No. _______

In the Supreme Court of the United States

MAKAH INDIAN TRIBE,

Petitioner,

v.

QUILEUTE INDIAN TRIBE AND QUINAULT INDIAN NATION, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On the same day in 1859, the Senate ratified several treaties between the United States and Indian tribes in western Washington. The Treaty of Neah Bay secured to the Makah Indian Tribe the "right of taking fish and of whaling or sealing at usual and accustomed grounds and stations." The Treaty of Olympia secured to the Quileute Indian Tribe and Quinault Indian Nation, the southern neighbors of Makah along the Washington coast, the "right of taking fish at all usual and accustomed grounds and stations." Unlike the Treaty of Neah Bay, the Treaty of Olympia expressed only a "right of taking fish"; it did not reference "whaling or sealing."

In this case, the Ninth Circuit held the "right of taking fish" in the Treaty of Olympia includes a right of whaling and sealing. Then, the Ninth Circuit held Quileute and Quinault's "usual and accustomed" fishing grounds under the treaty extend beyond the areas in which the Tribes customarily *fished* to areas in which they hunted "'marine mammals—including whales and fur seals.'" App. 15a (quoting district court). In the process, the Ninth Circuit extended Quileute and Quinault's fishing right under the treaty to some 2,400 square miles of ocean—an area almost as large as the State of Delaware—in which the Tribes did not customarily fish at treaty time.

The question presented is whether the Ninth Circuit—in conflict with the decisions of this Court and other courts—properly held the Treaty of Olympia confers this expansive "fishing" right.

PARTIES TO PROCEEDINGS

Petitioner, the Makah Indian Tribe, initiated this proceeding seeking a determination pursuant to the injunction entered in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974); it was the plaintiff in the district court and appellant in the Ninth Circuit. Respondents are (1) the Quileute Indian Tribe and Quinault Indian Nation, which were the defendants in the district court and appellees in the Ninth Circuit; (2) the State of Washington, which was an appellant at the Ninth Circuit; (3) the Hoh Indian Tribe, Squaxin Island Tribe, Muckleshoot Tribe, Puyallup Tribe, Nisqually Indian Tribe, Suquamish Indian Tribe, Skokomish Indian Tribe, Swinomish Indian Tribal Community, Jamestown S'Klallam Tribe, Port Gamble S’Klallam Tribe, and Upper Skagit Indian Tribe, which participated as real parties in interest in the Ninth Circuit; (4) the United States of America, which was a plaintiff in the underlying proceeding but did not participate in the Ninth Circuit; and (5) the Lummi Indian Nation, Lower Elwha Klallam Tribe, and Stillaguamish Tribe, which were real parties in interest but did not participate in the Ninth Circuit.

RULE 29.6 STATEMENT

The Makah Indian Tribe is a federally recognized Indian tribe. It does not have a parent corporation, and no publicly held corporation owns stock in the Tribe.

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The Makah Indian Tribe (Makah) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1a-26a) is reported at 873 F.3d 1157. The principal rulings of the district court (App. 27a-164a) are reported at 88 F. Supp. 3d 1203 and 129 F. Supp. 3d 1069. The order of the court of appeals denying rehearing (App. 165a-167a) is unreported.

JURISDICTION

The court of appeals entered its opinion on October 23, 2017. App 2a. On January 19, 2018, the court of appeals denied a timely petition for rehearing. *Id.* at 165a-167a. On April 4, 2018, Justice Thomas granted petitioner's request for an extension of time within which to file a petition for certiorari to May 21, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

TREATY PROVISIONS

Article 4 of the Treaty of Neah Bay, 12 Stat. 939 (1855), provides:

> The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: *Provided, however,* That they shall

> not take shell-fish from any beds staked or cultivated by citizens.

Article 3 of the Treaty of Olympia, 12 Stat. 971 (1856), provides:

> The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however*, That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

INTRODUCTION

This case presents a fundamental question of treaty interpretation arising from a dispute among Indian tribes over the right to fish in an area of the Pacific ocean almost as large as the State of Delaware. The Ninth Circuit's decision deviates from settled principles of treaty interpretation established by this Court and others to reach a result at odds with the explicit terms of the treaty at issue, the express language of a contemporaneous treaty entered into with neighboring tribes, and the position of the United States and the State of Washington on the fishing rights reserved by these treaties.

In the mid-1800s, the United States entered into a group of treaties with Indian tribes in the Pacific Northwest known as the "Stevens Treaties," which reserved to the tribes fishing and other rights in exchange for release of land claims. The Treaty of Neah Bay secured to the Makah Indian Tribe the "right of taking fish and of whaling or sealing at usual and accustomed grounds and stations." The Treaty of Olympia secured to the Quileute Indian Tribe and Quinault Indian Nation the "right of taking fish at all usual and accustomed grounds and stations." It does not mention "whaling" or "sealing." The two treaties were contemporaneously negotiated with the Tribes by a small group of various federal officers and later ratified by the Senate on the same day.

This proceeding represents the second time the federal courts have been asked to identify "usual and accustomed grounds" for *ocean* fishing rights under the Stevens Treaties. App. 30a. In 1982, in what is known as the "*Makah* proceeding," the courts—in part at the urging of the United States—held that Makah's "usual and accustomed grounds" for fishing under the Treaty of Neah Bay extended as far offshore as Makah regularly fished for salmon, halibut, and other species of finfish at treaty time (40 miles), but did not extend as far offshore as Makah hunted whales or seals (roughly 50 to 100 miles). *United States v. Washington,* 626 F. Supp. 1405, 1466-68 (W.D. Wash. 1982), *aff'd*, 730 F.2d 1314 (9th Cir. 1984). That ruling has represented the settled interpretation of the Treaty for more than 30 years.

In this proceeding, Makah sought a determination of Quileute and Quinault's ocean fishing boundaries under the Treaty of Olympia, after a dispute arose among the Tribes over fisheries in the area. *See* App.

139a-140a. The district court found Quileute and Quinault customarily fished 20 and six miles offshore at treaty time, respectively. *Id.* at 49a-50a, 73a-74a. Yet, the court held the Tribes' "usual and accustomed grounds" for fishing under the Treaty of Olympia extended 40 and 30 miles offshore, respectively, because the Tribes had hunted *whales or seals* out that far. *Id.* at 129a; *see also id.* at 55a-56a, 58a, 97a. That decision represents the first time a court has held that a tribe's fishing rights under a Stevens Treaty extend to areas where the tribe hunted whales or seals but did not traditionally *fish* at treaty time.

The Ninth Circuit affirmed in relevant part. It held the Treaty of Olympia's "right of taking fish" extends to whales and seals. App. 20a-21a. The court flatly refused to construe the Treaty of Olympia in light of the Treaty of Neah Bay, even though the treaties were contemporaneously negotiated by neighboring tribes and ratified on the same day. *Id.* at 11a-12a. Instead, the court invoked the "Indian canon of construction" and then relied upon "ethnology studies and expert reconstructions" to determine what the Tribes purportedly would have understood "fish" to mean some 150 years ago. *Id.* at 12a-21a. Then the court went further. It concluded that Quileute and Quinault's "usual and accustomed grounds" for fishing under the Treaty of Olympia extend to areas in which the Tribes took "whales and seals," regardless of whether they actually *fished* in those areas at treaty time. *Id.* at 21a.

The Ninth Circuit's decision grants Quileute and Quinault a treaty-based right to take fish in some 2,400 square miles of ocean that were neither "usual" nor "accustomed" fishing grounds at treaty time. It sharply conflicts with the decisions of this Court and

other courts on treaty interpretation, as well as with the United States' longstanding position on how to determine an ocean boundary for Stevens Treaty fishing rights. It directly impacts Makah's own fisheries and creates a recipe for inter-tribal conflict over fisheries. And it conflicts with the State of Washington's own interpretation of the Treaty of Olympia and threatens to reduce substantially the fisheries available to non-Indian fishermen.

This Court's review is warranted.

STATEMENT

A. The Stevens Treaties

1. The "Right Of Taking Fish"

Between December 1854 and January 1856, Isaac Stevens, the Governor of the newly formed Territory of Washington, led a small group that negotiated several treaties with Indian tribes in the Territory on behalf of the United States. As one might expect from treaty negotiations led by members of the same small band in succession, the treaties—known collectively as the "Stevens Treaties"—share much in common. The treaties were negotiated using the same Chinook trading jargon, and while "[t]here is no record of English having been *spoken* at the treaty councils," "it is probable that there were Indians at each council who would have spoken or understood some English." *United States v. Washington*, 384 F. Supp. 312, 355-56 (W.D. Wash. 1974), *aff'd*, 730 F.2d 1314 (9th Cir. 1984) (emphasis added). Many of the same terms appear, without material modification, in all six documents. And five of the six treaties were ratified by the Senate on the same day, March 8, 1859.

This case, however, involves an important textual *difference* between two Stevens Treaties involving the Tribes here. Petitioner, the Makah Indian Tribe, entered into the Treaty of Neah Bay in January 1855. As part of its treaty, Makah—"primarily a seafaring people who spent their lives either on the water or close to the shore," *Washington*, 384 F. Supp. at 363—secured "[t]he right of taking *fish and of whaling or sealing* at usual and accustomed grounds and stations . . . in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands . . . ." *Supra* at 1 (emphasis added).

Respondents, the Quileute Indian Tribe and Quinault Indian Nation, who lived immediately south of the Makah, entered into the Treaty of Olympia six months later, in July 1855. That treaty was based on a draft that Stevens presented during negotiations at Chehalis River in February 1855, just a month after the Treaty of Neah Bay was signed. App. 35a-36a. In contrast to the Treaty of Neah Bay, the Treaty of Olympia (both in its draft and final form) secured "[t]he right of taking *fish* at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands . . . ." *Supra* at 2 (emphasis added).

Unlike the Treaty of Neah Bay, the Treaty of Olympia made no mention of whaling or sealing. That different treatment is consistent with the comparative priorities of these tribes: Whereas Makahs benefited from "the peculiarly rich resources

available to them in their ocean territories, primarily halibut and whale," and were "greatly concerned about their marine hunting and fishing rights," the Tribes to the south of them "relied primarily on salmon and steelhead taken in their long and extensive *river* systems." *Washington*, 384 F. Supp. at 363, 372 (emphasis added); *see also id.* at 375.

Nor is there any record that either Quileute or Quinault raised whaling or sealing during treaty negotiations. Indeed, the only recorded reference to whales or seals during negotiations at which Quileute and Quinault participated came at the instigation of *other* tribes, and only as part of a discussion of "[e]verything that comes *ashore*," including *beached* whales as well as shipwrecks. App. 38a (emphasis added).

2. Prior Stevens Treaties Litigation

The Stevens Treaties made the first of their many appearances before this Court in *United States v. Winans*, 198 U.S. 371 (1905). *Winans* involved a provision of the Stevens Treaty with the Yakama tribe that secured their "right of taking fish at all usual and accustomed places, in common with citizens of the Territory." *Id.* at 378. This Court held that provision precluded the construction by non-Indians of "fishing wheels" that would capture all of the fish traveling along the river, effectively preventing the Yakama from taking fish in their usual and accustomed locations. *See id.* at 381-82.

The treaties have been a fertile source of litigation ever since—which is hardly surprising given the importance of the subjects they address. This Court itself has directly addressed the treaties on seven different occasions; an eighth case is currently

pending before the Court. *See Washington v. United States*, No. 17-269. And since 1970, the U.S. District Court for the Western District of Washington has retained continuing jurisdiction to resolve disputes over the scope of the fishing rights the treaties secured. *See United States v. Washington*, 384 F. Supp. at 419. That litigation commenced when the United States sued Washington to enforce the tribal fishing rights under the Stevens Treaties. *Id.* at 327-28. Twenty-one tribes, including Makah, Quileute, and Quinault, intervened. The district court (Boldt, J.) issued a decision in 1974, which it referred to as "Final Decision #I," that made findings regarding many of the tribes' "usual and accustomed fishing grounds" within the meaning of the treaties. *Id.* at 359-82. At the same time, it retained jurisdiction to resolve any further disputes over the boundaries for such grounds. *Id.* at 419.

From Judge Boldt's initial decision more than 40 years ago, the "usual and accustomed grounds" under the Stevens Treaties have been understood to encompass "every *fishing* location where members of a tribe customarily *fished* from time to time at and before treaty times." *Id.* at 332 (emphasis added). The use of marine waters for travel, even when accompanied by incidental trolling, did not "make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians." *Id.* at 353. According to the district court, "[t]he words 'usual and accustomed' were probably used in their restrictive sense, not intending to include areas where use was occasional or incidental." *Id.* at 356.

This Court largely affirmed Final Decision #I in *Washington v. Washington State Commercial*

Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658 (1979). The Court adhered to its 1905 holding that, in "securing" the right of taking fish, the treaties "'reserv[ed]' rights previously exercised." *Id*. at 678 (quoting *Winans*, 198 U.S. at 381). The Court further held that the treaties "secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas." *Id*. at 679.

In the decades since Judge Boldt's initial decision, the district court has repeatedly applied the customary-fishing standard from Final Decision #I to resolve disputes over the "usual and accustomed grounds" of the 21 plaintiff-intervenor tribes. All told, the district court has made dozens of these so-called "U&A" determinations. Until this proceeding, however, neither the district court nor the court of appeals had ever held that a tribe's usual and accustomed grounds for *fishing* include waters where the tribe did not customarily *fish* for salmon or other species of finfish or shellfish at treaty times.[1]

3. The *Makah* Proceeding

Final Decision #I left unresolved the extent of the usual and accustomed *ocean* fishing grounds of Makah, Quileute, and Quinault. *See United States v. Washington*, 384 F. Supp. at 364, 372, 374. In 1982, Makah sought a determination of its usual and accustomed grounds for ocean fishing under the

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[1] The district court has made occasional findings regarding marine mammal harvests (specifically, for Makah, Quileute, and Skokomish). However, the court has never made a "usual and-accustomed grounds" finding for an area in which the tribes did not customarily fish to begin with. *See Washington*, 384 F. Supp. at 364 (Makah), 372 (Quileute), 376-77 (Skokomish); 626 F. Supp. at 1467 (Makah).

Treaty of Neah Bay. Following a trial at which Makah presented evidence that Makah fishermen had regularly fished for salmon, halibut, and other finfish as much as 40 miles offshore at treaty time (a considerable distance, but less than the 50 to 100 miles offshore that Makah had customarily traveled to hunt whale and seal), the district court determined Makah's "usual and accustomed" ocean fishing grounds extended 40 miles offshore. *United States v. Washington*, 626 F. Supp. at 1467.

During the *Makah* proceeding, the United States argued—successfully—that evidence of whaling or sealing in a particular area at treaty time could not establish that that area was a "usual and accustomed grounds" for *fishing*. The United States explained that, because "there are essential differences between whaling and fishing," evidence that the Makah whaled as far out as "90 or 100 miles" offshore failed to support "the tribe's claim that their usual and accustomed *fishing* grounds extended 90 miles offshore." U.S. Suppl. Memo re Makah Renewed Request for Determination of Ocean Fishing Grounds, at 4-5 (Oct. 12, 1982) (emphasis in original). Ultimately, that position prevailed, as the courts drew Makah's ocean "usual and accustomed grounds" boundary at 40 miles. *See infra* at 27-29.

B. This Dispute

1. The Makah Whiting Fishery

Relying on the 1982 *Makah* decision, Makah developed a substantial treaty fishery for Pacific whiting within its "usual and accustomed" fishing grounds. Tribal members invested millions of dollars on specialized midwater trawl vessels and gear to participate in the fishery and on training to operate

this equipment. The Tribe sought and received whiting allocations from the National Marine Fisheries Service (NMFS), and partnered with a company to process whiting harvested by tribal members at sea. *See* App. 139a.

For more than a decade, as Makah defended the tribal treaty rights against various legal challenges and proved the economic viability of a tribal whiting fishery, the Tribe labored mostly alone. In 2007, however, Quileute and Quinault announced their intent to enter the fishery. In doing so, they refused to request a separate whiting allocation from NMFS. Instead, they insisted that there could only be a single, overall "treaty" allocation, and that the Tribes would compete with each other for shares of the catch. Because whiting migrate from south to north during the spring, Quileute and Quinault's locations south of Makah meant that, as a practical matter, they would be able to substantially preempt Makah's harvest—if they could fish for whiting as far out to sea, or nearly as far out to sea, as Makah. *See* App. 139a-142a (summarizing whiting dispute).[2]

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[2] NMFS had previously established boundaries for Quileute and Quinault's fisheries by simply extending the adjudicated western boundary of Makah's usual and accustomed grounds due south. In doing so, however, NMFS explicitly recognized that those boundaries were not intended to have any presumptive or precedential effect in litigation over whether the usual and accustomed fishing grounds of Quileute and Quinault had actually extended that far out to sea, as the United States reiterated in two filings it made in the district court in this proceeding. *See* App. 133a-135a, 159a-161a.

2. District Court Proceedings

After unsuccessfully attempting to negotiate a mutually agreeable solution, Makah invoked the district court's continuing jurisdiction under Final Decision #I to determine the western boundaries of Quileute and Quinault's ocean fishing grounds. Makah argued that the Treaty of Olympia did not subsume a treaty right of whaling or sealing within the "right of taking fish," much less expand the right of taking fish at customary places to areas in which Quileute and Quinault hunted whales or seals but did not customarily fish at treaty time. The State of Washington likewise argued that, as a matter of law, the "usual and accustomed grounds" for fishing could not be expanded to include areas where the Tribes may have whaled or sealed but did not customarily fish. Washington Post-Trial Br. 3-15 (Apr. 17, 2015).

The case proceeded to trial, at which the parties disputed the legal relevance of whaling and sealing to establishing Quileute and Quinault's usual and accustomed grounds for fishing, and presented extensive evidence both of where the Tribes had fished and of where they had hunted whales and seals at treaty time. Based on that evidence, the court found Quileute and Quinault customarily *fished* up to 20 and 6 miles offshore, respectively, at treaty times—substantially closer to shore than Makah. App. 49a-50a (Quinault), 73a-74a (Quileute). Nevertheless, the court held the Tribes' "right of taking fish" extended 40 and 30 miles offshore, respectively, based on evidence that they had hunted *whales or seals* that far offshore. *Id.* at 129a.

In so holding, the district court framed the issue as whether "whaling and sealing practices can be the

basis for establishing the tribe's offshore U&A," which, the court explained, turned on "the scope of the 'right of taking fish,' as this term was used in the Treaty of Olympia." *Id.* at 115a. To answer that question, the court observed at the outset of its analysis that the "canons of construction for Indian treaties require that the Court give a 'broad gloss' on the Indians' reserved fishing rights." *Id.* at 116a.

"Applying these principles" to "linguistic evidence" about how the Indians might have understood the Treaty of Olympia in 1855, the district court concluded that the Treaty's reference to "fish" included "sea mammals." *Id.* at 121a-123a. From that premise, the court concluded that "Quinault and Quileute's usual and accustomed fishing locations encompass those grounds and stations where they customarily harvested marine mammals—including whales and fur seals—at and before treaty time," regardless of whether the Tribes customarily *fished* in those areas for salmon, halibut, or any other species of finfish or shellfish. *Id.* at 128a-129a. In so holding, the court refused to give any weight to the fact that the Treaty of Neah Bay had expressly distinguished between "taking fish" and "whaling or sealing," stating "these treaties were negotiated by different individuals and in different contexts." *Id.* at 124a.

3. The Ninth Circuit's Decision

Both Makah and the State of Washington appealed, and the Ninth Circuit affirmed in relevant part. The court concluded that the Treaty of Olympia's use of "fish" was ambiguous because, "[a]t the time of signing, 'fish' had multiple connotations of varying breadth." *Id.* at 10a. The court flatly refused to resolve that ambiguity by looking to the Treaty of

Neah Bay, holding that, "[r]ather than comparing and contrasting language and rights across treaties, courts '*must* interpret a treaty right in light of *the particular tribe's* understanding of that right at the time the treaty was made.'" *Id.* at 12a (quotation omitted; emphasis added).

Instead, the court invoked the "Indian canon of construction," under which "treaties 'are to be construed, so far as possible, in the sense in which the Indians understood them,' . . . and 'ambiguous provisions [should be] interpreted to their benefit[.]'" *Id.* at 12a-13a (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)). It rejected Makah's argument that this canon is inapplicable in cases like this one that involve conflicting Indian interests, where expanding one tribe's treaty rights will adversely affect a competing tribe's treaty rights. *See id.* at 13a-14a.

Having concluded that the unambiguous contrast between the Treaty of Neah Bay and Treaty of Olympia on the precise question was irrelevant, the court turned to Quileute and Quinault's supposed understanding of the Treaty of Olympia. It concluded Quileute and Quinault would have understood "fish" to include whales based on evidence concerning "[t]he general context and tenor of the negotiations" carried out previously with *other* tribes, and "ethnology studies and expert reconstructions of what likely happened at the negotiations" of the Treaty of Olympia. *Id.* at 15a-20a. The Ninth Circuit acknowledged that the "Chinook, Quileute, and Quinault languages had separate words for 'fish,' 'whales,' and 'seals,' as well as for 'fishing,' 'whaling,' and 'sealing,'" and that there were "practical and

cultural differences in the real-world [Quileute and Quinault] occupations of fishing, whaling and sealing." *Id.* at 17a-18a. But the court concluded that none of that trumped its own reconstruction of what the Tribes would have understood. *Id.* at 18a.

The court added that "interpreting 'fish' to cover whales and seals also respects the reserved-rights doctrine, which recognizes that treaties reserving fishing rights on previously owned tribal lands do not constitute 'a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted.'" *Id.* at 20a (quoting *Winans*, 198 U.S. at 381). The court pointed to no instance, however, in which the reserved-rights doctrine had been used to reserve a right to engage in a traditional activity (fishing, here) in areas in which the tribe did *not* traditionally engage in that activity.[3]

REASONS FOR GRANTING THE WRIT

From time immemorial, fisheries have been of "vital importance" to the Indian tribes who are parties to the Stevens Treaties. *Fishing Vessel,* 443 U.S. at 666. This Court thus has long taken an active role in superintending the "right of taking fish" at "usual and accustomed grounds" under the Stevens Treaties. On eight separate occasions, including this very term (*Washington v. United States*), the Court has

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[3] The Ninth Circuit agreed with Makah that the district court had erred in "imposing *longitudinal* boundaries" to implement the 40- and 30-mile distances where it found Quileute and Quinault whaled or sealed. App. 26a (emphasis added). That ruling is not at issue here. On remand, the district court already has drawn new boundaries consistent with the Ninth Circuit's decision. Quileute and Quinault have appealed that decision, seeking more expansive boundaries.

addressed the scope and implications of this fishing right, recognizing it as a matter of unquestioned "public importance." *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 393 (1968) (*Puyallup I*). The reason is plain: As competition for fisheries has intensified, "the meaning of the Indians' treaty right to take fish has accordingly become critical" not only to the tribes but to non-treaty fishing interests and the public at large. *Fishing Vessel*, 443 U.S. at 669.

This Court's intervention is needed again. The decision below holds, for the first time, that tribes have a treaty-based right to harvest fish in expansive marine-mammal hunting areas where they did not customarily fish at treaty time. The Ninth Circuit arrived at that result by flouting this Court's precedents on treaty interpretation and ignoring key textual differences between contemporaneous treaties with neighboring Indian tribes. It conflicts with the longstanding position of the United States on how to determine ocean boundaries for "usual and accustomed" fishing grounds under a Stevens Treaty. And it will only increase inter-tribal strife and reallocate harvests among treaty and non-treaty fishermen worth millions of dollars annually.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. The Ninth Circuit's Striking Disregard For Treaty Language Sharply Conflicts With This Court's Decisions

In reaching its decision, the Ninth Circuit contravened perhaps the most important canon of treaty interpretation: while "treaties are construed more liberally than private agreements," "even Indian

treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation*, 318 U.S. at 431-432). "[C]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985).

In that respect, the interpretation of Indian treaties is like interpretation of *any* treaty: It "'begin[s] with the text of the treaty and the context in which the written words are used.'" *Water Splash, Inc. v. Menom*, 137 S. Ct. 1504, 1508-09 (2017) (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988)); *see also Air France v. Saks*, 470 U.S. 392, 396-97 (1988) (same). And one particularly useful way of analyzing that text and context, this Court's cases demonstrate, is by looking to the language of other contemporaneous treaties to see how the inclusion or omission of similar terms was understood when the treaty was adopted.

For example, in *Minnesota v. Mille Lacs Band*, this Court addressed whether an 1855 treaty with an Indian tribe had extinguished the hunting, fishing, and gathering rights (collectively "usufructuary rights") preserved in an earlier treaty. 526 U.S. 172, 195 (1999). Although the 1855 treaty contained a broadly worded release of rights, the Court emphasized that it was "devoid of any language expressly mentioning—much less abrogating—usufractuary rights." *Id.* "These omissions are telling," the Court emphasized, "because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights. In fact, just a few months" after

completing the treaty in question, the same drafters "negotiated a Treaty with [a separate band of Indians] that expressly revoked fishing rights that had been reserved in an earlier Treaty." *Id.*

Similarly, in *Oregon Department of Fish and Wildlife*, this Court found that "the absence of any express reservation of [off-reservation hunting and fishing] rights, *as found in other 19th-century agreements*" with other tribes, indicated that "no special off-reservation rights were comprehended by the parties to the 1901 Agreement" with the Klamath Indian Tribe. 473 U.S. at 769 (emphasis added); *see also, e.g.*, *Johnson v. Geralds*, 234 U.S. 422, 436 (1914) (interpreting a provision in a treaty with the Chippewa in light of the meaning of a "contemporaneous treaty with the Winnebagoes [that] contained a similar" term); *cf. Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912) (pointing to provisions included in other contemporaneous treaties to discern meaning of treaty).

The courts of appeals likewise have long relied on the omission of a clause in one treaty that had been included in other contemporaneous treaties. In *United States ex rel. Neidecker v. Valentine*, for example, Judge Learned Hand addressed whether an extradition treaty between the United States and France gave the Secretary of State authority to surrender American citizens accused of committing offenses in France. 81 F.2d 32 (2d Cir. 1936). In doing so, he relied heavily on the fact that U.S. extradition treaties with six other countries contained language expressly granting such a right. *Id.* at 34. The inclusion of the express provision in those other treaties, he concluded, demonstrated that the

ambiguous language in the French treaty was *not* understood to convey such a right. *Id.*

The Ninth Circuit's decision flouts these bedrock principles of treaty interpretation. Even assuming the Ninth Circuit was right that "fish" had some meanings at treaty time that might encompass whales (though even then, not seals), it erred in categorically dismissing the contemporaneous usage in the Treaty of Neah Bay to resolve that ambiguity. The Treaty of Neah Bay clearly illustrates that "fishing" and "whaling or sealing" were understood to refer to separate things and separate pursuits in the context of the Stevens Treaties. Certainly that is the way the Senate would have understood it, when it ratified the Treaty of Olympia and Treaty of Neah Bay on the very same day in 1859. And there is no persuasive reason to think that these neighboring Indian tribes—for whom the evidence shows there were linguistic as well as "practical and cultural differences in the real-world occupations of fishing, whaling, and sealing," App. 18a—would have viewed the treaty language any differently.[4]

The Ninth Circuit's contrary analysis displaces the requisite inquiry into the meaning of the treaty's plain text with a one-sided, purposivist approach to interpretation that this Court and other circuit courts

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[4] Indeed, the Treaty of Olympia and Treaty of Neah Bay were both negotiated using the same Chinook trading jargon. Like English, the Chinook language "had separate words for 'fish,' 'whales,' and 'seals,' as well as for 'fishing,' 'whaling,' and 'sealing.'" App. 17a-18a. And the Quileute and Quinault's own expert at trial testified that he was aware of no instance in which the Quileute and Quinault words for "fish" and "fishing" had ever been used to refer to sea mammals or sea mammal hunting. *See* Ninth Circuit Makah Excerpts of Record 325-30, 335-41.

have squarely rejected. Until now, it was well established that a court "cannot, under any acceptable rule of interpretation, hold that the Indians [had a certain right] merely because they thought so." *Confederated Band of Ute Indians v. United States*, 330 U.S. 169, 180 (1947); *see also DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975) (Indian canon "is not a license to disregard clear expressions of tribal and congressional intent"); *Little Six, Inc. v. United States*, 280 F.3d 1371, 1376 (Fed. Cir. 2002); *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 457 (7th Cir. 1998).

As the Federal Circuit held just last year, "the extent of our interpretive deference to the perspective of the Native leaders cannot extend past the meeting of the minds between the parties." *Jones v. United States*, 846 F.3d 1343, 1356 (2017). It is "the intention of the parties, and not solely that of the superior [or inferior] side, that must control any attempt to interpret [a treaty]." *Fishing Vessel*, 443 U.S. at 675; *see also Absentee Shawnee Tribe of Indians of Okla. v. Kansas*, 862 F.2d 1415, 1417 (10th Cir. 1988). The Ninth Circuit flouted this rule, putting all the weight on its supposed reconstruction of Indian understanding and simply disregarding the language of the treaties that the Senate ratified.

Indeed, the Ninth Circuit's refusal to consider the language of other contemporaneous treaties conflicts with this Court's decisions interpreting the Stevens Treaties themselves. In *Puyallup Tribe v. Department of Game*, this Court interpreted the fishing right in the Treaty of Medicine Creek, to which Puyallup was a party, based on its prior interpretation of fishing rights in the Treaty with the Yakama. 391 U.S. at 398-99 (discussing *Tulee v.*

Washington, 315 U.S. 681 (1942)). And in *Fishing Vessel*, the Court relied on prior interpretations of the Medicine Creek and Yakama treaties, as well interpretations of other similar treaties and agreements, to interpret the right of taking fish in all six Stevens Treaties. 443 U.S. at 679-85. The Court explained that "[a]ll of the treaties were negotiated by Isaac Stevens . . . and a small group of advisers," *id.* at 666, were authorized by a single act of Congress, and contained the same major provisions, including the right of taking fish, *id.* at 661-62 & n.1; *see id.* at 667-68 & n.11.

The Ninth Circuit's refusal to consider the language in the contemporaneous Treaty of Neah Bay is bad enough. But the Ninth Circuit exacerbated that error by replacing an analysis of the different language used in contemporaneous treaties among neighboring tribes on the precise issue with its own reconstruction of how Quileute and Quinault might have *wanted* the treaty to be written, disregarding concrete evidence of linguistic and real-world differences among fishing, whaling and sealing in Quileute and Quinault language and society. *See* App. 17a-18a. This approach led the court to effectively rewrite the Treaty of Olympia by adding a "whaling or sealing" clause that the parties did not include—in direct conflict with *Choctaw Nation*—and then to rely on that imaginary clause to greatly expand Quileute and Quinault's fishing right to waters in which they did not fish at treaty times despite the express restriction of the right of taking fish to "usual and accustomed grounds."[5]

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[5] In seeking to defend the result here, Quileute and Quinault have pointed to the "*Shellfish* proceeding," under the

B. The Ninth Circuit's Invocation Of The Indian Canon Conflicts With The Decisions Of This Court And Other Courts

The Ninth Circuit's invocation of the Indian canon in this case conflicts with the decisions of this Court and other courts in another fundamental respect: the Ninth Circuit invoked the canon to favor the interests of one set of Indian tribes over another Indian tribe.

As this Court has held, the Indian canon "has no application [where] the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976) (construing statute). Other courts have applied that principle as well. *See Utah v. Babbitt*, 53 F.3d 1145, 1150 (10th Cir. 1995) (Indian canon inapplicable "because the interests at stake both involve Native Americans"); *Confederated Tribes of Grand Ronde Cmty. v. Jewell*, 75 F. Supp. 3d 387, 396 (D.D.C. 2014)

Stevens Treaties, in which the lower courts held "usual and accustomed grounds" for shellfishing include all areas in which the tribes customarily harvested finfish. *United States v. Washington*, 873 F. Supp. 1422, 1430-31 (W.D. Wash. 1994), *aff'd*, 157 F.3d 630 (9th Cir. 1998). But the Tribes miss the salient point: The holding in the *Shellfish* proceeding was "compelled by the plain language of the Treaties." *Id.* at 1430. The Stevens Treaties include a proviso to the "right of taking fish" that prohibits taking "shell-fish" from staked and cultivated beds. The explicit proviso for "shell-fish" establishes that the treaties included "shell-fish" within "fish"; otherwise, the proviso would serve no purpose. *Id.* In this case, however, the textual evidence points in the opposite direction—namely, that whales and seals are *not* covered by the bare "right of taking fish" because, otherwise, the "whaling or sealing" provision in the Treaty of Neah Bay, like the shell-fish proviso, would serve no purpose.

(Indian canon "does not apply for the benefit of one tribe if its application would adversely affect the interest of another tribe"), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016); *Cherokee Nation of Okla. v. Norton*, 241 F. Supp. 2d 1374, 1380 (N.D. Okla. 2002) ("Tenth Circuit and other courts have also held that this [Indian] canon is inapplicable when 'the competing interests at stake both involve Native Americans'" (internal brackets omitted)); *see also Baker v. John*, 982 P.2d 738, 791 (Alaska 1999) (Matthews, J., dissenting) (Indian canon is a "non-factor" because "Native Alaskans are on both sides of this case"). The Ninth Circuit's invocation of the Indian canon here directly conflicts with those decisions.

The Ninth Circuit believed it appropriate to apply the Indian canon even when the dispute is among Indian tribes unless the competing tribes assert "contradictory rights under the *same* statute or treaty." App. 14a (emphasis added). This analysis just doubles down on the Ninth Circuit's improper refusal to consider the language of other contemporaneous treaties. But more fundamentally, the rule established by this Court in *Hollowbreast* and followed in the Tenth Circuit and elsewhere turns on the *adversity* of Indian interests, not the *source* of those interests. That follows from the basis for the Indian canon itself, which is "the unique trust relationship between the United States and the Indians." *Oneida*, 470 U.S. at 247. Whatever benefit that trust relationship may confer when the United States is adverse to a tribe, it provides no basis for granting one tribe a preference over another in a dispute among the tribes themselves.

The Ninth Circuit's holding also flies in the face of this Court's long history, discussed above (at 20-21),

of interpreting the Stevens Treaties as a *group*. That practice reflects the fact all of the Stevens Treaties tribes share in a common treaty allocation for each species of fish, such that greater rights for one tribe will often mean lesser rights, as a practical matter, for others, even if they are not parties to the same treaty. *See Fishing Vessel*, 443 U.S. at 685-86; *United States v. Washington*, 143 F. Supp. 2d 1218, 1220-21 (W.D. Wash. 2001). Indeed, it was Quileute and Quinault's insistence that they fish on the same treaty whiting allocation as Makah that triggered this dispute. On the Ninth Circuit's logic, however, the Indian canon will apply if a given tribe's "usual and accustomed grounds" are challenged by a tribe that is a party to a different Stevens Treaty, but will not apply if the exact same challenge over the exact same issue is raised by a tribe that entered into the same Stevens Treaty. Especially given the ad hoc manner in which tribes were assembled for purposes of the Stevens Treaty negotiations, *see Fishing Vessel*, 443 U.S. at 664 n.5; App. 34a, this distinction makes no sense. Instead, it will simply introduce arbitrary differences in outcome among the tribes, and invite gamesmanship in the longstanding and inevitable disputes over "usual and accustomed grounds."

Despite having grounded its analysis on the Indian canon, the Ninth Circuit stated in cursory fashion that "we would reach the same conclusion without a beneficial preference" for one tribe over the other because "the evidence alone supports a broad interpretation of the Treaty language." App. 14a. But of course, the court refused to consider the most relevant evidence—the fact that the Treaty of Neah Bay, unlike the Treaty of Olympia, explicitly refers to "whaling or sealing." And even if the court *had*

considered all the evidence itself, the Ninth Circuit ignored the fact that the *district court's* decision was guided in large part by the Indian canon, which the district court identified as the "[f]irst . . . canon[] of construction for Indian treaties" upon which its decision depended. *Id.* at 116a. Without the overlay of that presumption, the district court's view of the evidence and resulting interpretation of the Treaty might well have been different. A determination that the Indian canon was inapplicable, therefore, would at a minimum require the district court to reconsider its decision in the first instance, which in turn could—and should—alter the result it initially reached.

Especially given the increasing frequency of disputes between and among Indian tribes (including in connection with gaming), the Court's guidance on the role of the Indian canon in this context is needed.

C. The Ninth Circuit's Decision Conflicts With This Court's Decisions On The "Reserved Rights" Principle

Importantly, the Ninth Circuit's decision also conflicts with this Court's decisions holding the "right of taking fish at all usual and accustomed places" under the Stevens Treaties was not a "grant of rights to the Indians," but instead a *reservation* of "rights previously exercised." *Fishing Vessel*, 443 U.S. at 678 (citing *Winans*, 198 U.S. at 381). This "reserved rights" principle is derived from the text of the treaties, which "secure" rather than *grant* the right of taking fish at "usual and accustomed" places, *id.*, and has been critical to this Court's decisions construing that right. And as the State of Washington explained below, the principle precludes the Ninth Circuit's

interpretation here regardless of whether "fish" is interpreted to encompass marine mammals.

The district court found Quileute and Quinault traditionally fished out to only 20 and six miles offshore, respectively, and the Tribes did not challenge those findings on appeal. App. 49a-50a, 73a-74a.[6] Thus, as the State of Washington explained, Quinault and Quileute did not prove "that their treaty-time forefathers fished in the same far-offshore areas where they purportedly engaged in whale or seal hunting." Washington CA9 Br. 21-22.

By nevertheless construing the Treaty of Olympia's "right of taking fish at all usual and accustomed grounds" to encompass huge ocean areas beyond where the Tribes traditionally fished, the Ninth Circuit effectively held the Treaty created *new*, expansive fishing rights that the Tribes did not exercise at treaty time. This holding directly contravenes not only the text of the Treaty, which "secure[s]" fishing rights at "usual and accustomed" places, but also the core, reserved rights principle this Court has derived from that text and repeatedly applied in construing the Stevens Treaties. That conflict underscores the need for this Court's review.[7]

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[6] Makah argued that Quileute did not customarily fish out to 20 miles, but the Ninth Circuit did not address that argument because of its erroneous reliance on whaling and sealing.

[7] Quinault and Quileute argue that the reserved rights principle supports the conclusion that they retained the right to engage in whaling and sealing because they did not expressly forfeit such rights in the Treaty. But even assuming the Tribes retained a right to hunt whales and seals not expressed in the treaty, that does not mean that the treaty granted them a *new* right to take fish in areas in which the tribes hunted whales and seals but did not customarily fish at treaty times.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE LONGSTANDING TREATY INTERPRETATION OF THE UNITED STATES

In holding Quileute and Quinault's "usual and accustomed" fishing grounds extend beyond the grounds in which they traditionally fished at treaty time to areas in which they hunted whales or seals, the Ninth Circuit also adopted a position directly at odds with the United States' interpretation of the fishing right in the only prior proceeding determining "usual and accustomed" ocean fishing boundaries.

In the *Makah* proceeding, the Special Master initially recommended a boundary for Makah's "usual and accustomed grounds" for fishing roughly 100 miles offshore, even though the evidence showed the Tribe "fished regularly at areas about 40 miles out" and the only hunting beyond 40 miles involved whales or seals. *United States v. Washington,* 730 F.2d at 1317-18. In response, the United States filed objections to the use of whaling or sealing to establish fishing grounds. The district court adopted the United States' position and held that Makah's "usual and accustomed grounds" for ocean fishing extended only to 40 miles (where Makah had customarily fished), not 100 miles (where Makah had hunted whales and seals), *Washington,* 626 F. Supp. at 1467, and the Ninth Circuit affirmed, 730 F.2d 1314.

In its brief objecting to the Special Master's report in that proceeding, the United States explained that the evidence showed that at treaty time "the Makah Indians fished for salmon, halibut and other species of fish at locations up to 40 miles offshore." *Makah* US Supp. Memo at 3. Although the United States

recognized that there was a report that "the Makahs traveled fifty to one hundred miles in their canoes to capture whales," the United States dismissed the legal relevance of the report on the ground that it "does not speak of *fishing*, and there are essential differences between whaling and fishing." *Id.* at 4 (emphasis added). The United States likewise stressed that "the usual and accustomed fishing areas must be defined now in terms of where tribal members customarily *fished*," and "there simply is no evidence supporting the tribe's claim that their usual and accustomed *fishing* grounds extended 90 miles offshore." *Id.* at 5 (emphasis in original); *see also* U.S. Objections to Special Master's Report at 2-4. The United States reiterated the same position in defending the district court's decision on appeal in the Ninth Circuit. Brief of Plaintiff-Appellee United States of America at 9-10, *United States v. Washington*, No. 93-3802 (9th Cir. Nov. 18, 1983).

It is "well settled that the United States' interpretation of a treaty is entitled to great weight." *Medellin v. Texas*, 552 U.S. 491, 513 (2008) (internal quotations omitted). Here, the United States' interpretation of the Treaty of Neah Bay is highly relevant to the interpretation of the Treaty of Olympia. Even assuming the Ninth Circuit correctly held the Treaty of Olympia's "right of taking fish" extends to whales and seals, the Treaty could not possibly confer a broader fishing right than the Treaty of Neah Bay, which, unlike the Treaty of Olympia, explicitly refers to whaling and sealing. Moreover, as the only common party to the Treaty of Neah Bay and Treaty of Olympia, the United States has a substantial interest in ensuring that the courts' interpretations of the Treaties do not conflict.

Nevertheless, the Ninth Circuit afforded no weight to the United States' longstanding interpretation of the ocean fishing right in the Stevens Treaties.[8]

Instead, the Ninth Circuit focused on whether its *own* prior decision in the *Makah* proceeding decided "the question of what role whaling and sealing evidence plays in a U&A determination," and concluded it had not. App. 9a. In the court's view, its prior *Makah* decision "turn[ed] on the extent of the evidence presented" concerning whaling and sealing, not on that evidence's relevance. *Id.* We disagree with that reading of the *Makah* decision. But the salient point is that the Ninth Circuit's subsequent interpretation of its decision in the *Makah* proceeding in no way changes the *United States' position* in the proceeding. Nothing in the Ninth Circuit's decision in *Makah,* or its spin on *Makah* below, changes the United States' interpretation of the Treaty there. And the conflict between the decision below and the United States' longstanding treaty interpretation is an independent reason to grant certiorari.

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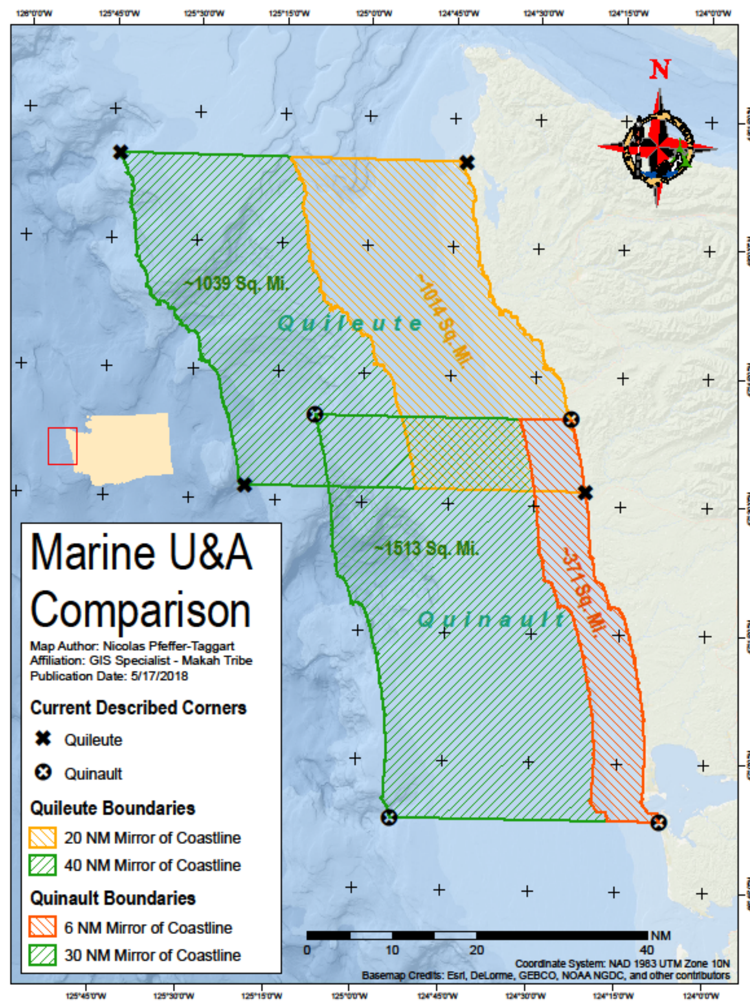
[8] In doing so, the Ninth Circuit ignored the State of Washington's position on the views expressed by the United States in the *Makah* proceeding. *See* Washington CA9 Br. 9 ("[T]he United States argued that Makah's treaty-reserved ocean fishing claim was limited to those locations no farther distant than 40 miles where they regularly fished at treaty times, notwithstanding undisputed evidence of whale hunting beyond 40 miles."); Washington CA9 Reply Br. 5-6 (discussing United States' "legal argument" that "whale hunting cannot establish usual and accustomed grounds or stations for fishing finfish as a matter of treaty interpretation").

III. THE NINTH CIRCUIT'S DECISION WARRANTS THIS COURT'S REVIEW

The proper manner of interpreting Indian treaties, especially the weight to be given to the text and the context in which the words were used, is a recurring issue of unquestionable importance. But for several reasons, this case also has enormous practical significance to the Indian tribes that are parties to the Stevens Treaties, non-Indians who fish the waters at issue, and the State of Washington.

The first is the sheer magnitude of the area in question. As the following map shows, the Ninth Circuit's ruling extends Quileute and Quinault's treaty fishing rights over some 2,400 square miles of ocean where they did not customarily fish, with the green area reflecting the expanse at issue here[9]:

[9] *See* Makah Indian Tribe, *Map Depicting Disputed Area*, http://makah.com/2018/05/18/dispute-regarding-the-usual-and-accustomed-fishing-areas-of-the-quileute-tribe-and-quinault-nation/map-depicting-disputed-area-v2/ (last visited May 21, 2018).



Not surprisingly, given the vast area of ocean at issue, the Ninth Circuit's decision will also have a major impact on Pacific fisheries. As this case illustrates, at least some tribes went *much* farther out to sea to hunt whales and seals than they did to fish, so if evidence of whaling and sealing is relevant in establishing a usual and accustomed ground for

fishing, the areas over which the tribes have treaty-based rights to fish are many times larger.

Those rights, moreover, apply to *all* fish—not just Pacific whiting, the particular fish that gave rise to the dispute in this case—and so they would apply to salmon, halibut, and any other fish the Tribes may decide to harvest in the future. And while ocean fisheries may have seemed overabundant at treaty time, they are subject to much greater demands today, creating the potential for fights over limited resources and the need to apportion harvest opportunities for each different species of fish. For this reason, among others, the State of Washington is "directly impacted by the ruling below." State of Washington's Application for Extension of Time to File Petition for Certiorari 2, State of Washington v. Quileute Indian Tribe and Quinault Indian Nation, No. 17A1095. As the State explained, the expansion of a treaty right to fish over large swaths of ocean means that all "individuals who participate in [existing] fisheries will see their harvest opportunities substantially reduced." *Id.* at 3.

The magnitude of these impacts is illustrated by the Pacific whiting fishery, in which Makah invested millions of dollars based on its own established treaty rights to continue fishing in areas where it *fished* at treaty time. In announcing their intent to enter this fishery, Quileute and Quinault projected that they would harvest more than 70,000 metric tons of whiting annually. *See* App. 140a n.1; Dist. Ct. Dkt. No. 126-1 at 50-51. This translates into harvests worth more than $11.5 million per year. *See* 83 Fed. Reg. 3291, 3293 (Jan. 24, 2018) (noting 2016 average price of $165 per metric ton). Thus, the Ninth Circuit's decision may reduce annual harvests

currently available to Makah and non-treaty fishermen worth millions of dollars. *See* App. 139a (discussing potential impacts on "Makah's valuable Pacific whiting fishery"); Dist. Ct. Dkt. No. 76 at 2 (declaration of state fisheries official discussing impacts on "the non-treaty fishery based in Washington and State tax revenue that is collected").

But this represents only a fraction of the potential impact of the decision below on fisheries. As discussed, the boundaries set in this case for Quinault and Quileute's "usual and accustomed" fishing grounds are not limited to Pacific whiting; they apply to all fish. Thus, recognizing a treaty right for Quileute and Quinault to fish in thousands of square miles of ocean waters beyond those in which they customarily fished at treaty time has allocative effects in other valuable sport and commercial fisheries (including halibut, salmon, black cod, groundfish, and crab) as well—worth millions of dollars more. *See, e.g.*, Dist. Ct. Dkt. No. 278 at 38-39.

Apart from the substantial impact on other fisheries and fishing communities, the Ninth Circuit's decision will also profoundly disrupt previously settled understandings about the Stevens Treaties. As discussed, the Ninth Circuit's conception of how to draw the boundary for "usual and accustomed grounds" for fishing conflicts with the United States' own interpretation of the Stevens Treaties. The decision almost certainly will lead to an "arm's race" in which other tribes will seek to extend their fishing boundaries based on marine mammal harvests.

The decision below will destabilize settled understandings of other clauses that are used in multiple treaties, too, because the Ninth Circuit's methodology—under which a prior interpretation of a

given term in a treaty (here, "fish") sheds essentially no light on the meaning of that same term in other treaties ratified by the Senate around the same time—turns entirely on a tribe-by-tribe, treaty-by-treaty reconstruction of likely understandings, in which "expert reconstructions" (App. 16a) about what happened 150 plus years ago carry more weight than the text of the treaties themselves.

And because the Ninth Circuit also held that the application of the Indian canon depends on whether the competing parties in a given case are all subject to the same treaty or are instead parties to different treaties (*see* App. 13a-14a), those questions will potentially vary not just from one treaty to the next but from one *case* to the next, even where dealing with the same treaty, further multiplying litigation that has already burdened the federal courts and stoked tensions between the tribes. In *United States v. Washington* alone, the district court and Ninth Circuit have been called upon to adjudicate at least a dozen inter-tribal disputes in the last ten years in addition to this case. And the fallout from the Ninth Circuit's novel conception of the Indian canon in cases in which the dispute is among tribes themselves would extend to other types of inter-tribal disputes as well, including increasingly contentious (and litigious) conflicts over Indian gaming.

In short, denying review of the Ninth Circuit's seriously flawed decision in this case and allowing the conflicts discussed above to persist will only exacerbate the number of disputes that ultimately will require this Court's intervention.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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