No. 21-906

In the
Supreme Court of the United States

KLICKITAT COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF WASHINGTON; KLICKITAT COUNTY SHERIFFS OFFICE, AN AGENCY OF KLICKITAT COUNTY; BOB SONGER, IN HIS OFFICIAL CAPACITY; KLICKITAT COUNTY DEPARTMENT OF THE PROSECUTING ATTORNEY, AN AGENCY OF KLICKITAT COUNTY; DAVID QUESNEL, IN HIS OFFICIAL CAPACITY,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, A SOVEREIGN FEDERALLY RECOGNIZED NATIVE NATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SAMIR DEGER-SEN
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
(212) 906-1200

GREGORY G. GARRE
Counsel of Record
JOSHUA J. CRADDOCK
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

INTRODUCTION

After filing its petition, Klickitat County learned of petitions for certiorari filed earlier in December by the Penobscot Nation and the United States in an Indian reservation boundary case that implicates many of the issues raised in this case. *See Penobscot Nation v. Frey*, No. 21-838 (U.S. filed Dec. 3, 2021); *United States v. Frey*, No. 21-840 (U.S. filed Dec. 3, 2021). The United States' petition, in particular, underscores that certiorari is warranted in tribal boundary disputes, even in the absence of an inter-circuit conflict, given the profound jurisdictional and practical consequences of such determinations. *See* Pet. for Certiorari at 32-33, *United States v. Frey*, No. 21-840 (U.S. filed Dec. 3, 2021) ("U.S. *Penobscot* Pet."). The petitions also illustrate a conflict among the courts of appeals concerning the application of the Indian canon that should be resolved by this Court. Klickitat County planned to address the *Penobscot* petitions in its reply brief, but the Yakama Nation waived its right of response, and this case is set for consideration at this week's conference.

The *Penobscot* petitions reinforce the importance of the issues raised by this case and thus support Klickitat County's arguments for certiorari. Indeed, important aspects of the Ninth Circuit's decision in this case conflict with the First Circuit's decision in *Penobscot,* bolstering the case for certiorari here. But it is also apparent that Klickitat County's petition should be considered alongside the *Penobscot* petitions because the cases present overlapping issues about application of the Indian canon and the interpretation of statutes that define the borders of an Indian reservation. If the Court grants certiorari

either in this case or in *Penobscot*, it would benefit from consideration of these important issues in the context of both disputes. In addition, if the Court grants certiorari in only one case, it would be appropriate to hold the other petition(s) pending the Court's decision in the case in which it granted certiorari because the decision almost certainly would bear on the issues presented by the other case.

ARGUMENT

1. The *Penobscot* petitions—filed shortly before the petition in this case was filed—raise the question "[w]hether the Penobscot Indian Reservation includes only the uplands of the islands in the main stem of the Penobscot River or also includes the surrounding River." U.S. *Penobscot* Pet. at I. The answer turns primarily on interpretation of two statutes known as the Settlement Acts—the Maine Implementing Act and the Maine Indian Claims Settlement Act—which together define the boundaries of the Penobscot Indian Reservation and the Penobscot Nation's rights to sustenance fishing along a particular stretch of the Penobscot River in Maine. But that question, in turn, raises important issues concerning the Indian canon and the interpretation of statutes that define the borders of an Indian reservation.

In *Penobscot Nation v. Frey*, the First Circuit held that the Penobscot Indian Reservation is limited to the island uplands, because the text of the Settlement Acts unambiguously define the reservation to exclude the Penobscot River. 3 F.4th 484, 490-95 (1st Cir. 2021) (en banc) (examining dictionary definitions of terms used in the Settlement Acts). Accordingly, the court declined to apply the canon that statutes and treaties must be interpreted "liberally in favor of the

Indians, with ambiguous provisions interpreted to their benefit." *Id.* at 503 (quoting *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992)). Applying the Indian canon, the court concluded, would "disregard clear expressions of tribal and congressional intent." *Id.* (quoting *DeCoteau v. District Cnty. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 445 (1975)).

The First Circuit further held inapplicable the canon that Congress's intent to "diminish [the] boundaries" of a reservation "must be clear." *Id.* (quoting *Nebraska v. Parker*, 577 U.S. 481, 487-88 (2016)). As the court explained, the *Penobscot* case was "not a traditional diminishment case" because Congress had directly and unambiguously defined the contours of a reservation. *Id.* at 503-04.

2. The *Penobscot* dispute is not only similar to the dispute in this case, but also the petitions in *Penobscot* raise issues that substantially overlap with the petition in this case, including the proper application of the Indian canon and the deference owed to Congressional boundary determinations.

For example, if this Court were to grant the *Penobscot* petitions, the Court would be called upon to clarify the proper application of the Indian canon, in a way that may be dispositive of this case. *Klickitat Cnty.* Pet. 29-31 ("Pet."). In the decision below, the Ninth Circuit held that a purported ambiguity in *one part* of a treaty (the reference to the "spur") was sufficient to invoke the Indian canon, even when doing so would erase a separate, unambiguous geographic call (that the boundary must fall along the Pisco-Klickitat divide). *Klickitat Cnty.* App. 16a-17a; *see* Pet. 29-31. The First Circuit, by contrast, found that the Settlement Acts had to be considered as a

whole, *see Penobscot*, 3 F.4th at 504-05, and squarely found that the Indian canon cannot override an unambiguous geographic call for "islands," which necessarily excludes the surrounding waters, *id.* at 491-92. That conflict over how to apply the Indian canon underscores that this Court's guidance on the proper application of the Indian canon is sorely needed to avoid such radically disparate results in the courts of appeals.

Resolving the question presented in the *Penobscot* petitions also would require the Court to address the standards governing the interpretation of federal statutes defining the boundaries of an Indian reservation. In the decision below, the Ninth Circuit found that the 1904 Act did not control despite language unambiguously "'defin[ing]'" the reservation to exclude Glenwood Valley, Pet. 18 (quoting Act of Dec. 21, 1904, ch. 22, § 8, 33 Stat. 595, 598), because the Act did "clearly express" Congress's "intent to abrogate the Treaty," *Klickitat Cnty.* App. 19a. The First Circuit, confronting a substantially similar issue, found the clear-statement requirement inapplicable and determined that even if it did apply, the Settlement Acts had clearly expressed intent to exclude the Penobscot River based on the unambiguous statutory language. *See Penobscot*, 3 F.4th at 503-04. The Ninth Circuit's insistence on a clear statement *separate from* the unambiguous language of the 1904 Act "defin[ing]" the boundary thus conflicts with the First Circuit's decision in *Penobscot*. Resolving petitioners' challenge to the First Circuit's decision in *Penobscot* will thus necessarily implicate the proper approach to interpreting the 1904 Act here.

3. Separate from the overlap between the two sets of petitions, the *Penobscot* petitions underscore the importance of this Court's review over questions concerning Indian reservation boundary disputes—even when there is no direct conflict in the courts of appeals. As the Solicitor General explains in the United States' petition, these cases are unusual because "[t]here is no prospect of a division among the courts of appeals" that can develop with respect to the precise statute or treaty involved. U.S. *Penobscot* Pet. 32. But this Court's guidance is nonetheless essential for consistent application of principles of Indian law, including the Indian canon and diminishment framework, across the courts of appeals. And, as the Solicitor General explained, "this Court has many times reviewed other court of appeals decisions involving important statutes or treaties particular to one or a small subset of Indian tribes." *Id.* at 32-33 (citing *Ysleta del Sur Pueblo v. Texas*, 142 S. Ct. 395 (2021); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020); *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019); *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019)). The same course is appropriate here.

Indeed, if anything, the case for certiorari is even stronger in this case, given the direct conflict between the Ninth Circuit's decision and this Court's decision in *Northern Pacific Railway Co. v. United States,* 227 U.S. 355 (1913). *See* Pet. 22-25. In addition, whereas the dispute in *Penobscot* concerns a 60-mile stretch of river, this case concerns a 190-square mile tract of land. At a minimum, there is no basis for concluding that one of these fundamental boundary disputes is more important than the other; neither is there any basis to adopt a one-way ratchet in favor of boundary

disputes in which the United States petitions for certiorari in advancing the interests of tribes, in accordance with its special trust relationship with tribes. This case is just as important to Klickitat County and its residents.

4. Certiorari is warranted in this case. But because this case and *Penobscot* raise overlapping issues concerning the application of the Indian canon and proper interpretation of boundary statutes, and because this Court's resolution of one case may have a substantial effect on the other, the petitions should at the very least be jointly considered. Furthermore, the Washington Farm Bureau has indicated its intent to file an amicus brief in support of Klickitat County's petition. That brief will elaborate on the importance of the issues presented by this case. Rescheduling consideration of this petition, or calling for a response from the Yakama Nation, would thus also give the Court the benefit of the insights from that amicus brief as it evaluates whether certiorari is warranted in this case. At a minimum, the important issues presented by this case, as underscored by the recent petitions in *Penobscot,* warrant such consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMIR DEGER-SEN
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
(212) 906-1200

GREGORY G. GARRE
Counsel of Record
JOSHUA J. CRADDOCK
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioners

January 10, 2022