No.

In The Supreme Court of the United States

PENOBSCOT NATION,

Petitioner,

v.

AARON M. FREY, ATTORNEY GENERAL FOR THE STATE OF MAINE, *et al.*

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Maine Indian Settlement Acts—consistent with this Court's precedents on statutory interpretation and the Indian canons of construction—codify the historical understanding of the Penobscot Nation, the United States, and the State that the Penobscot Reservation encompasses the Main Stem of the Penobscot River.

PARTIES TO THE PROCEEDINGS

1. Petitioner, the Penobscot Nation, was plaintiff/counter-defendant in the district court and appellant/cross-appellee in the court of appeals.

2. The United States intervened on its own behalf and as trustee for the Penobscot Nation. The United States was intervenor-plaintiff/counter-defendant in the district court and appellant/cross-appellee in the court of appeals.

3. The following State-related parties (or their predecessor State officials) were defendants/counterclaimants in the district court and appellees/cross-appellants in the court of appeals:

- State of Maine
- Aaron M. Frey, Attorney General for the State of Maine;
- Judy A. Camuso, Commissioner for the Maine Department of Inland Fisheries and Wildlife; and
- Dan Scott, Colonel for the Maine Warden Service.

4. The following private parties, municipalities, and related entities were intervenor-defendants/counterclaimants in the district court and appellees/cross-appellants in the court of appeals:

- Town of Howland;
- True Textiles, Inc.;
- Guilford-Sangerville Sanitary District;
- City of Brewer;

- Town of Millinocket;
- Kruger Energy (USA) Inc.;
- Veazie Sewer District;
- Town of Mattawamkeag;
- Covanta Maine LLC;
- Lincoln Sanitary District;
- Town of East Millinocket;
- Town of Lincoln; and
- Verso Paper Corporation.

5. The following private parties and municipalities were intervenor-defendants/counterclaimants in the district court and appellees in the court of appeals:

- Expera Old Town;
- Town of Bucksport;
- Lincoln Paper and Tissue LLC; and
- Great Northern Paper Company LLC.

6. The Town of Orono and Red Shield Acquisition LLC were intervenor-defendants/counterclaimants in the district court, but did not participate in the court of appeals.

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* Formerly codified at 25 U.S.C. §§ 1721-1735, MICSA remains in effect, but was removed from the United States Code as of 25 U.S.C. Supp. IV (Sept. 2016) by codifiers to improve the Code's organization. This petition and appendix refer to MICSA's sections as previously codified.

TABLE OF AUTHORITIES

CASES:

STATUTES:

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INTRODUCTION

The Penobscot River is the lifeblood of the Penobscot Nation. The Settlement Acts memorialize and ratify an agreement between the Nation and the State of Maine to settle claims brought by the United States (as trustee) for loss of the Nation's aboriginal homelands through unlawful treaty cessions. Those Acts expressly protect the Nation's authority over its members' fishing rights "within the boundaries of [its] *** Indian reservation[]," 30 M.R.S.A. § 6207(4)—long understood to include the River's Main Stem. Yet a divided (and depleted) en banc First Circuit found that the Acts' use of the term "islands" in defining the Penobscot Reservation requires total exclusion of the waters of the Penobscot River—the Nation's historic fishing grounds and the only place within its Reservation where its members could conceivably fish.

That untenable conclusion flouts this Court's repeated instruction that the meaning of statutory language should not be based solely on dictionary definitions of isolated terms, but must be determined by considering those terms in context. The Settlement Acts expressly reference treaties reserving aboriginal title to the Main Stem of the Nation's namesake River and explicitly guarantee the Nation's continued exercise of sovereign authority over *on-Reservation* sustenance practices that undisputedly can occur only there. The text and structure of the Acts, read as a whole, support only one conclusion: that the Nation's Reservation includes the water and submerged lands of the Main Stem, not just the uplands where the State's newfound position seeks to confine it.

If there were any doubt, application of the Indian canons dispels it. But the First Circuit turned this Court's precedents upside down on that front too. Instead of looking to the Nation's contemporaneous understanding of the relevant terms, resolving ambiguities in favor of the Nation, or seeking clear evidence of Congress's intent to diminish the Reservation, the en banc majority fixated on a dictionary definition of "islands." According to the majority, the historical status of the Penobscot River's Main Stem and its indispensability to on-Reservation cultural practices preserved in the Acts are "beside the point." That misguided approach subverts the meaning of the Settlement Acts at issue and unsettles expectations for other tribes subject to settlement acts.

In rebuking this Court's jurisprudence, the en banc decision strikes a devastating blow to the Nation's sovereignty. Since time immemorial, the Nation has centered not only its domain, but also its economy, culture, and spiritual beliefs, on the Main Stem of the Penobscot River. The decision below strips the Nation of the heart of its homeland, deprives its on-River hunting/trapping/fishing regulations of effect, guts its game warden service, and constricts its tribal court jurisdiction. The exceptionally important question of the scope of the Nation's Reservation, as well as of the proper approach for interpreting settlement acts more broadly, warrants this Court's review.

OPINIONS BELOW

The opinion of the en banc court of appeals is reported at 3 F.4th 484 and reproduced at App. 1a-124a. The prior opinion of the court of appeals is reported at 861 F.3d 324 and reproduced at App. 125a-187a. The order of the district court on cross-motions for summary judgment is reported at 151 F. Supp. 3d 181 and reproduced at App. 188a-278a. The order of the district court on the motions of state intervenors is unreported and reproduced at App. 279a-281a.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2021. This petition is subject to the Court's July 19, 2021 Order extending the time to file a petition for a writ of certiorari to 150 days from the date of a judgment issued by a court of appeals on or before July 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND TREATY PROVISIONS

The relevant statutory and treaty provisions are reproduced in the Appendix. App. 290a-336a.

STATEMENT OF THE CASE

A. Factual and Legal Background

1. The Penobscot Nation is a "riverine" American Indian tribe. S. REP. NO. 96-957, at 11 (1980); H. REP. NO. 96-1353, at 11 (1980). "[F]rom time immemorial the Penobscot Nation has centered its domain, originally consisting of many thousands of acres of territory in what today is the State of Maine, on the Penobscot River." App. 89a (Barron, J., dissenting).

Referring to itself as "Pa'nawampske 'wiak"—"People of where the river broadens out"—the Nation regards "the Penobscot River and its natural resources [as] 'not much less necessary to [its] existence *** than the atmosphere they breathe[].'" *Id.* at 90a n.45, 91a (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). The River has long provided the Nation "with the main resources upon which its members depended to live by way of fishing, hunting, and trapping, as well as a means of travel." *Id.* at 90a. And the River's "foundational influence" is deeply "embedded in the Nation's language, culture, traditions, and belief systems." *Id.* at 91a.

"[T]here is little question—and certainly no contention to the contrary by the State of Maine in this litigation"—that the Penobscot Nation's aboriginal title "encompass[ed] use and occupancy of the Main Stem of the Penobscot River" "when the European colonists arrived in New England in the early seventeenth century." App. 90a.[1] Early historical records confirm as much: In exchange for the "friendship and assistance" offered by the Penobscot Nation in the Revolutionary War, the Third Provincial Congress of Massachusetts and the Massachusetts militia promised to respect and protect that domain, "beginning at the head of the tide on Penobscot River, extending six miles on each side of said [R]iver." *Id.* at 92a-93a.

2. Following American independence, in 1796, Massachusetts purported to enter into a treaty with

[1] The Main Stem is the 60-mile stretch of the River flowing from Indian Island north to the confluence of the East and West Branches. App. 4a-5a, 195a.

the Penobscot Nation to obtain certain of its lands along a thirty-mile stretch "on both sides of the River." App. 93a-94a; *see id.* at 319a-321a (1796 Agreement). In exchange, Massachusetts pledged to provide specified quantities of "blue cloth for blankets," hats, salt, ammunition, corn, and rum. *Id.* at 93a-94a.

In 1818, a second treaty between Massachusetts and the Nation purposed to cede the Nation's remaining lands "on both sides of the Penobscot [R]iver, and the branches thereof, above the tract of thirty miles in length" purportedly ceded in the prior treaty, with the exception of four townships abutting the River. App. 95a-96a; *see id.* at 322a-327a (1818 Agreement). In exchange, Massachusetts again offered "seemingly minimal consideration": four hundred dollars, in addition to a pledge to provide various articles, like "two drums" and "one box of pipes." *Id.* at 95a-96a.

The treaties do not so much as "hint that [they] disclaimed the Penobscot Nation's historic rights to the [Penobscot] [R]iver." App. 96a. Instead, the treaties expressly reserved for the Nation's "enjoy[ment] and improve[ment] *** all the islands in the Penobscot [R]iver above Oldtown and including *** Oldtown island." *Id.* at 324a; *see id.* at 319a-320a. Now commonly called Indian Island, the Nation's name for Old Town Island—"Pe'no'om skee'ok" or "Panawamskeag"—expressed the Nation's understanding that it was the "place from which the River is called." J.A. 1159-1160; *see* App. 90a n.46. Rather than cede submerged lands and waters surrounding its island-based villages, in the 1818 treaty, the Nation granted the citizens of Massachusetts the "right to pass and repass any of the

rivers *** which run through any of the lands hereby reserved, for the purpose of transporting their timber and other articles through the same." *Id.* at 325a-326a.

In 1820, upon its separation from Massachusetts, Maine entered into an agreement with the Nation to accede to the prior treaties. App. 328a-336a. In 1833, Maine purported to purchase the four reserved townships. *Id.* at 99a.

3. The federal government had not authorized the land cessions, as required under the Nonintercourse Act. *See* Trade and Intercourse Act of 1793, 1 Stat. 329, 330 (codified as amended at 25 U.S.C. § 177) ("[N]o purchase or grant of lands, or any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution[.]"). Accordingly, in the 1970s, the United States, as trustee for the Nation, sued Maine to challenge the validity of the land cessions. Alongside land claims by two other tribes, the potential area in dispute totaled "up to two-thirds of the area of what is now the State of Maine." App. 102a-103a. The lawsuit was resolved in a 1980 settlement codified in two statutes—the Maine Implementing Act ("MIA"); and the federal statute ratifying that Act, the Maine Indian Claims Settlement Act ("MICSA")—collectively known as the "Settlement Acts." *Id.* at 6a.

As relevant here, the MIA defines the Reservation as "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with

the States of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818." 30 M.R.S.A. § 6203(8). The MICSA incorporates and gives effect to that definition, providing that "'Penobscot Indian Reservation' means those lands as defined in the [MIA]." 25 U.S.C. § 1722(i). The MICSA further ratifies "[a]ny transfer of land or natural resources *** from, by, or on behalf of *** the Penobscot Nation *** pursuant to any treaty *** of any State *** effective as of the date of said transfer." 25 U.S.C. § 1723(a)(1).

The Settlement Acts also include a provision entitled "Sustenance fishing within the Indian reservation[]." 30 M.R.S.A. § 6207(4). That provision states that (subject to certain limitations) members of the "Penobscot Nation may take fish, within the boundaries of the[] *** Indian reservation[], for their individual sustenance," free from state regulation. *Id.* These on-Reservation fishing rights, and related hunting and trapping prerogatives (*id.* § 6207(1)(A)), were of such central concern to the Nation that Congress saw fit to address them as "Special Issues" in its final committee reports. S. REP. NO. 96-957, at 14-17; H. REP. NO. 96-1353, at 14-17. Section 6207, Congress explained, protects the Nation's "permanent right to control hunting and fishing *** within [its] reservation[]," and "ended" the power the State had claimed "to alter such rights without the consent of the *** [N]ation." S. REP. NO. 96-957, at 16-17; H. REP. NO. 96-1353, at 17. Underscoring the Nation's "exclusive authority to regulate sustenance fishing within [its] respective reservation[]," Congress described these prerogatives as attributes of "inherent

sovereignty" the Nation "retain[ed]" under established principles of federal Indian law. S. REP. NO. 96-957, at 13-15, 37; H. REP. NO. 96-1353, at 13-15.

It is undisputed that, apart from the River, no other body of water in the Reservation supports those sustenance-fishing rights. App. 42a n.21, 74a, 196a.

4. In the aftermath of the Settlement Acts, the Nation, the federal government, and the State acknowledged repeatedly that the Reservation includes portions of the River. In regulatory and judicial filings, for example, the State recognized that a "portion of the Penobscot River *** falls within the boundaries of the Penobscot Indian Reservation," which "includ[es] the islands in the Penobscot River *** and a portion of the riverbed between any reservation island and the opposite shore." App. 116a-117a. When paper companies first posited in the 1990s that the River was outside the Reservation, the then-chair of the Maine Indian Tribal-State Commission explained that "the State ha[d] never questioned the existence of the right of the Penobscot Indian Nation to sustenance fishing in the Penobscot River," and that such a restrictive understanding of the Reservation could not be "imagine[d]." App. 115a-116a (alteration in original).

Those positions were reflected in practice. In 1988, Maine's Attorney General issued a formal opinion that the Settlement Acts "clearly" permitted the Nation to "place gill nets in the Penobscot River within the boundaries of the Penobscot Reservation," despite state law prohibiting gill-net fishing. J.A. 753-754; *see* App. 113a-114a. In the 1990s, state game wardens transferred cases involving the River to

Penobscot Nation wardens, who were "largely [supported] through federal funding from the U.S. Department of the Interior for the Nation's exercise of governmental authority on 'Reservation lands and waterways.'" App. 112a. The Nation's tribal court, in turn, prosecuted these violations of tribal laws regulating the hunting, trapping, and other taking of wildlife on the Main Stem. *See id.* at 113a. Around the same time, State permits for eel potting advised the public that "[t]he portions of the Penobscot River and submerged lands surrounding the islands in the river are part of the Penobscot Indian Reservation." *Id.* at 114a (alteration in original).

5. In 2012, for the first time, the State of Maine departed from that uniform understanding. Maine's Attorney General announced, by directive to the State game wardens and letter to the Nation's Chief, that "the River itself is not part of the Penobscot Nation's Reservation" and "therefore" the State has "exclusive regulatory jurisdiction over activities" on the Main Stem. App. 7a, 129a; J.A. 948-950. Accordingly, the State declared, the Nation's "authority to regulate hunting, trapping, and [fishing]" is confined to the island surfaces. J.A. 949-950. As a result, the Nation has been forced to cease its regular patrols of the River, leaving unenforced its ordinances passed to protect its members' sustenance rights.

B. Procedural History

1. Soon after the State adopted its new position, the Nation sued for declaratory and injunctive relief to protect its on-Reservation sustenance fishing, trapping, and hunting prerogatives in the Main Stem. App. 8a. The State filed a counterclaim seeking a

declaration that "[t]he waters of the main stem of the Penobscot River are not within the Penobscot Nation reservation." *Id.* The United States intervened in support of the Nation; private interests, towns, and other political entities "that border the River and use it for discharges or other purposes" intervened in support of the State. *Id.*

On cross-motions for summary judgment, the district court held that the Reservation includes only the island uplands—not the surrounding waters or submerged lands—but that the Nation was entitled to sustenance fish in the entirety of the Main Stem free from State regulation. App. 8a-9a, 188a-278a.

2. A divided panel of the court of appeals affirmed the first holding and vacated the second on standing and ripeness grounds. App. 125a-152a. Judge Torruella dissented "most emphatically." *Id.* at 187a; *see id.* at 153a-187a.

3. The court of appeals granted rehearing en banc. Judge Kayatta recused, and Judge Torruella passed away following oral argument. A divided five-judge (3-2) en banc court affirmed the district court's judgment on the scope of the Reservation.

a. "The plain text of the definition of Reservation" in the Settlement Acts, the en banc majority held, "plainly and unambiguously includes certain islands in the Main Stem but not the Main Stem itself." App. 5a, 10a-14a. That conclusion flowed from dictionary definitions, which "make two things clear." *Id.* at 13a. First, "an island is 'a piece of land'" and "land is ordinarily defined in opposition to water." *Id.* Second, although "the presence of water around a piece of land is what makes that piece of land an

island[,] [t]he surrounding water is not itself part of an island." *Id.* The majority added that section 6203(8) uses the word "solely" to limit the Reservation's reach to the designated islands, and uses the phrase "*in* the Penobscot River" to describe "where the islands are located and which body of water surrounds them." *Id.* at 13a-14a.

The majority found no conflict between a definition of the Reservation that excludes the River and the Nation's retention of on-Reservation fishing rights that can only be exercised therein. App. 5a, 42a-47a. The majority "agree[d] with the Nation and the United States" that section 6207(4) of the MIA preserves "the Nation['s] sustenance fishing rights in the Main Stem." *Id.* at 45a. It also acknowledged that section 6207(4) meant "to strengthen" "the Nation's [and Passamaquoddy Tribe's] 'right to control Indian subsistence hunting and fishing within their reservations.'" *Id.* at 46a (quoting S. REP. NO. 96-957, at 16; H. REP. NO. 96-1353, at 17-18). The majority reasoned, however, that "[its] inquiry [was] focused on the meaning of Reservation under § 6203(8), not the scope of the Nation's sustenance fishing rights under § 6207(4)," and that the latter does not "have anything to do with" the former. *Id.* at 5a, 42a.

The majority dismissed *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78 (1918), and related decisions from this Court that, taking account of the context and nature of an underlying tribal agreement, understood statutory terms like "islands" and "lands" to "embrac[e] the intervening and surrounding waters as well as the upland." App. 15a-18a. The majority also held more broadly "that the Indian canons are inapplicable" to this case. *Id.* at 36a-40a & n.20.

Even if the treaties referenced in the statutory definition of the Reservation "could arguably be thought to induce any ambiguity," the majority concluded, "the drafters [of the Settlement Acts] never intended the Reservation to include the River itself." App. 27a. The "importance of the River to the Nation" and "the Nation's understanding" of "the various treaties the Nation entered into," the majority explained, were "beside the point." *Id.* at 31a-32a. Factoring in "practical consequences," the majority ultimately found that "[t]he stakes of reading the definition of Reservation to include the River" were too disruptive to support a construction of the Acts that would "carry out such a massive change in ownership and control over the Main Stem." *Id.* at 34a-36a.[2]

b. Judge Barron, joined by Judge Thompson, dissented in an opinion spanning more than 70 pages. App. 52a-124a.

The Settlements Acts' definition of the Reservation should be construed to encompass the Main Stem, he explained, for three textual reasons. *First*, the Settlement Acts define the Reservation using "not just the word 'islands'—or 'lands'—but a larger phrase referring to a specific set of 'islands.'" App. 63a. "On more than one occasion," in *Alaska Pacific Fisheries* and elsewhere, this Court has held

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[2] The majority held separately that the "assertion that Maine has infringed [the Nation's] subsistence fishing rights is not ripe and the Nation lacks standing to pursue that claim" because of the State's "policy" of allowing the Nation's members to fish in the River. App. 47a-48a (formatting omitted). The Nation does not seek this Court's review of that subsidiary question, which becomes moot if the River's Main Stem is recognized as part of the Nation's Reservation.

that similar phrases in "reservation-defining statutes refer to waters despite their failure to make any express reference to those waters." *Id.* at 61a.

Second, the Settlement Acts' Reservation definition "specifies that it is referring to what was 'reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine.'" App. 64a. In particular, by "express reference to the 1818 date," the statute invokes "an agreement excluding 'all islands' in the river from the cessions of lands 'on both sides of' it that the Nation had purported to make." *Id.* at 67a. That language indicates "the drafters were intent on capturing past understandings arising from past dealings." *Id.* at 69a. "[A]n area-based reading *** give[s] a meaningful role to th[is] 'reserved *** by agreement' language" that the majority's "ahistorical, dictionary-based understanding of what is meant by 'islands'" does not. *Id.*

Third, the dissent explained that a fair construction of the Reservation requires "at least consider[ing] th[e] [definitional] provision's text in the context of the text of the other provisions of the Settlement Acts." App. 73a. In section 6207, the neighboring provision guaranteeing the Nation's on-Reservation sustenance-fishing rights, "Penobscot Nation *** Indian reservation[]" "must be understood—at least when read in context—to include the area comprising the islands at issue in this case, waters included, rather than merely the discrete uplands that are situated in that area." *Id.* at 74a (ellipsis and alteration in original). "This conclusion follows from the District Court's factual finding, accepted by all parties to this appeal, that '[n]one of

[the uplands of] those islands contains a body of water in which fish live.'" *Id.* (alterations in original).

This "focus" on the "four corners" of the Settlement Acts reveals, according to the dissent, "that it is at the very least far from clear on the face of the overall statutory scheme" that the definition of the Reservation excludes the waters of the River. App. 84a. "[C]onsider[ing] the relevant 'circumstances' in which the settlement that produced these Acts was forged," *id.*, *see* pp. 3-9, *supra*, "reinforce[s] the reasons to find the relevant words in the provision here at least *** ambiguous with respect to whether the waters at issue are included as a textual analysis of them suggests that they are," App. 85a; *see id.* at 85a-119a (canvassing pre- and post-enactment history).

The Indian canons, according to the dissent, are thus "responsive to [any] interpretative question that we are left with." App. 123a. Indeed, there is "especially good reason to think that a construction in the Nation's favor is in fact a fair proxy for Congress's intent, given the particular role Congress was playing in settling these land claims in the face of assertions that the Nonintercourse Act had been violated." *Id.* To "conclude that a statute purporting to honor what this riverine Nation had 'reserved *** by agreement' in fact deprives it of the sovereign rights that it had long enjoyed in the river that defines it," as the majority held, requires "a clearer indication than is present here that the statute was intended to have such a dramatic and potentially devastating consequence." *Id.* at 124a (ellipsis in original).

REASONS FOR GRANTING THE WRIT

The divided en banc decision interpreting the Settlement Acts conflicts with this Court's precedents in two significant respects.

First, by training its analysis on dictionary definitions of individual words in the statutory provision defining the Reservation, and by detaching its construction of that provision from the rest of the Acts, the decision contravenes this Court's instruction that statutory terms must be considered in context. Congress ratified the Settlement Acts against the background principle from this Court's cases that a reservation defined by reference to a specific set of "islands" or "lands" may encompass both the uplands and the adjacent water and submerged lands. The Settlement Acts not only use a similar phrase, but attach to it an express reference to (and ratification of) treaties "reserving" the Nation's aboriginal territory. Critically, a neighboring provision guarantees the exercise of the Nation's sustenance-fishing rights *within the Reservation*—undermining an uplands-only construction that would exclude any water to fish. But the en banc majority gave short shrift to those critical textual and contextual points.

Second, the decision contravenes well-established Indian canons of construction that this Court has recently reaffirmed. The en banc majority refused to consider the Nation's understanding of the relevant terms on the ground that the Settlement Acts are "statutes" rather than "treaties." But that distinction misconceives the nature of these (and other) Settlement Acts, which (i) invoke historical treaties that must be viewed from the perspective of the

Nation, and (ii) memorialize and ratify an agreement between the Nation and the State. Having found no ambiguity based on its improperly narrow construction, the en banc majority declined to resolve the interpretive dispute in favor of the Nation. The en banc majority also rejected the diminishment canon, which requires a clear indication of Congress's intent to reduce the Reservation, even though the majority's interpretation contracts the Nation's sovereign boundaries.

In the rare First Circuit en banc proceedings below, all parties acknowledged that the proper construction of the Reservation poses a profoundly important question. For the Nation, the stakes could not be higher. The en banc majority's incorrect interpretation inflicts an existential strike at the core of its remaining Reservation that Congress recognized the Settlement Acts were meant to protect. Not only have the Nation's regulatory, enforcement, and judicial authorities been decimated in practical ways; its sovereign identity as a riverine tribe, inextricably linked to the River since time immemorial, now hangs in the balance.

This Court should grant review to undo that manifest injustice and to reinforce the proper approach to interpreting settlement acts affecting tribes more broadly.

I. THE DIVIDED EN BANC DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS

A. The Decision Below Disregards This Court's Instruction That Statutory Language Cannot Be Considered In Isolation.

The court of appeals' dictionary-driven interpretation of the Settlement Acts, adopting an untenable definition of the Reservation "islands" divorced from its statutory context, conflicts with this Court's precedents.

"Whether a statutory term is unambiguous," this Court has insisted, "does not turn solely on dictionary definitions of its component words." *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality). "Rather, '[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well] by the specific context in which that language is used, and the broader context of the statute as a whole.'" *Id.* (alterations in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). That precedent reflects the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Indeed, "that the meaning of a word cannot be determined in isolation" is a basic principle "of language itself." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 70 (2012) ("One should assume the

contextually appropriate ordinary meaning unless there is reason to think otherwise *** which ordinarily comes from context.").

This Court has invoked that rule time and again across varied contexts to construe statutory terms differently than a blinkered understanding of the words might support. *See, e.g.*, *Yates*, 574 U.S. at 537 ("tangible object"); *King v. Burwell*, 576 U.S. 473, 486-490 (2015) ("an Exchange established by the State"); *Robinson*, 519 U.S. at 341 ("employees"); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477-479 (1992) ("entitled"); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("pay or compensation"); *McBoyle v. United States*, 283 U.S. 25, 25-26 (1931) ("vehicles"). It should do so again here.

1. The scope of the Reservation must be construed against the backdrop of Alaska Pacific Fisheries *and the Acts' incorporation of relevant treaties.*

a. The en banc majority eschews all else for the dictionary definition of "islands" as excluding offshore water. In doing so, it disregards this Court's decision interpreting statutory language defining an Indian reservation as specified "islands" to "embrace[] [not] only the upland of the islands [but] include[] as well the adjacent waters and submerged land." *Alaska Pac. Fisheries Co.*, 248 U.S. at 87. In *Alaska Pacific Fisheries*, this Court faced a nearly identical "question *** of construction—of determining what Congress intended by the words 'the body of *lands* known as Annette *Islands*.'" *Id.* at 87 (emphases added). The Court held that the phrase could refer to "the area comprising the islands"—*i.e.*, an area inclusive of

waters—rather than only to the uplands. *Id*. at 86-89. A broader consideration, informed by the Indian tribe's historical relationship to the waters, therefore was necessary to reveal the intended meaning of the larger phrase in which the words "lands" and "islands" were embedded. *Id*. at 87.

This Court applied the same principle when interpreting the statutory phrase "any other public *lands* which are actually occupied by Indians" to authorize the inclusion of both "the uplands and [adjacent] waters" within a tribe's reservation. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 110-111 (1949) (emphasis added). The Court warned against the exact approach taken in this case: "extracting from [a reservation-defining statute] a single phrase, such as 'public lands'[,] and getting the phrase's meaning from the dictionary." *Id.* at 115-116. Recognizing that *Alaska Pacific Fisheries* provided the relevant background drafting principles, the Court understood that the text could not be construed to unambiguously exclude water, even though it did not expressly include that term. *Id.* at 116.

Those cases provided the default legislative rule—if not controlling law—guiding Congress's ratification of the Settlement Acts: an "island"-based reservation may in fact include surrounding waters and submerged lands. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."). In light of that background precedent, the relevant phrase here—"all the islands in the Penobscot River"—"is configured in a way that at least raises the question whether it refers to an area inclusive of waters, despite the fact that the only

geographic terms used in connection with that phrase are 'islands' and 'lands.'" App. 63a (Barron, J., dissenting). The en banc majority's contrary holding that the dictionary definition of "islands" *unambiguously* strips the Reservation of any waters is not a defensible analysis.

b. The Settlement Acts confirm that the "islands" must be understood as those "*reserved* to the Penobscot Nation by agreement with the States of Massachusetts and Maine." 30 M.R.S.A. § 6203(8) (emphasis added). That text reinforces that the scope of the Reservation is grounded in the Nation's historical agreements, which comprise not a "grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 680-681 (1979); *see* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (Nell Jessup Newton ed., 2017) ("COHEN") (describing "reserved rights doctrine"). The historical record leaves "little question" that the Nation's aboriginal title, since "time immemorial" and through the founding of the United States, "encompass[ed] use and occupancy of the Main Stem of the Penobscot River and not merely land masses (individual islands, which may come and go over time) within it." App. 90a; *see* pp. 3-4, *supra*. And nothing in the subsequent treaties invoked in the Settlement Acts ceded the Nation's aboriginal title to the Main Stem. *See* pp. 4-6, *supra*.

By reference to "all islands in that river *** that existed on June 29, 1818," 30 M.R.S.A. § 6203(8), the Settlement Acts emphasize the treaty of that date that ceded (only) "lands *** on both sides of the Penobscot [R]iver," App. 323a. Underscoring that this transfer

did not encompass the water (or lands) in between, the 1818 treaty conferred on the citizens of Massachusetts (and, later, Maine) a "right to pass and repass" the water. *Id.* at 325a-326a. The Settlement Acts ratified the treaties and made the transfer of interests therein—including the easement granted from the Nation—"effective as of the date of said transfer." 25 U.S.C. § 1723(a)(1).

"Quite obviously, no dictionary can reveal the nature of an earlier agreed-to reservation between specific historically rooted sovereign actors," which must inform the meaning of the Reservation given the Settlement Acts' express ratification of these agreements. App. 65a (Barron, J., dissenting). That is why even the State asserted in prior litigation that "a proper determination of the 'Reservation' necessarily '*involves analysis of the relevant treaties* referenced in the Reservation definitions in the [Settlement Acts] *including the historical transfers* of Reservation lands and natural resources.'" *Id.*

Yet the en banc majority refused to factor any consideration of these sources into the definition of the Reservation. App. 20a-26a. According to the majority, because "[t]he treaties no longer have any meaning independent of the Settlement Acts," there is "no plausible argument" that the Acts' "reference to these treaties *** alter[s] the plain meaning of 'islands' and creates *** ambiguity." *Id.* at 21a, 26a. That construction runs afoul of the canon against superfluity, *id.* at 66a (Barron, J. dissenting) (phrase treated as "wasted"), and it contradicts this Court's instruction that such historical "circumstances" imported by a statute's text may "shed much light on

what Congress intended," *Alaska Pacific Fisheries*, 248 U.S. at 89.

2. "Reservation" must be construed in light of the statute as a whole.

Worse yet, the decision below divorces the definition of the Reservation from the text of neighboring provisions. The en banc majority "agree[d] with the Nation and the United States" that section 6207(4) of the MIA confirms "the Nation['s] sustenance fishing rights in the Main Stem." App. 45a. That provision explicitly preserves the Nation's rights "within the boundaries of [its] *** reservation[]." 30 M.R.S.A. § 6207(4). And it is uncontested that the Nation's uplands do not "contain[] a body of water in which fish live." App. 74a (Barron, J., dissenting). Read together, section 6207(4) thus requires that the Reservation identified in section 6203(8) encompass at least some portion of the Main Stem. Otherwise, the Nation would be left to exercise its on-Reservation sustenance-fishing rights "on dry land where there are no fish and no places to fish." App. 154a (Torruella, J., dissenting).

The en banc majority asserted that its "inquiry [was] focused on the meaning of Reservation under § 6203(8), not the scope of the Nation's sustenance fishing rights under § 6207(4)." App. 42a. That blithe demarcation of the provision defining the Nation's Reservation and the neighboring provision preserving the Nation's rights within that Reservation inverts this Court's established presumption that the same words "used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v.*

Secretary of Treasury, 475 U.S. 851, 860 (1986)). Although it is theoretically possible that Congress could have chosen silently "to refer to the Penobscot Indian Reservation in two fundamentally inconsistent ways," "it seems far more natural to read § 6207(4) to incorporate the definition of the 'Indian Reservation' set forth in § 6203(8), precisely because that definition has a purpose *only* once it is plugged into such rights-granting provisions." App. 77a, 79a (Barron, J., dissenting).

The en banc majority's silo-like approach cannot be squared with this Court's commands that statutes must be interpreted "as a symmetrical and coherent regulatory scheme." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995). Under that precedent, the definition of the Reservation cannot be separated from its "place in the overall statutory scheme." *Brown & Williamson*, 529 U.S. at 133. But instead of endeavoring "to fit, if possible, all parts into an harmonious whole," *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (quoting *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)), the majority looked for reasons to discount a consistent reading of the Nation's on-Reservation rights to maintain its uplands-only reading, *see, e.g.*, App. 46a (questioning "[w]hether Congress was aware or not that there are no places to fish on the Reservation's [upland] islands").

B. The Decision Below Dismisses The Indian Canons Of Construction.

The en banc majority does violence to another line of this Court's precedent: that establishing the Indian

canons of construction. The decision below implicates three related aspects of the Indian canons.

a. The en banc majority holds that "the Indian canons are inapplicable" because "the definition of Reservation in the Settlement Acts is not ambiguous." App. 36a-37a & n.20. But that determination itself suffers from a misunderstanding of the Indian canons.

Beyond the generally applicable principles of statutory construction requiring courts to consult context in assessing (and not merely resolving) ambiguity, the Indian canons require that courts "look beyond the written words to the larger context" to "shed[] light on how the [Tribe] *** understood the agreement" at issue. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). The relevant terms of an agreement, as this Court recently reaffirmed, "must be construed 'in the sense in which they would naturally be understood by the Indians.'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (quoting *Washington State Com. Passenger Fishing Vessel Assn.*, 443 U.S. at 676). For example, this Court looked to a tribe's river-based sovereign interests, and what those interests indicated about what the tribe "would have considered," to hold that a grant of "land" to the Choctaw Nation included submerged lands in the Arkansas River. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635 (1970).

On the premise that this canon applies only to treaties per se, and that "the Settlement Acts are not treaties" but "statutes," the en banc majority held that the canon "has no bearing on their interpretation." App. 38a. That syllogism overlooks that the Settlement Acts define the Reservation by

incorporating the territory "reserved to the Penobscot Nation" in prior treaties. 30 M.R.S.A. § 6203(8); *see* 20-21, *supra*. Properly construing the meaning of that clause requires analyzing "how the [Nation] understood the treat[ies'] terms." *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring).

More fundamentally, the majority's holding disregards that the Settlement Acts themselves represent an "agreement between the [Nation] and the State" that could take effect only upon ratification by Congress. 30 M.R.S.A. § 6202; *see* App. 102a-103a (Barron, J., dissenting) (explaining that Acts ratified agreement to settle then-pending claims covering "up to two-thirds of the area of what is now the State of Maine"). Since the United States stopped entering into treaties with Indian Tribes in the late nineteenth century, this Court has regarded statutes ratifying agreements with Tribes as "treaty substitutes." FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 311-326 (1994); *see Oneida Cnty. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985) ("The Court has applied similar canons of construction in nontreaty matters."); *Antoine v. Washington*, 420 U.S. 194, 199 (1975) (applying canon with respect to "the wording of treaties and statutes ratifying agreements with the Indians"); *Choate v. Trapp*, 224 U.S. 665, 671 (1912) ("[A]lthough the Atoka agreement is in the form of a contract, it is still an integral part of the Curtis act, and, if not a treaty, is a public law relating to tribal property[.]"). The Court has rejected a State's "attempted distinction" between "ratification of a contract [with a tribe] by treaty effected by

concurrence of two-thirds of the Senate *** [and] ratification of a contract [with a tribe] effected by legislation passed by the House and the Senate." *Antoine*, 420 U.S. at 200-201.

The Second Circuit has interpreted the Connecticut Settlement Act, modeled on the Settlement Acts at issue, by drawing on this Court's "early formulations" of the Indian canon "construing any treaty between the United States and an Indian tribe"—without distinguishing between "statutes or treaties." *Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior*, 228 F.3d 82, 92-93 (2d Cir. 2000); *see id.* at 91 n.3 (analogizing settlement acts to "compact between two states that had been ratified by Congress," which this Court has viewed as "both a contract and a statute"). The en banc majority's conflicting approach foreclosed any consideration of whether the Nation—and the United States, acting pursuant to its "unique trust relationship," *Oneida County, N.Y.*, 470 U.S. at 247—would have understood their settlement of aboriginal claims to impliedly strip from the Reservation the River on which everyone agreed the Nation's "aboriginal territory *** is centered." S. REP. NO. 96-957, at 11; H. REP. NO. 96-1353, at 11.

b. Had the en banc majority properly considered the Nation's understanding, it should have resolved the resulting ambiguity "in favor of the Indians." *Herrera*, 139 S. Ct. at 1699; *see, e.g., County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."). After all, the State of Maine "drew up this contract,

and we normally construe any ambiguities against the drafter who enjoys the power of the pen." *Cougar Den, Inc.*, 139 S. Ct. at 1016 (Gorsuch, J., concurring).

The majority's skewed discussion of the record confirms that it did just the opposite. The majority found the Nation's "view of history," as accurately recited by Jude Barron, "beside the point," because "the drafters were motivated by *** their stated purpose of 'remov[ing] the cloud on the titles to land in the State of Maine resulting from Indian claims.'" App. 32a (alteration in original) (quoting 25 U.S.C. § 1721(b)(1)). That circumscribed perspective does not account for the fact that the cloud on title resulted from the State's having entered into agreements to transfer the Nation's territory without the federal authorization Congress required "to protect tribes from states swindling them." *Id.* at 53a (Barron, J., dissenting); *see id.* at 123a ("There is *** especially good reason to think that a construction in the Nation's favor is in fact a fair proxy for Congress's intent, given the particular role Congress was playing in settling these land claims in the face of assertions that the Nonintercourse Act had been violated.").

The majority also allowed the State's self-asserted control over the Main Stem to displace the Nation's understanding and flip the proper presumption in favor of tribal interests. App. 27a-36a. That reasoning credits the sort of constructive (and unlawful) possession this Court recently warned against: "A State could encroach on the tribal boundaries or legal rights *** and, with enough time and patience, nullify the promises made[.]" *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020).

c. The en banc majority's decision also tramples this Court's "well settled" principle that "'[o]nly Congress can divest a reservation of its land and diminish its boundaries,' and [Congress's] intent to do so must be clear." *Nebraska v. Parker*, 577 U.S. 481, 487-488 (2016) (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)); *see United States v. Sante Fe Pac. R.R. Co.*, 314 U.S. 339, 345-346 (1941) (given strong federal policy "to respect the Indian right of occupancy," congressional intent to extinguish Indian title must be "plain and unambiguous").

"Under [this Court's] precedents," before determining that Congress meant to diminish a tribe's sovereign territory, courts must examine "all the circumstances" providing the relevant context for the congressional enactment: its text but also "the history surrounding [its] passage," including "the text of earlier treaties" and the legislative history; and the "contemporaneous and subsequent understanding of [its] effect on the reservation boundaries." *Parker*, 577 U.S. at 488-490. A statute can be construed to reduce the scope of the reservation only if its language, considered in light of the relevant context, "unequivocally reveal[s] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471.

Here, there is at best "mixed historical evidence" supporting an uplands-only interpretation of the Reservation. *Parker*, 577 U.S. at 490; *see* pp. 3-9, *supra*. As the en banc majority recognized in a discussion it viewed as "entirely separate" from the meaning of the Reservation, "[t]he House and Senate Reports explain that Maine previously recognized the

Nation's 'right to control Indian subsistence hunting and fishing within their reservation[]"—before the Settlement Acts were passed. App. 42a-43a, 46a (quoting S. REP. NO. 96-957, at 16; H. REP. NO. 96-1353, at 17-18). Yet the majority declined to consider that context to evaluate whether Congress clearly intended to diminish the Nation's preexisting reservation. App. 38a-40a. Believing that "[t]his is not a traditional diminishment case," the majority summarily concluded that the canon is "inapplicable." *Id.* at 38a.

The result is "tragically ironic": under the en banc majority's construction, "the Acts [now] leave the Nation with even fewer sovereign rights in the river that has been its lifeblood than it had reserved for itself in its own unprotected dealings with [Massachusetts and Maine] so early on in our history." App. 54a (Barron, J., dissenting). Because "courts have no proper role in the adjustment of reservation borders," no matter how much they "might wish an inconvenient [part of the] reservation would simply disappear," *McGirt*, 140 S. Ct. at 2462, this Court's review is required to bring the First Circuit's law in line with this Court's jurisprudence.

II. WHETHER THE SETTLEMENT ACTS DEPRIVE THE PENOBSCOT NATION OF ITS RIGHTFUL RESERVATION IS A QUESTION OF EXCEPTIONAL IMPORTANCE WITH IMPLICATIONS FOR OTHER SETTLEMENT ACT TRIBES

As made apparent by the "emphatic[]" statements of the many parties, intervenors, amici, and dissents throughout this long-running litigation,

App. 187a (Torruella, J., dissenting), the question presented is one of exceptional importance to all affected—and to many other tribes subject to settlement acts of their own.

a. On one side, the State and intervenors (municipal and private) claim the longstanding understanding of the Settlement Acts represents "an enormous change" concerning the status of "the largest river running through the heart of the state, used by myriad mills, municipalities, and the public." App. 33a-34a & n.18. The purported loss of the State's "control" over this "important water artery," according to the en banc majority, would have "massive" "practical consequences." *Id.* Under that view, "[t]he stakes of reading the definition of Reservation to include the River are *** great[]." *Id.* at 36a.

On the other side, the consequences of construing the Reservation to exclude the River's Main Stem cannot be understood as anything less than "dramatic," "tragic[]," and "devastating" for the Nation. App. 54a, 124a (Barron, J., dissenting). Under the decision below, the hard-fought settlement "purporting to honor what this riverine Nation had 'reserved *** by agreement' in fact deprives it of the sovereign rights that it had long enjoyed in the river that defines it." *Id.* at 124a (ellipsis in original). The Main Stem is and always has been the Nation's lifeblood. *Id.* at 54a. No less than other tribes for which uplands-adjacent water is considered "essential," *Alaska Pacific Fisheries Co.*, 248 U.S. at 89, and for which this Court has expressed a "responsibility" and "obligation" to protect river-based "immemorial customs" retained in prior agreements, *Tulee v. Washington*, 315 U.S. 681, 684 (1942), the

Nation has forever "centered" its domain, economy, culture, and spiritual beliefs on the Main Stem, S. Rep. No. 96-957, at 11; H. Rep. No. 96-1353, at 11.

That undisputed and nonnegotiable fact was a fundamental assumption of the settlement discussions and guided the United States' role as trustee—a relationship that the State's own highest court recognized at the time to provide "protection in the most primal aspect of the tribe's existence." *State v. Dana*, 404 A.2d 551, 561 (Me. 1979); *see Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942) (explaining that, in acting as trustee, the federal government "has charged itself with moral obligations of the highest responsibility and trust"). Chief among the features of "inherent sovereignty" that Congress acknowledged the Nation "retain[ed]," and that the United States has a duty to preserve, is the Nation's "exclusive authority to regulate sustenance fishing within [its] respective reservation[]." S. REP. NO. 96-957, at 13-15, 37; H. REP. NO. 96-1353, at 13-15. As Judge Torruella explained—before his death prevented his participation in the en banc decision—the River-stripping interpretation that the State adopted (and that the en banc First Circuit has now enshrined) is "nothing short of stunning." App. 180a.

The en banc majority's attempt to soften its extreme construction—by relying on the State's "informal policy" to permit the Nation's members to fish the Main Stem as a matter of grace—only crystalizes the threat to the Nation's sovereignty. *See* App. 49a, 148a. In addition to protecting tribal members' ability to exercise sacred rights, "[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations."

United States v. Mazurie, 419 U.S. 544, 558 (1975) (quoting *Williams v. Lee*, 358 U.S. 217, 223 (1959)). Accordingly, "[t]he Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980); *see Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (tribes' sovereignty "centers on the land held by the tribe and on tribal members within the reservation"); *Mazurie*, 419 U.S. at 557 (tribes "possess[] attributes of sovereignty over both their members and their territory").

Curtailing the Nation's borders by stripping its namesake River from the Reservation is no less offensive and intrusive to the Nation's core sovereignty than if an international court were to afford Canada exclusive jurisdiction over the entirety of the Great Lakes. Canada could hardly blunt that blow with halfhearted pledges to allow Americans to continue to fish the lakes that it suddenly insists are outside U.S. territory.

b. The decision below also has profound practical consequences for the Nation. Before the State Attorney General issued the 2012 directive, the Nation regularly exercised regulatory authority, through its natural resources department and its game warden service, to promulgate and enforce tribal laws governing hunting, trapping, and fishing on the Main Stem. App. 112a (Barron, J., dissenting); *see id.* at 218a-221a, 224a-227a. The Nation began operating its warden service on the River before the Settlement Acts and continued doing so for decades after they were enacted, largely through federal funding for the Nation's exercise of governmental authority on

"Reservation lands and waterways." App. 112a. Consistent with its "exclusive authority" to regulate critical activities within the Reservation, *see, e.g.*, 30 M.R.S.A. §§ 6207(1), 6210(1), the Nation's wardens patrolled the Main Stem daily, "from sun up to sun down," J.A. 1043-1044, to protect the Nation's sacred territory and related sustenance hunting, trapping, and fishing rights.

The State's abrupt change in position in 2012 brought these regulatory and enforcement activities to a standstill. Indeed, that was the stated purpose of the State Attorney General's directive that "the River itself is not part of the Penobscot Nation's Reservation, and therefore is not subject to its regulatory authority or proprietary control." App. 194a.

The decision below also has a substantial impact on the Nation's tribal court. That sovereign court has regularly exercised its power over enforcement proceedings relating to activities in the Main Stem. App. 244a-252a (discussing examples of proceedings); *see, e.g.*, *id.* at 113a & n.51 (discussing tribal court prosecution of tribal member who unlawfully hunted deer from boat in the River). The curtailed Reservation boundary strips from the jurisdiction of the tribal court various criminal offenses committed on the River by members of federally recognized tribes, 30 M.R.S.A. § 6209-B(1)(A) & (B), as well as certain civil actions arising on the River filed against a Nation member, *id.* § 6209-B(1)(C).

c. Other collateral consequences flow as well. At a minimum, the decision below unsettles the baseline understanding of federal-state-tribal jurisdiction and regulation over this critical waterway. In fact, the

State has already invoked the uplands-only construction of the Reservation in an attempt to sidestep EPA disapprovals of Maine water-quality standards meant to protect the Nation's enjoyment of resources in the River. *See* State's Mot. for J. on Admin. R. 48 & n.55, *Maine v. McCarthy*, No. 14-cv-264 (D. Me. Feb. 16, 2018), ECF No. 118. The decision thus both prevents the Nation from enforcing tribal regulations to sustain the fishing (and hunting and trapping) rights of its members and hampers the federal government from carrying out its duty as trustee to protect those rights.

The decision, moreover, casts serious doubt on the jurisdiction of the Maine Indian Tribal-State Commission, the expert intergovernmental body established by the Settlement Acts to "continually review the effectiveness" of the landmark settlement and "the social, economic and legal relationship" between the tribes and the State. 30 M.R.S.A. § 6212(3). The Commission has the power to promulgate fishing regulations within the Nation's (and other tribes') territory, taking into account the interests of both the Indians and non-Indians. *Id.* § 6207(3)(A)-(C). In that role, the Commission has "consistently supported the Nation's claim to on-Reservation sustenance fishing rights in the Main Stem." Amicus Br. of Maine Indian Tribal-State Commission 1 (July 14, 2020) (formatting modified). By construing the Reservation to exclude the River, the decision below not only flouts that expert body's position; it also deprives the Commission of authority with respect to the Main Stem.

d. Finally, the en banc majority's interpretation threatens to constrict the reservations of other Maine

tribes affected by the same Settlement Acts and of tribes outside Maine subject to other settlement acts.

For example, the construction of "land" as necessarily "in opposition to water," App. 13a, risks diminishing the scope of the Passamaquoddy Reservation, which the Settlement Acts define in reference to "land" and "lands" only, 25 USC § 1722(f); 30 M.R.S.A. § 6203(5); *see* App. 75a-76a n.37 (Barron, J., dissenting).

More broadly, the en banc majority's dismissal of the Indian canons, including its holding that certain canons are categorically inapplicable, reflects a sea change with serious implications for tribes affected by other settlement acts. *See, e.g.*, *Connecticut ex rel. Blumenthal*, 228 F.3d at 90 (explaining MICSA "was a model for" the Connecticut Settlement Act); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994) (explaining Maine and Massachusetts Settlement Acts were "modeled after" Rhode Island Settlement Act). The prevalent use of settlement acts in lieu of treaties makes the decision below all the more alarming for Indian tribes. *See* 25 U.S.C. ch. 19 (codification of settlement acts with various tribes); COHEN § 1.07 (discussing "increasing significance" of settlement acts as "one of the most dramatic changes" in Indian law and policy in the twentieth century given that "[m]any states had assumed that nineteenth-century state treaties or agreements had extinguished tribal land claims and legal existence when, in fact, states were not authorized to so act").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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