House Committees on Interior and Insular Affairs explicitly identify the trust duty to provide health care as the foundation of all other responsibilities toward tribes. *See* S. REP. NO. 94-133, at 23 (1975); H.R. REP. NO. 94-1026, pt. 1, at 13 (1976). Likewise, committee reports emphasize Congress's recommitment to the fiduciary duty each time they reauthorized the legislation. *See* H.R. REP. NO. 100-222, pt. 1, at 29 (1987); S. REP. NO. 102-392, at 16 (1992).

139 25 U.S.C. § 1602.

140 *See* Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984) ("Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that . . . '[statutory] language must ordinarily be regarded as conclusive.'" (quoting North Dakota v. United States, 460 U.S. 300, 312 (1983) (alteration in original))).

141 *See supra* Part I.

142 *See* John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank, 510 U.S. 86, 94–95 (1993) ("[W]e examine first the language of the governing statute, guided not by 'a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy.'" (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987))); United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (Scalia, J.) ("Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . .").

and IHS assume complete responsibility for the provision of tribal health care.[143] Ranging from diabetes therapy[144] to domestic abuse prevention and treatment,[145] epidemiological resources[146] to emergency contract health services,[147] and safe water[148] to school health education,[149] the other sections of the IHCIA only further reinforce the fiduciary duty.

Opponents have argued that § 1602 is too broad to constitute a statutory imposition of a trust duty.[150] In fact, the district court in *Rosebud* adopted that rationale, asserting that § 1602 is "too thin a reed" to impose an affirmative duty, but rather that these statutes only express Congress's goals.[151] However, § 1602 is better understood as the foundation on which the IHCIA and its 165 provisions are rooted.

The architects of the IHCIA appreciated the sweeping nature of the statute and intended IHS to serve "as the principal Federal advocate for Indians in the health field to assure comprehensive health services for American Indians and Alaska Natives."[152] Similarly, when reauthorizing the IHCIA in 1987, Congress noted the importance of IHS and its mission: "the discharge of the Federal trust responsibility to provide health care of American Indians and Alaska Natives."[153]

In the modern era, IHS continues to be an expansive operation. As of 2016, IHS operates forty-six hospitals, ten youth treatment centers, 344 health centers, 105 health stations, and 150 Alaskan village centers.[154] These centers are staffed by over 15,000 health care professionals from both the civil service and the Public Health Services Commissioned Officer Corps.[155] It is, therefore, suspect how courts

143 *See* 25 U.S.C. §§ 1601–85.

144 *Id.* § 1621(c).

145 *Id.* § 1665(m).

146 *Id.* § 1621(m).

147 *Id.* § 1646.

148 *Id.* § 1632.

149 *Id.* § 1621(n).

150 Brief for Defendants-Appellants at 16, Rosebud Sioux Tribe v. United States, 9 F.4th 1018 (8th Cir. 2021) (No. 20-2062) ("Congress established IHS under broad authorities that grant the agency discretion to carry out health care programs . . . . This does not suffice to create an enforceable trust duty.").

151 Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d 986, 1002 (D.S.D. 2020) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 19 (1981)).

152 S. REP. NO. 94-133, at 25 (1975).

153 H.R. REP. NO. 100-222, pt. 2, at 26 (1987).

154 HEISLER, *supra* note 70, at 6–7.

155 *Our Employees*, INDIAN HEALTH SERV., https://www.ihs.gov/aboutihs/ouremployees/ [https://perma.cc/22VG-RBVX].

could disregard a statutory scheme as expansive and explicit as the IHCIA and reduce it to mere "goals."

3. Title of the Act Rule

The title of the act rule is also instructive. Under this canon of statutory interpretation, the Court is permitted to call upon the title of the entire act or statutory section to resolve any residual ambiguity.[156] The full title of the IHCIA reads: An Act "to improve the implementation of the *Federal responsibility* for the care and education of Indian people by improving the services and facilities of Federal Indian health programs and encouraging maximum participation of Indians in such programs, and for other purposes."[157] This title expressly acknowledges the association between the trust duty and the IHCIA. Furthermore, the specific title of § 1602—"Findings and Declaration of Purpose"—does not mention "goals" or "policy," as the government insinuated in *Rosebud*,[158] but provides context for the "purpose" of the following statutory sections.[159] When read together, the statutory text, the statuary structure, and the statutory title all point to the federal trust duty for the provision of Indian health care.

4. "Common Law Meaning" Canon

Finally, the common law meaning canon eliminates any remaining uncertainty. This canon asks the Court to apply a developed common law definition to ambiguous phrases, particularly when dealing with more technical statutes that include terms of art.[160] As addressed in Section I.A, the common law definition of trust duties in Indian law is clear: when the government assumes total control and management of tribal resources through substantive sources of law, a trust responsibility exists and creates a cause of action if the government breaches this duty.[161] Albeit circular, the Court has already grafted a complex definition onto the term "trust responsibility" through a lengthy his-

156 INS v. Nat'l Ctr. for Immigrants' Rts., Inc., 502 U.S. 183, 189–90 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

157 H.R. 1662, 107th Cong. (2001) (emphasis added).

158 *See* Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d 986, 999 (D.S.D. 2020) ("The Government asserts that the provisions of the Snyder Act and the IHCIA cited by the Tribe are general statements of aspirational policy that do not create specific responsibilities.").

159 25 U.S.C. § 1602.

160 NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.").

161 *See supra* Section I.A; United States v. Mitchell, 463 U.S. 206, 225 (1983) ("[A] fiduciary

tory of high court decisions.[162] Under this canon, the Court should assume that Congress was aware of this common law definition of trust duty, and respect Congress's decision to utilize such imputed language.

5. *The Adversarial Nature of Canons*

Canons are interpretative tools, and jurists can easily use one of the hundreds relied upon by courts[163] to reinforce their interpretation, while relying on another one to dismantle adverse interpretations.[164] It is difficult, therefore, to anticipate every canonical counterargument that might be raised in the course of statutory interpretation. One possibility is the collection of canons that compel the Court to avoid interpreting in broad terms where Congress has provided elsewhere for broad policy in more specific terms.[165] Similarly, another canon instructs the Court to only apply general interpretations when more specific provisions are not present.[166] This is certainly reminiscent of the *Rosebud* court's "thin reed" complaint, and recognition that other, more limited "provisions in the IHCIA place affirmative duties on the Government for Indian health care."[167]

[trust] relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians.").

162 *See supra* Section I.A.

163 In his seminal work, Justice Antonin Scalia focused on seventy separate canons. *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012). One textbook denominates over two hundred canons of interpretation. *See* WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION 1091–114 (2014).

164 *See* Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 930–31 (2016) (providing quantitative evidence of the majority and minority opinions of the Roberts Court between 2005–2010 using the same tool of statutory interpretation to arrive at disparate results). Similarly, canons can often be used by jurists to cancel out and overpower another canon. *See* Chickasaw Nation v. United States, 534 U.S. 84, 94–95 (2001). In a recent Indian law case, the Supreme Court applied the "plain meaning canon" to hold that Alaska Native Corporations are "Indian tribes" for the purposes of eligibility under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), 15 U.S.C. §§ 9001–9141, while the respondent asked the Court to answer in the negative by using a "term-of-art-canon." *See* Yellen v. Confederate Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2441–45 (2021). Meanwhile, the dissent relied upon linguistic canons to determine that Alaska Native Corporations are not "Indian tribes" under the CARES Act. *See id.* at 2458–59 (Gorsuch, J., dissenting).

165 *See* Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))).

166 *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule.").

167 Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d. 986, 1002 (D.S.D. 2020).

Invoking these "broad v. specific" canons, however, misses the mark. First, the Court can altogether avoid the broad policy canon because Congress could not have drafted § 1602 with any greater level of specificity. In direct language, Congress identifies the "special trust responsibility" and makes it operative on ensuring quality health care.[168] Likewise, while the IHCIA contains more specific language concerning measures and methods of health care, no other provision contains more specific language about the trust duty to provide health care. These canons would only arise in alternative situations where a litigant attempted to create a trust duty through a separate section of the IHCIA, say emergency contract health services[169] or safe water and sanitary waste disposal,[170] without invoking § 1602 as well.

Either through the text alone, or with the assistance of interpretive canons, the IHCIA is clear: a trust duty exists, operative on the federal government, to provide quality health care. The Justices' recent federal Indian opinions and accompanying legal reasoning are an instructive analogue to best discern an ultimate resolution of this imperative question before the Supreme Court.

B. Supreme Court Justices, Stand by Your Words

The Supreme Court's collection of federal Indian jurisprudence remains slim.[171] The high Court's complexion, meanwhile, has recently changed significantly.[172] In tribal case law, often few analogous cases

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168 25 U.S.C. § 1602.

169 *Id.* § 1646.

170 *Id.* § 1632.

171 In the past eleven terms, the Supreme Court has decided only twenty Indian law related cases. *See Archives for the Indian Law Bulletins*, NAT'L INDIAN L. LIBR., https://narf.org/nill/bulletins/archive.html [https://perma.cc/3MN2-UQCZ].

172 Since 2016, Justice Neil Gorsuch was appointed following the death of Justice Antonin Scalia, Justice Brett Kavanaugh replaced the retiring Justice Anthony Kennedy, and Justice Amy Coney Barrett was appointed following the death of Justice Ruth Bader Ginsburg. *See* Ed O'Keefe & Robert Barnes, *Senate Confirms Neil Gorsuch to Supreme Court*, WASH. POST (Apr. 7, 2017), https://www.washingtonpost.com/powerpost/senate-set-to-confirm-neil-gorsuch-to-supreme-court/2017/04/07/da3cd738-1b89-11e7-9887-1a5314b56a08_story.html [https://perma.cc/NE68-ED2D]; Seung Min Kim & John Wagner, *Kavanaugh Sworn in as Supreme Court Justice After Divided Senate Votes for Confirmation*, WASH. POST (Oct. 6, 2018), https://www.washingtonpost.com/politics/kavanaugh-vote-divided-senate-poised-to-confirm-trumps-nominee/2018/10/06/64bf69fa-c969-11e8-b2b5-79270f9cce17_story.html [https://perma.cc/KJC8-8QFB]; Seung Min Kim, *Senate Confirms Barrett to Supreme Court, Cementing Its Conservative Majority*, WASH. POST (Oct. 26, 2020, 9:26 PM), https://www.washingtonpost.com/politics/courts_law/senate-court-barrett-trump/2020/10/26/df76c07e-1789-11eb-befb-8864259bd2d8_story.html [https://perma.cc/N2GY-RVCP]. For practical implications of this new makeup of the Supreme Court, see Amelia Thomson-DeVeaux & Laura Bronner, *How a Conservative 6-3 Majority Would Reshape the Supreme Court*, FIVETHIRTYEIGHT (Sept. 28, 2020,

shed light on how the Court might rule on any given question. Thus, the practice of counting votes is complicated. The record of the Justices' views, however, further demonstrates that a unanimous Court should affirm the IHCIA creates a fiduciary duty to provide health care.

1. The Tribal Rights Core—Four Votes

The Supreme Court's recent high-profile Indian law case, *McGirt v. Oklahoma*,[173] provides a sufficient baseline for counting votes. In *McGirt*, five justices, led by Justice Gorsuch, relied on statutory interpretation to hold that Congress never explicitly withdrew from the United States' treaties with the Creek Nation.[174] The Court solidified the Indigenous canons holding that "[i]f Congress wishes to withdraw its promises, it must say so,"[175] relying first on the text of the treaty, and turning to "extratextual sources" only "when the meaning of a statute's terms is [not] clear."[176]

There are several differences between *McGirt* and the present issue. First, this Note's proposed solution concerns an affirmative conveyance of rights from Congress, while *McGirt* addressed the failure of Congress to revoke rights. Furthermore, *McGirt* rested on treaty language, whereas this Note emphasizes statutes. Despite these differences, the legal analysis is the same: read the statute (or treaty), apply canons of statutory interpretation (if ambiguous), and "hold the government to its word."[177] It is likely, therefore, that Justices Gorsuch, Breyer, Kagan, and Sotomayor would decide this case in favor of the tribes.[178]

This presumption is buttressed by these four Justices' other opinions concerning Indian law. For instance, in *Washington State Depart-*

6:00 AM), https://fivethirtyeight.com/features/how-a-conservative-6-3-majority-would-reshape-the-supreme-court/ [https://perma.cc/ZB9H-F5MU]. *But see* Adam Liptak, *The Supreme Court's Newest Justices Produce Some Unexpected Results*, N.Y. TIMES (June 18, 2021), https://www.nytimes.com/2021/06/18/us/politics/supreme-court-conservatives-liberals.html [https://perma.cc/VTS3-CTDZ] (detailing the unconventional majorities formed by the Court during October Term 2020, despite a 6-3 conservative majority).

173 140 S. Ct. 2452 (2020).

174 *See id.* at 2482 (Gorsuch, J., joined by Ginsburg, Breyer, Sotomayor & Kagan, JJ.).

175 *Id.*

176 *Id.* at 2469.

177 *Id.* at 2459.

178 These are the four Justices from the *McGirt* majority that remain on the Court. Justice Ginsburg also joined the majority opinion but passed away in October 2020. Mark Sherman, *Supreme Court Justice Ruth Bader Ginsburg Dies at 87*, WASH. POST (Sept. 18, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-justice-ruth-bader-ginsburg-dies-at-87/2020/09/18/6e309e10-fa08-11ea-85f7-5941188a98cd_story.html [https://perma.cc/95NR-PD7K].

ment of Licensing v. Cougar Den, Inc.,[179] the Court applied Indigenous canons to hold that the Yakama Nation had a right to travel upon all public highways, and thus preempted Washington State's fuel tax.[180] Writing for the Court, Justice Breyer warned that "[c]onstruing the treaty [negatively] . . . would amount to 'an impotent outcome to negotiations . . . which seemed to promise more and give the word of the Nation for more.'"[181] In a separate concurrence, Justice Gorsuch raised concerns for the negative implications of poor statutory interpretation, similar to those he later voiced in *McGirt*, and applauded the Court for holding "the parties to the terms of their deal."[182]

Justice Sotomayor, similarly, applied the Indigenous canons in *Herrera v. Wyoming*,[183] and held that neither Congressional action nor Wyoming statehood explicitly abrogated the Crow Tribe's hunting rights.[184] Furthermore, in *Michigan v. Bay Mills Indian Community*,[185] Justice Kagan required Congress to explicitly authorize Michigan's lawsuit against the tribe, holding that "unless and 'until Congress acts, the tribes retain' their historic sovereign authority."[186]

2. The Textualist Stalwarts—Three Votes

The three established dissenters in *McGirt*—Chief Justice Roberts and Justices Thomas and Alito—are more difficult votes to garner. First, the dissent primarily relied on extratextual sources because the reservation disestablishment precedents permitted such an exercise.[187] Without such allowances in the fiduciary duty jurisprudence, these three dissenters would at least be required to face the statutory text of the IHCIA.

Justices Alito and Thomas, both writing for unanimous Courts, encountered this conundrum in *Menominee Indian Tribe of Wisconsin*

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179 139 S. Ct. 1000 (2019).

180 *See id.* at 1011–12 (relying on treaty language and historical meaning canon to read treaty in light most favorable to tribes).

181 *Id.* at 1012 (quoting United States v. Winans, 198 U.S. 371, 380 (1905)).

182 *Id.* at 1021 (Gorsuch, J., concurring in the judgment).

183 139 S. Ct. 1686 (2019).

184 *See id.* at 1699 (applying historical meaning canon and reading treaty in light most favorable to tribes, Court announced "there is no suggestion in the text of the 1868 Treaty" that Congress abrogated hunting rights).

185 572 U.S. 782 (2014).

186 *Id.* at 788 (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).

187 *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2482–83 (2020) (Roberts, C.J., dissenting) (arguing that Congress's actions in aggregate abrogated the Creek treaty, not simply textual language).

v. United States,[188] and *Nebraska v. Parker*,[189] respectively. In *Menominee*, Justice Alito's holding was prefaced by the underlying notion that "any specific obligations the Government may have under that [trust] relationship are 'governed by statue rather than the common law.'"[190] In *Parker*, Justice Thomas relied predominantly on textual provisions and required explicit references to cession in deciding a reservation disestablishment question.[191] When analyzing the IHCIA, the language of the text and the explicit references to the congressionally imposed fiduciary responsibility are enough to confirm the trust duty. Consistent with prior decisions, it is likely that Justices Thomas and Alito and the Chief Justice would find the trust duty in the IHCIA.

3. New Justices, Textual Fidelity—Two Votes

The two newest members to the Court, Justices Kavanaugh and Barrett, have not authored many opinions concerning Indian law. Their prior circuit court experience and academic writing, however, evidence the desire to rely upon the statutory text and to apply the Indigenous canons.

Justice Kavanaugh's experience on federal Indian law is limited, as he has drafted only one Indian law opinion while on the Court[192] and has not produced written comments on the subject. Although he joined the dissent in the above referenced cases[193]—*McGirt*,[194] *Cougar*

188 577 U.S. 250 (2016) (concerning equitable tolling doctrine's effect on tribal claims for reimbursement).

189 577 U.S. 481 (2016) (concerning boundaries of Omaha Indian Reservation).

190 *Menominee*, 577 U.S. at 258 (quoting United States v. Jicarilla Apache Nation, 564 U.S. 162, 165 (2011)).

191 *Parker*, 557 U.S. at 489–90.

192 Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1026–27 (2019) (Kavanaugh, J., dissenting) (evaluating plain text of treaty to retain distinction between Indigenous "free access" rights on roads connecting the reservation and Indigenous rights "in common with" other U.S. citizens on public highways).

193 It should be noted that Justice Kavanaugh joined the majority in the two Indian law cases decided during October Term 2020, including a unanimous opinion in *United States v. Cooley*, 141 S. Ct. 1638 (2021) (holding that tribal police officer may detain and search non-Indian persons on public-rights-of-way traveling through reservations based on "inherent sovereign powers" doctrine), and an opinion penned by Justice Sotomayor in *Yellen v. Confederated Tribes of Chehalis Reservation*, 141 S. Ct. 2434 (2021) (determining under plain meaning of Indian Self-Determination and Education Assistance Act that Alaska Native Corporations are "Indian tribes" for purposes of receiving COVID-19 funding and resources).

194 McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., Alito & Kavanaugh, JJ., dissenting).

Den,[195] and *Herrera*[196]—Justice Kavanaugh, when on the D.C. Circuit, signaled agreement with the practice of beginning statutory construction with Congress's plain meaning when analyzing the Indian Self-Determination and Education Assistance Act.[197] The D.C. Circuit and Judge Kavanaugh acknowledged that the government should not abandon self-imposed actions, particularly when fulfilling a "distinctive obligation of trust."[198]

Recently installed, Justice Barrett's resume is equally devoid of Indian law jurisprudence, particularly because the Seventh Circuit—her previous appointment—does not often hear such cases. The Justice's academic writing, however, signals a willingness to uphold the Indigenous canons.[199] Further, the Justice implicitly blessed the federal courts' equitable application of the canon to both treaties and statutes as a matter of constitutional necessity.[200] In other writings, Justice Barrett committed to applying "the most natural meaning of the words at issue because that is the way their principal—the people—would understand them."[201]

Finally, both Justices joined the recent majority in *Yellen v. Confederate Tribes of Chehalis Reservation*.[202] The majority applied the "plain meaning rule" to hold that Alaska Native Corporations are "Indian tribes" under the statutory language in the Coronavirus Aid, Relief, and Economic Security Act.[203] With an explicit mandate from Congress as to the definition of "Indian tribes," the Justices avoided enlisting any additional canons or legislative history. Despite limited

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195 *Cougar Den, Inc.*, 139 S. Ct. at 1021 (Roberts, C.J., Thomas, Alito & Kavanaugh, JJ., dissenting).

196 Herrera v. Wyoming, 139 S. Ct. 1686, 1703 (2019) (Alito, J., Roberts, C.J., Thomas & Kavanaugh, JJ., dissenting).

197 *See* Navajo Nation v. U.S. Dep't of the Interior, 852 F.3d 1124, 1128 (D.C. Cir. 2017) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."); *id.* at 1130–31 (Kavanaugh, J., concurring).

198 *See id.* at 1129 (majority opinion) (quoting Seminole Nation v. United States, 316 U.S. 286, 296 (1942)).

199 *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 122 (2010) ("[T]extualists embrace . . . the Indian canon[s] . . . .").

200 *See id.* at 152 ("That is not to say that federal courts have been wrong to apply the Indian canon to statutes."); *id.* at 152 n.206 ("[U]nderstood [as an outgrowth of the sovereign relationship between tribes and the United States], the canon might be rationalized with reference to the Constitution . . . .").

201 Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. Chi. L. Rev. 2193, 2195 (2017).

202 141 S. Ct. 2434, 2441–42 (2021).

203 Coronavirus Aid, Relief, and Economic Security Act, 15 U.S.C. §§ 9001–9141; *Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct at 2441–42.

substantive experience, when faced with the IHCIA, Justices Kavanaugh and Barrett should be led by their fidelity to the text and plain meaning. The explicit text of § 1602 leaves no ambiguity and requires all Justices to give the words their straightforward meaning.

Ultimately, achieving unanimity on any issue before the high Court is a tall order. When the Court is faced with a novel question without analogous case law to ground their decision making, there is little confidence in predicting votes. When quality health care is at stake, however, an avenue to every vote is invaluable.

Conclusion

The coronavirus pandemic has exposed both the shortcomings of the provision of tribal health care, and the urgency required to combat the problem. As shown, the federal circuits require guidance on whether the government must provide health care to Native Americans. Although the Eighth Circuit's treaty approach occasionally works, it is limited to tribes fortunate enough to have entered into a treaty that expressly provides for health care. This approach is susceptible to both history and treaty interpretation. The Supreme Court, therefore, must apply proper statutory interpretation to the IHCIA and confirm that it creates a fiduciary duty to provide health care to tribal members. This approach grants all federally recognized Native Americans, regardless of disparate treaties, the ability to enforce their legal rights and receive the most basic of human needs.