Nos. 21-838, 21-840

In The
Supreme Court of the United States

PENOBSCOT NATION,
Petitioner,
v.
AARON M. FREY, ATTORNEY GENERAL OF MAINE, ET AL.,
Respondents.

UNITED STATES,
Petitioner,
v.
AARON M. FREY, ATTORNEY GENERAL OF MAINE, ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF MEMBERS OF THE CONGRESSIONAL NATIVE AMERICAN CAUCUS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are U.S. Representatives Sharice L. Davids and Raúl M. Grijalva, Co-Chair and Vice-Chair, respectively, of the Congressional Native American Caucus, a coalition of Members of Congress working to improve nation-to-nation relationships between the United States and the 574 sovereign tribal nations. For over 20 years, the Caucus has worked to protect tribal sovereignty, satisfy federal trust obligations, and improve the lives of American Indians, Alaska Natives, and Native Hawaiians. *Amici* are committed to ensuring that the United States fulfills its trust responsibilities and protects tribal sovereignty as set forth in the U.S. Constitution and treaties.

As current leaders of the Caucus representing both political parties, *amici* have worked to strengthen the relationships between the United States and Indian tribes through legislation that secures the vital sovereign interests of tribal governments, including the implementation of treaties and agreements with Native nations such as the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721 et. seq. (the "Agreement").[2] That Agreement was enacted to set

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[1] Counsel of record for all parties received timely advance notice of intent to file this brief and consented to filing of the brief. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

[2] This brief refers to the Agreement as it was formerly codified at 25 U.S.C. §§ 1721-1735. The Agreement ratified Maine's Act to Implement the Maine Indian Claims Settlement, 30 M.R.S.A.

the boundaries of the Penobscot Nation reservation under federal law, recognize the sovereignty of the Penobscot Nation, and preserve the rights of the Nation's members to sustenance fishing, hunting, and trapping within its reservation without interference from the State of Maine—aims that are all undermined by the court of appeals' decision.

Amici write separately to provide the Court with their unique congressional perspective on interpreting treaties and agreements with Native nations—especially those agreements codified legislatively. When enacting such agreements, Congress fulfills the trust responsibility of the United States to Indian tribes, furthers the congressional policy of tribal self-determination, and legislates against the backdrop of Supreme Court precedent. The court of appeals' decision upends those principles and gravely misconstrues the text, history, and purpose of the Agreement, with severe consequences that could reverberate for the many other Native nations with reservation boundaries set by agreements memorialized in statutes, or similar treaty substitutes, rather than formal treaties. The Court's review is urgently needed to forestall this upheaval.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the first decades of the Republic, the Penobscot Nation entered into two treaties with Massachusetts that ceded certain aboriginal lands on either side of

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§§ 6201 et seq., which this brief refers to as the "Implementing Act."

the Penobscot River. But not, all agree, the submerged lands below the river itself. Massachusetts broke federal law when it entered those treaties, and the United States, on behalf of the Penobscot Nation, sued to press the Nation's claims to the unlawfully ceded land. The agreement negotiated by the Penobscot Nation, the United States, and Maine (as Massachusetts' successor) to resolve those claims struck a clear bargain, codified in Maine and federal statutes: the unlawful treaties were ratified, the Penobscot Nation was compensated for the cession of those lands, and the Nation's sovereignty over the lands that had not been ceded by treaty was reaffirmed, including especially its rights to fish in the river.

Contravening the codified agreements' text, purpose, and history, the court of appeals' myopic and hypertextual interpretation places the Nation in a worse position than the unlawful treaties from 1796 and 1818 did: forcing the Nation to cede without compensation all of the land under the river—and thus all sovereignty over the only place where the Nation's fishing rights matter—simply because a dictionary defines "island" as a piece of land. This judgment is untenable in light of the parties' intent—including the intent of Congress—an intent which is revealed under the rules this Court has repeatedly applied when interpreting treaties and agreements with Native nations.

The court of appeals dodged these principles by reasoning the codification of the parties' agreement was not a treaty, and therefore was subject only to "ordinary tools of statutory construction." App. 10a;

see id. 38a.[3] But, as the dissent recognized, such tools point to the opposite result. In contravention of longstanding Supreme Court precedent, the court of appeals failed to consider the intent of the parties in reaching the agreement—including Congress's intent to act as a trustee for the Penobscot Nation in fashioning an agreement to settle a longstanding dispute arising from Maine's illegal acquisition of the Nation's lands. Compounding that error, the court of appeals did not follow this Court's rules to require a clear statement for enactments diminishing reservation boundaries, and to resolve any ambiguities in treaties and agreements with Native nations in favor of those nations.

What's more, by creating a distinctive doctrine for reservations whose borders are set by an agreement memorialized in a congressional act, rather than a formal treaty, the court of appeals created a conflict with potentially wide-ranging consequences. Whether a formal treaty, or a congressional act codifying a settlement involving a prior illegal treaty, the doctrinal rules should be the same. The Penobscot Nation is not alone in having its reservation borders set by agreement or "treaty substitute" rather than by a formal treaty. *See* Charles F. Wilkinson, American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy 63-64 (1987). Many Native nations across the United States have their reservation borders set by executive order or legislation. *See* Appendix. This Court, as well as the

[3] Citations to the Petition Appendix are to the Appendix in No. 21-838.

Second and Tenth Circuits, have interpreted these executive orders and statutes using the principles applicable to the interpretation of Indian treaties.

The court of appeals refused to do so, and therefore it did not interpret the Agreement considering the intent of the parties, did not resolve any ambiguity in favor of the Penobscot Nation, and did not require a clear statement from Congress before interpreting the Agreement to further diminish the reservation borders. Had it applied any one of those principles, much less all of them, the result would have been different.

In memorializing the Agreement in a statute, Congress intended to confirm the borders of the Penobscot Reservation where they had been established by treaty for over one hundred years, to resolve the unlawful purchases of land by the state of Massachusetts on either side of the Penobscot River, and to protect the Penobscot Nation's sustenance fishing, hunting, and trapping rights. Congress did *not* intend to diminish the Penobscot Reservation borders beyond that set by treaty and to cede lands implicitly and without compensation. Interpretations of the Agreement must reflect Congress's intent and the background understandings that Congress takes for granted when drafting agreements with Native nations, including the federal trust relationship and Supreme Court precedent that makes clear that words like "islands" refer to encompassing waters when those waters are an essential part of tribal self-sufficiency. This Court should grant the petitions for review to restore the rule that the well-established

methodology for interpreting Indian treaties applies as well to claims settlement acts.

ARGUMENT

I. The Court Of Appeals' Failure To Apply Indian Canons Of Construction Absent A Formal Treaty Conflicts With Decisions Of This Court And Other Courts Of Appeal.

This Court has long recognized that special rules apply in the context of "interpretation of agreements and treaties with the Indians." *Winters v. United States*, 207 U.S. 564, 576 (1908). These agreements are "essentially … contract[s] between two sovereign nations." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). Therefore, they "'must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians,'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999)), and the agreement's terms must be construed "'in the sense that they would naturally be understood by the Indians,'" *id.* (quoting *Fishing Vessel Assn*, 443 U.S. at 676).

The decision below dodged these fundamental principles because, it reasoned, "the Settlement Acts are not treaties. … They are statutes. The treaty cannon has no bearing on their interpretation." App. 38a. The decision thereby created out of whole cloth a distinctive doctrine for agreements reached outside of the formal treaty process, even agreements (as here) meant to settle disputes arising from concededly

illegal treaties. In refusing to apply the Indian canons to such legislation, the First Circuit ruled in conflict with decisions of this Court and other courts of appeals. Moreover, by interpreting the Agreement to diminish reservation borders without requiring a clear statement of congressional intent to cede lands without compensation, the decision conflicts with this Court's precedent. *See Solem v. Bartlett*, 465 U.S. 463, 470-472 (1984). In effect, the court of appeals has created an end run around this Court's precedents on reservation diminishment and agreement interpretation by refusing to apply those precedents to an agreement ratified outside of the formal treaty process.

These wrong turns have potentially grave consequences beyond the instant dispute. From the late nineteenth century to today, the United States has moved away from formal treaties and towards multi-sovereign agreements that appear on their face as typical legislation. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm within Public Law*, 132 Harv. L. Rev. 1787, 1815 (2019) (charting the similarities between trends in federal Indian law and "twentieth-century international lawmaking [] made largely by ex ante congressional-executive agreements"). In the context of federal Indian law, this Court has held affirmatively that "treaty-substitutes" are indistinguishable from agreements ratified by treaty. *Antoine v. Washington*, 420 U.S. 194, 205 (1975) (documenting the 1871 shift away from "the contract-by-treaty method of dealing with Indian tribes" and holding agreements ratified by legislation are indistinguishable from treaties); *Arizona v.*

California, 373 U.S. 546, 596-97 (1963) (holding reservations established by executive order are indistinguishable from reservations established by treaty).[4] Like other agreements with Native nations or "treaty-substitutes," the Agreement here resolved a range of issues through negotiations and memorialized an agreement among three sovereigns (the Penobscot Nation, the United States, and Maine). The First Circuit's approach to interpreting such an agreement is inconsistent with congressional intent, risks upsetting settled expectations for many Native nations' agreements with the United States made outside of the Article II treaty process, and cries out for this Court's review.

A. The First Circuit stands alone in adopting a distinct doctrine for agreements that are not formal treaties.

1. Unlike the First Circuit, this Court has never distinguished between formal treaties and other inter-sovereign agreements in the context of "interpretation of agreements and treaties with the Indians." *Winters*, 207 U.S. at 576; *Antoine*, 420 U.S. at 205; *Arizona*, 373 U.S. at 596-97. Statutory codifications of agreements

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[4] Wilkinson, *supra*, at 63-67 (charting the 1871 shift away from treaties toward "treaty substitutes" and the Supreme Court's treatment of "treaty substitutes" as interchangeable in *Antoine* and *Arizona v. California*); *see also* Seth Davis, *The Constitution of Our Tribal Republic*, 65 UCLA L. Rev. 1460, 1468-70 (2018) (explaining that since 1871, when Congress ended formal treatymaking with Native nations, "negotiations memorialized in statutes and executive orders" have substituted for treaties).

with Native nations are treated no differently than treaties and such agreements are preserved unless Congress's intent to abrogate them unilaterally is "unambiguous," "clear[,] and plain." *United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R.*, 314 U.S. 339, 346, 353 (1941).

Ample Supreme Court precedent applies federal Indian law's rules of interpretation and canons of construction to myriad agreements, statutes, and executive orders, not just to formal treaties. *See* Cohen's Handbook of Federal Indian Law § 2.02[1], at 114-15 (Nell Jessup Newton ed., 2012). Thus, in *Antoine*, the Court explained that the Indian canons inform interpretation of both treaties and statutes "ratifying agreements with the Indians." 420 U.S. at 199. In *Choate v. Trapp*, the Court presumed "conclusively" that Congress intended for courts to read a statute ratifying an agreement with an Indian tribe to favor Indians, if the text is "'susceptible of [that] more extended meaning.'" 224 U.S. 665, 675 (1912) ("In view of the universality of this rule, Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their favor in determining the rights granted to the Choctaws and Chickasaws."). To determine whether the text is so "susceptible," the Court eschewed the "'technical meaning of the[] words'" in favor of the way they would "'naturally be understood by the Indians.'" *Id.* Courts must thus look to a tribe's understanding both to determine whether an agreement codified in statute is ambiguous and to resolve that ambiguity in favor of the tribe, in contrast to the "strict

construction" approach applied to typical statutes. *Id.* ("The rule of strict construction would have compelled a holding that the property was liable. But Mr. Justice Davis, in speaking for the court [in *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866)], said that 'enlarged rules of construction are adopted in reference to Indian treaties.'").

The Court's decision in *United States ex rel. Hualpai Indians*, exemplifies the proper approach. In that case, this Court interpreted Congress's act "creating the Colorado River reservation [as] . . . making an offer to the Indians, including the Walapais, which it was hoped would be accepted as a compromise of a troublesome question." 314 U.S. at 353. In describing Congress's act as an offer to contract, the Court did not simply turn to plain text and dictionary definitions. Instead, the Court reflected upon the intent of all parties to the act and recognized that the Tribe could decline—which it did. *Id.* at 354 ("the Walapais did not accept the offer which Congress had tendered"). Further, in interpreting the effect of Congress's act creating the Reservation on the Tribe's aboriginal title, the Court employed "the rule of construction recognized without exception for over a century," including in *Choate*, that the Tribe's understanding be considered in determining whether the statute presents an ambiguity that must be resolved in favor of Indians. *Id.* Because there was not a "clear and plain indication" that Congress intended to extinguish aboriginal title, the Court concluded "that the creation of the Colorado River reservation was, so far as the Walapais were concerned, nothing more than an abortive attempt to solve a perplexing

problem." *Id.* at 353-55. When the Court turned to a subsequent executive order creating a reservation, it again looked to the understanding of the Tribe before concluding that its rights had been ceded. *See id.* at 357-58 ("[I]n view of all of the circumstances, we conclude that [the] creation [of the Reservation] at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have outside that reservation …").[5]

The Second Circuit similarly has applied this Court's methodology for interpreting treaties and other agreements to a settlement act, reading the act in light of the intent of the parties and the Indian canons. In *Connecticut ex rel. Blumenthal v. U.S. Department of Interior*, 228 F.3d 82, 84-85 (2d Cir. 2000), the Second Circuit addressed the question whether the Connecticut Settlement Act limited the Secretary of the Interior's authority to take land into trust for the Mashantucket Pequot Tribe of Indians. Citing this Court's canons for the interpretation of Indian treaties, the Second Circuit analogized the Act to a "compact between two states that had been ratified by Congress" and construed the Act in favor of the Tribe. *Id.* at 91 n.3, 92-93.

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[5] This Court has long taken an identical approach with respect to agreements with non-Native foreign governments—treating Art. II treaties, executive agreements, and acts of Congress interchangeably as "treaties" and applying principles of treaty interpretation. *Weinberger v. Rossi*, 456 U.S. 25, 30-31 (1982) ("Congress has not been consistent in distinguishing between Art. II treaties and other forms of international agreements.").

The court of appeals' decision here conflicts with these precedents. Rather than require Maine to survive the "uphill battle" of showing that Congress "abrogate[d] Indian treaty rights" in the Agreement, *Mille Lacs Band*, 526 U.S. at 202, the First Circuit simply deemed the body of Supreme Court precedent on treaties inapposite, stating "that the Indian canons are inapplicable" and that the Penobscot Nation's understandings are "beside the point" even if one assumes that the Agreement is ambiguous as to the boundaries of the Reservation. App. 32a, 36a-37a n.20. This holding conflicts with this Court's precedents.

2. This conflict reverberates beyond the proper interpretation of the Penobscot Nation Reservation. Since 1871, when Congress ended formal treatymaking, Native nations and the United States have negotiated these sorts of agreements in lieu of treaties. *See Antoine*, 420 U.S. at 202-03. More than 90 Native nations have reservation boundaries that are set by statute or executive order. *See* Appendix.

Interpreting these treaty substitutes requires discerning the intent of the parties, including Native nations and Congress, just as interpreting treaties does, because treaty substitutes address the same sort of inter-sovereign issues that are resolved by treaty. The inter-sovereign issues addressed in the Agreement codified by statute here (which itself resolved a dispute arising from illegal treaties) are indicative. First, the Agreement resolved the issue of Massachusetts unlawfully purchasing lands on either side of the River. Congress established two funds of approximately $40 million to be used for the benefit of the Penobscot Nation and then it retroactively ratified

the 1796 and 1818 treaty purchases. 25 U.S.C. § 1723(a)(1), 1724(a)-(d). Second, Congress set terms for future relationships between the Nation, Maine, and the United States, including formally adopting the longstanding recognition by Maine of the Penobscot Nation. Third, Congress approved a lawmaking commission, populated jointly by Maine and the Nation, that would regulate fishing within the Penobscot Nation reservation. *See* 30 M.R.S.A. § 6212. Fourth, the Agreement protected fishing rights "within the boundaries" of the reservation. *See id.* § 6207(4). Further, just like a formal treaty, the Agreement defined the borders of the Penobscot Nation reservation.

3. The Court should review the First Circuit's decision that jettisoned long-standing principles of federal Indian law requiring courts to interpret inter-sovereign agreements, whatever their form, in light of the parties' intent and to resolve ambiguity in favor of tribal nations. That doctrinal dodge mattered here. As Judge Barron explained in dissent, there is "especially good reason" to apply the Indian canons here "given the particular role Congress was playing in settling these lands claims in the face of assertions that the Nonintercourse Act had been violated." App. 123a. Furthermore, the evidence concerning the negotiation of the settlement, Congress's enactment of the Agreement, and the Agreement's implementation in the years immediately following its enactment suggest that the Penobscot Nation and the United States government understood the Agreement to reserve the Nation's aboriginal rights to the uplands of the islands and waters and submerged lands adjacent to them. *Id.*

113a; *see* Pet. in No. 21-840 at 26-29. Had the agreement-related canons been applied, this shared understanding would have prevailed. But the court majority ruled that the agreement-related canons are irrelevant because "the Settlement Acts are not treaties." App. 38a.

B. The First Circuit compounded the conflict by diminishing reservation borders without a clear congressional statement.

The court of appeals' newly minted approach to the interpretation of inter-sovereign agreements also conflicts with this Court's precedent and the precedent of other circuits concerning the diminishment of reservation boundaries. In *McGirt v. Oklahoma*, this Court explained that Congress "wields significant constitutional authority when it comes to tribal relations" and that only "'Congress can divest a reservation of its land and diminish its boundaries.'" 140 S. Ct. 2452, 2462 (2020) (quoting *Solem*, 465 U.S. at 470). Under the *Solem* test, "once a reservation is established, it retains that status 'until Congress explicitly indicates otherwise.'" *Id.* at 2469 (quoting *Solem*, 465 U.S. at 470).

The *en banc* Tenth Circuit has properly applied this approach to a dispute involving reservation boundaries set by statute. In *Ute Indian Tribe v. Utah*, the Tenth Circuit explained that there must be "clear support for a finding" that Congress intended to diminish the boundaries of an Indian reservation, including a reservation whose borders were

established by statute. 773 F.2d 1087, 1088 (10th Cir. 1985) (*Ute III*); *see also Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d 1255, 1258 (10th Cir. 2016) (Gorsuch, J.) (discussing *Ute III*).

Unlike the Tenth Circuit, the First Circuit did not require clear evidence that Congress intended to diminish reservation boundaries. Had it done so, the result would have been different. Under Maine's view, adopted by the First Circuit, the Agreement made the Penobscot Nation Reservation smaller than it was under the illegal 1796 and 1818 treaties. But no clear statement orders as much. In drafting the Agreement, Congress did not include "[e]xplicit reference to cession" of lands beyond those ceded by the earlier treaties on either side of the River, nor did it offer an "unconditional commitment . . . to compensate" for any additional land cessions. *Solem*, 465 U.S., at 470. To the contrary, Congress preserved the tribal members' sustenance-fishing rights "within . . . [the Penobscot Nation's] reservation[]," 30 M.R.S.A. § 6207(4), and, accordingly, preserved also the tribal sovereignty necessary to engage in those sustenance practices in the River—the only place the Nation's members can fish. The First Circuit's failure to apply the anti-diminishment canon to the Agreement only compounded the conflict resulting from its decision to sidestep fundamental Indian canons of construction.

II. The Decision Below Is Wrong And Misconstrues The Agreement.

For reasons outlined in the petitions, even "ordinary" canons of constructions, when properly

applied, warrant reversal here. *See, e.g.*, Pet. in No. 21-838 at 19-23. A fortiori, when the Indian canons and clear statement rule for diminishment are applied to these inter-sovereign agreements—as they should be under the Court's precedents and in consonance with the practice in other courts of appeals—only one conclusion is possible: The Penobscot Reservation includes the waters and submerged lands of the Main Stem of the Penobscot River. The Agreement evinces clear congressional intent to preserve, not diminish, the Reservation's boundaries.

Congress intended to "'strengthen[] the sovereignty of the Maine Tribes'" by "'recognizing their power to control their internal affairs.'" *Akins v. Penobscot Nation*, 130 F.3d 482, 489 (1st Cir. 1997) (quoting S. Rep. No. 96-957, at 14 (1980)). Congress did not intend to leave Maine with the discretion to ignore the Nation's sovereignty over its waterways and subsistence fishing rights, much less to diminish the Nation's reservation borders beyond what the Nation ceded in earlier treaties. Any ambiguity must be construed in light of the intent of the parties to the Agreement to preserve, not diminish the Nation's sovereign rights, including Congress's intent in memorializing the Agreement.

A. Congress intended to preserve the treaty borders of the Reservation.

In 1796 and 1818, the state of Massachusetts entered into two treaties with the Penobscot Nation. According to the 1796 treaty, the Nation agreed to cede lands "on both sides of the [Penobscot] River" in exchange for nominal compensation from

Massachusetts of "blue cloth for blankets," hats, salt, ammunition, corn, and rum. App. 93a-94a. The 1818 treaty included additional cession of lands "on both sides of the Penobscot [R]iver" for nominal compensation of four hundred dollars and a future promise of "two drums" and "one box of pipes," among other similar items. *Id.* 95a-96a. Neither treaty ceded land within the River, with the Penobscot Nation retaining its aboriginal rights thereto. Both the state of Maine and the Nation relied for over a hundred years on these two treaties and the land cessions within them.

The treaties, however, violated federal law. The 1793 Nonintercourse Act prohibited purchase of lands from a Native nation "unless the same be made by treaty or convention entered into pursuant to the constitution." Trade and Intercourse Act of 1793, § 8, 1 Stat. 329, 330. This Court later affirmed that the recognition of Native nations and the regulation of reservation borders was within the power of the national government alone. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). Yet the state of Maine continued to maintain a direct relationship with the Penobscot Nation and continued to claim the lands on either side of the river.

In the 1970s, the Penobscot Nation strengthened its direct relationship with the United States government—gaining recognition and seeking to confirm its reservation borders at the federal level. *See* 44 Fed. Reg. 7235, 7236 (Jan. 31, 1979) (recognizing the Penobscot Nation). The United States initially sued Maine due to Maine's purchase of lands on either side of the River. *See* William H. Rodgers, Jr.,

Treatment As Tribe, Treatment As State: The Penobscot Indians and the Clean Water Act, 55 Ala. L. Rev. 815, 830-31 (2004). But the unlawful taking of lands and the establishment of reservation borders was ultimately resolved not by court judgment, but through negotiations between the state of Maine, the Penobscot Nation, and the United States.

With the Agreement, Congress quickly ratified the result of negotiations between the parties. The Maine legislature adopted its Implementing Act only one month after the Agreement was announced in March 1980. H.R. Rep. No. 96-1353, at 13 (1980). At the federal level, Senate legislation was introduced just three months after the agreement, with a House bill following shortly thereafter. *Id.* Congress passed the bill in September 1980, 126 Cong. Rec. H. 9275-9285 (daily ed., Sept. 22, 1980); 126 Cong. Rec. S. 13198-13202 (daily ed. Sept. 23, 1980), and the President signed it in October, Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785. Thus, the Agreement was codified quickly, reflecting its status as a product of inter-sovereign negotiation.

Throughout the legislative process, Congress' explicit intent was to reach a "fair and just settlement" of the Penobscot Nation's "land claims," 25 U.S.C. § 1721(a)(7), which the Agreement extinguished, *id.* § 1723. The Senate Report concluded the "settlement strengthens the sovereignty of the Maine Tribes," and confirmed the Penobscot Nation's "permanent right to control hunting and fishing . . . within [its] reservation[]." S. Rep. No. 96-957, at 14, 16-17.

Congress nowhere evinced an intent to approve further cessions of the Penobscot Nation's territory beyond what was ceded in the unlawful but retroactively ratified treaties between Massachusetts and the Nation. The Reservation-defining text of the Implementing Act, as ratified by the Agreement, makes clear that the parties, including Congress, intended to only resolve the status of the 1796 and 1818 land cessions. Section 6203(8) of the Implementing Act defines the "Penobscot Indian Reservation" to include "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine." 30 M.R.S.A. § 6203(8). It goes on to state that the relevant islands "consist[] solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818." *Id.*

As this statutory text reflects, the parties negotiated the Agreement to resolve the pending litigation challenging the past cessions of land "on both sides of the Penobscot [R]iver," and not to cede those rights that the Penobscot Nation had always retained to the submerged lands and waters of the River. *See* App. 101a, 103a (Judge Barron, concurring in part and dissenting in part).

B. Refusal to consider historical context and the parties' intent caused the First Circuit to misread the Agreement.

The court of appeals' insistence on a hyper-technical reading of isolated terms, rather than affording weight to the intent of the parties to the agreement and considering the full statutory context as required, led it to misinterpret Congress' intent. The court's majority concluded that the Agreement excludes the waters of the Penobscot River from the Penobscot Reservation because it refers to "islands" and "lands" in defining the Reservation. App. 9a-14a. According to the court's majority, the plain meaning of these words, as ascertained by reference to dictionaries, unambiguously forecloses any interpretation that would include the River within the Reservation. *Id.* Thus there was no need "to look to legislative history or Congressional intent," in the *en banc* majority's view. *Id.* 10a-11a.[6]

The First Circuit's failures to apply the unique principles of interpretation from federal Indian law compounded its poor judgment of congressional intent. As this Court has explained, "standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet*

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[6] The majority went on to find that nothing in the history, context, or purpose of the Agreement would change its interpretation. App. 27a. This analysis was colored from the outset, however, from the court's wrong decision not to view the Agreement's history, context, and purpose from the viewpoint of the Penobscot Nation.

Tribe of Indians, 471 U.S. 759, 766 (1985). In exercising its paramount constitutional authority to structure the United States' relationship with Indian tribes, Congress relies upon the Indian canons of construction. *See, e.g.*, S. Rep. No. 90-841, at 8 (1967) (discussing, in context of Indian Civil Rights of Act of 1968, that under the canon Indian tribes enjoy "full powers of internal sovereignty" unless Congress has "expressly" legislated otherwise); H.R. Rep. No. 101-877, at 24 (1990) (discussing "established rule of construction of the law that Congress's actions towards Indians are to be interpreted in light of the special relationship and special responsibilities of the Government towards the Indians"). When Congress legislates against the backdrop of this Court's longstanding practice, it expects that courts will construe its Indian-related legislation to favor Indians, particularly where (as here) statutes memorialize agreements with Indian tribes and reserve Indian territories. The text of the Agreement should have been (but was not) construed "'in the sense that [it] would naturally be understood by the [Penobscot].'" *Herrera*, 139 S. Ct. at 1699 (quoting *Fishing Vessel Assn*, 443 U.S. at 676).

The Penobscot could not possibly have understood the act to implicitly cede additional reservation lands without compensation for new cessions. The Penobscot Nation began negotiations to rectify the prior unlawful land cessions, and the Agreement compensated them for settling those claims. But there is no "natural understanding" that a settlement of the Nation's claims to land on either side of the River would include implicit cession of

additional reservation lands under the river. Any ambiguity in the definition of "reservation"—borders more often defined by land characteristics than by water—reflects at most the quick drafting of the Agreement and must be resolved in favor of the Penobscot Nation.

Congress recognizes that Indian tribes' control over tribal lands and natural resources is of paramount importance to tribes and tribal peoples. *See, e.g.*, Indian Financing Act of 1974, 25 U.S.C. § 1451 (recognizing importance of tribal control over "utilization and management of their own resources"). Congress, therefore, regularly supports Indian tribes' hunting and fishing activities. *See, e.g.*, 26 U.S.C. § 7873(a) (removing federal income and employment taxation from tribal members who engage in "fishing rights-related activity" under statutory authority). As the Court put it in *United States v. Winans*, hunting and fishing "were not much less necessary to the existence of the Indians than the atmosphere they breathed." 198 U.S. 371, 381 (1905).

Congress therefore does not lightly abrogate Indian tribal sovereignty or Indian hunting and fishing rights. Instead, it understands that the Indian canon of construction preserves "tribal property rights and sovereignty . . . unless Congress's intent to the contrary is clear and unambiguous." Cohen, *supra*, § 2.02[1], at 114 (citing, among others, *Mille Lacs Band*, 526 U.S. at 202).

The Agreement does not suggest—much less clearly state—that Congress intended to cede the Penobscot Nation's rights to the waters of the

Penobscot River, within which its members have always fished. Precedent therefore demands an interpretation of the Agreement that recognizes those hallmarks of tribal sovereignty and protects them from conflicting state law.

Far from clearly abrogating the Penobscot Nation's control over sustenance activities, Congress preserved the tribal members' sustenance-fishing rights "within . . . [the Penobscot Nation's] reservation[]," 30 M.R.S.A. § 6207(4). Statutory context then, an "ordinary" tool of statutory construction, shows what the clear statement rule reinforces: Congress preserved the tribal sovereignty necessary to engage in sustenance practices in the River—the only place the Nation's members can fish.

This construction, moreover, is consistent with the United States' trust responsibility towards Indian tribes. When Congress acts to reserve Indian territorial rights, it does so against the backdrop of this responsibility. In *Alaska Pacific Fisheries v. United States*, the Court recognized that when Congress acts as a trustee to reserve Indian lands, its aim is "to encourage, assist and protect the Indians." 248 U.S. 78, 89 (1918). This trust responsibility dates back to the first treaty relationships between Indian tribes and the United States. *See Worcester*, 31 U.S. (6 Pet.) at 551-56, 560-61. The political branches have defined the trust responsibility in terms of the Indian self-determination policy, which provides that "the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments." 25 U.S.C. § 5302(b).

As with the statute at issue in *Alaska Pacific Fisheries*, Congress acted here to support tribal self-sufficiency. When Congress reserved the "'the body of lands known as Annette Islands'" for the Metlakahtla Indians in 1891, the Court reasoned that Congress intended to reserve not only the "upland of the islands" but also "the adjacent waters and submerged land." 248 U.S. at 87. Why? Because its purpose was to support the Metlakahtla people's efforts to "become self-sustaining." *Id.* at 89. In construing that statute, the Court concluded that a "geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland." *Id*. So, too, here.

As was true of the Metlakahtla Indians, the Penobscot Nation "could not sustain themselves from the use of the upland alone." *Id*. Congress reserved the Penobscot Nation's "islands" in order to protect the Tribe's hunting and fishing rights, which, as the 1980 hearings on the Agreement showed, was an "area[] of particular cultural importance." App. 106a. Congress did so while expressly referring to the agreements between the Penobscot Nation and the States of Massachusetts and Maine, which reflected the Nation's understanding from those agreements that its sovereign powers and sustenance fishing rights would be reserved and respected. *See* 30 M.R.S.A. § 6203(8).

As a "contract between two sovereign nations," *Fishing Vessel Ass'n*, 443 U.S. at 675, any interpretation of the Agreement must reflect this intent of Congress, reinforced by the backdrop of *Alaska Pacific Fisheries*, to include in the Penobscot

Reservation all lands not previously ceded by treaty—including the Main Stem of the Penobscot River. Congress's reservation of "islands" within the Penobscot River must be construed as the Penobscot Nation reasonably understood it: as a reservation of the Penobscot Nation's aboriginal rights to the uplands of the islands and the waters and submerged lands adjacent to them in the River's Main Stem, bank-to-bank. The First Circuit erred in concluding otherwise, and did so in a way that could cast doubt on settled understandings of many other Native nations' non-treaty agreements.

CONCLUSION

The petitions should be granted.

Respectfully submitted.

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APPENDIX

Reservations Established by Statute

Acoma Pueblo
Act of Dec. 22, 1858, ch. 5, 11 Stat. 374

Auburn Rancheria
Auburn Indian Restoration Act, 25 U.S.C. § 1300l-2

Bridgeport Reservation
Act of Oct. 18, 1974, Pub. L. No. 93-452,
88. Stat. 1368

Burns Paiute Indian Colony
Act of Oct. 13, 1972, Pub. L. No. 92-488, 86 Stat. 806

Cheyenne River Reservation
Act of Apr. 30, 1888, ch. 206, 25 Stat. 94

Colorado River Indian Reservation
Act of Mar. 3, 1865, ch. 127, 13 Stat. 541

Coquille Reservation
Coquille Restoration Act, Pub. L. No. 101-42,
103 Stat. 91 (1989)

Crow Creek Reservation
Act of Apr. 30, 1888, ch. 206, 25 Stat. 94

Fort Apache Reservation
Act of June 7, 1897, ch. 2. 30 Stat. 62

Gila River Indian Reservation
Act of Feb. 28, 1859, ch. 66, 11 Stat. 388

Isleta Pueblo
Act of Dec. 22, 1858, ch. 5, 11 Stat. 374

Lac Vieux Desert Reservation
Act of Sept. 8, 1988, Pub. Law No. 100-420,
102 Stat. 1577

Lower Brule Reservation
Act of Apr. 30, 1888, ch. 206, 25 Stat. 94

Mashantucket Pequot Reservation
Mashantucket Pequot Indian Claims Settlement Act,
25 U.S.C. § 1753

Miccosukee Reservation
Florida Indian Land Claims Settlement Act of 1982, 25 U.S.C. § 1745

Mohegan Reservation
Act of Oct. 19, 1994, Pub. Law No. 103-377, 108 Stat. 3501

Pascua Pueblo Yaqui Reservation
Priv. L. No. 88-350, 78 Stat. 1196 (1964)

Penobscot Reservation
Maine Indian Claims Settlement Act of 1980, 25 U.S.C. 1723

Pine Ridge Reservation
Act of Apr. 30, 1888, ch. 206, 25 Stat. 94

Rosebud Indian Reservation
Act of Apr. 30, 1888, ch. 206, 25 Stat. 94

Santa Ana Pueblo
Act of Feb. 9, 1869, ch. 26, 15 Stat. 438

Standing Rock Reservation
Act of Apr. 30, 1888, ch. 206, 25 Stat. 94

Susanville Indian Rancheria
Act of Oct. 14, 1978, Pub. Law No. 95-459, 92 Stat. 1262

Tonto Apache Reservation
Act of Dec. 6, 1972, Pub. Law No. 92-470, 49 Stat. 332

Yavapai-Apache Nation Reservation
Act of June 7, 1935, Pub. L. No. 74-117, 49 Stat. 332

Reservations Established by Executive Order

Agua Caliente Indian Reservation
Indian Office, *Executive Orders Relating to Indian Reserves, From May 14, 1855, to July 1, 1902*, at 25 (1902) ("Compilation") (May 15, 1876)

Battle Mountain Reservation
Exec. Order No. 2639 (June 18, 1917)
Exec. Order No. 2803 (Feb. 8, 1918)

Benton Paiute Reservation
Exec. Order No. 2225 (July 22, 1915)

Big Cypress Reservation
Exec. Order No. 1379 (June 28, 1911)

Big Pine Reservation
Exec. Order No. 1496 (Mar. 11, 1912)

Bishop Reservation
Exec. Order No. 1496 (Mar. 11, 1912)

Blackfeet Indian Reservation
Compilation at 54-55 (July 5, 1873)

Bois Forte Reservation
Compilation at 52 (Dec. 20, 1881)

Cabazon Reservation
Compilation at 25 (May 15, 1876)

Cahuilla Reservation
Compilation at 24-25 (Dec. 27, 1875)

Capitan Grande Reservation
Compilation at 24-25 (Dec. 27, 1875)

Chehalis Reservation
Compilation at 111-12 (Oct. 1, 1886)

Cocopah Reservation
Exec. Order No. 2711 (Sept. 27, 1917)

Coeur d'Alene Reservation
Compilation at 40-41 (Nov. 8, 1873)

Cold Springs Rancheria
Exec. Order No. 2075 (Nov. 10, 1914)

Colville Reservation
Compilation at 125 (Apr. 9, 1872)

Duck Valley Reservation
Compilation at 68-69 (Apr. 16, 1877)

Elko Colony
Exec. Order No. 2824 (June 27, 1930)

Fort Berthold Reservation
Compilation at 82 (Apr. 12, 1870)

Fort Hall Reservation
Compilation at 42 (June 14, 1867)

Fort Independence Reservation
Exec. Order No. 2264 (Oct. 28, 1915)

Fort McDermitt Indian Reservation
Exec. Order No. 1606 (Sept. 16, 1912)

Fort McDowell Yavapai Nation Reservation
Exec. Order (Sept. 15, 1903)

Fort Yuma Indian Reservation
Compilation at 35 (July 6, 1883)

Goshute Reservation
Exec. Order No. 1903 (Mar. 23, 1914)

Havasupai Reservation
Compilation at 15 (Mar. 31, 1882)

Hoh Indian Reservation
Compilation at 126 (Sept. 11, 1893)

Hollywood Reservation
Exec. Order No. 1379 (June 28, 1911)

Hoopa Valley Reservation
Compilation at 20 (June 23, 1876)

Hopi Reservation
Compilation at 9 (Dec. 16, 1882)

Hualapai Indian Reservation
Compilation at 9 (Jan. 4, 1883)

Inaja and Cosmit Reservation
Compilation at 24-25 (Dec. 27, 1875)

Jemez Pueblo
Exec. Order No. 537 (Dec. 19, 1906)

Jicarilla Apache Nation Reservation
Compilation at 77 (Feb. 11, 1887)

Kalispel Reservation
Exec. Order No. 1904 (Mar. 23, 1914)

Maricopa (Ak Chin) Indian Reservation
Exec. Order No. 1538 (May 28, 1912)

Mesa Grande Reservation
Compilation at 24-25 (Dec. 27, 1875)

Mescalero Reservation
Compilation at 74 (May 29, 1873)

Moapa River Indian Reservation
Compilation at 69 (Mar. 12, 1873)

Morongo Reservation
Compilation at 25 (Aug. 25, 1877)

Muckleshoot Reservation
Compilation at 128 (Apr. 9, 1874)

Northern Cheyenne Indian Reservation
Compilation at 61-62 (Mar. 19, 1900)

Northwestern Shoshone Reservation
Compilation at 68 (May 10, 1877)

Ontonagon Reservation
Compilation at 47 (Sept. 25, 1855)

Paiute (UT) Reservation
Exec. Order No. 2229 (Aug. 2, 1915)

Pala Reservation
Compilation at 24-25 (Dec. 27, 1875)

Picayune Rancheria
Exec. Order No. 1522 (Apr. 24, 1912)

Pyramid Lake Paiute Reservation
Compilation at 71 (Mar. 23, 1874)

Quileute Reservation
Compilation at 133 (Feb. 19, 1889)

Round Valley Reservation
Compilation at 31 (Mar. 30, 1870)

Salt River Reservation
Compilation at 14 (June 14, 1879)

San Carlos Reservation
Compilation at 17 (Dec. 14, 1872)

San Felipe Pueblo
Compilation at 77-78 (June 13, 1902)

Santa Clara Pueblo
Exec. Order No. 344-B (July 29, 1905)

Seminole (FL) Trust Land
Exec. Order No. 1379 (June 28, 1911)

Shoalwater Bay Indian Reservation
Compilation at 133 (Sept. 22, 1866)

Siletz Reservation
Compilation at 95 (Nov. 9, 1855)

Spokane Reservation
Compilation at 134 (Jan. 18, 1881)

Summit Lake Reservation
Exec. Order No. 1681 (Jan. 14, 1913)

Sycuan Reservation
Compilation at 24-25 (Dec. 21, 1875)

Torres-Martinez Reservation
Compilation at 25 (May 15, 1876)

Tule River Reservation
Compilation at 34 (Jan. 9, 1873)

Tuolumne Rancheria
Exec. Order No. 1517 (April 13, 1912)

Turtle Mountain Reservation
Compilation at 85 (Dec. 21, 1882)

Uintah and Ouray Reservation
Compilation at 109 (Oct. 3, 1861)

Walker River Reservation
Compilation at 72 (Mar. 19, 1874)

Zia Pueblo
Exec. Order No. 3351 (Nov. 6, 1920)
Exec. Order No. 3637 (Feb. 16, 1922)

Zuni Reservation
Compilation at 79 (Mar. 16, 1877)