No. _____

In The
Supreme Court of the United States

JOHN ALBERT SCUDERO, JR.,
Petitioner
v.

STATE OF ALASKA,
Respondent.

On Petition for Writ of Certiorari
To The Alaska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Can the State of Alaska by criminal prosecution and threat of fine and incarceration prohibit Alaska Native members of the Metlakatla Indian Community and Tribe and the Tsimshian Nation, who have vested broad off-reservation, aboriginal, treaty, presidential proclamation, and congressional legislature enacted, and granted, fishing rights, from harvesting fish in their traditional Pacific Ocean fishing waters, and Annette Islands Reserve related waters, which fishing is essential to their culture, heritage, and lifestyle, and vital to the very purpose for which the Reserve was established and dedicated, under the guise of "conservation necessity" by criminally banning those natives who are "un-permitted" i.e., do not have State of Alaska "limited entry permits," which

permits are bought and sold for many tens of thousands of dollars and well beyond the financial resources and means of most natives, and which permits were issued in a restricted and "qualifying fashion" that discriminates against those Metlakatla Natives?

2. Should this Court act as the United States Supreme Court did on two (2) prior occasions in *Alaska Pacific Fisheries Company v. United States*, 248 U.S. 78, 39 S.Ct.40, 63 L.Ed. 138 (1918) and *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 82 S.Ct. 552, 7 L.Ed. 262 (1962), to protect the rights of the Tsimshian Nation members of the Metlakatla Indian Community and Tribe as to the Annette Islands Reserve, as to vested fishing rights relating to the Reserve, or allow the State of Alaska and the Alaska Supreme Court to abrogate and

extinguish those aboriginal, treaty, presidential proclamation, and congressional legislation and grant rights [which abrogation involves native fishing rights that evolve from the Russian Treaty of Succession of 1867 (Alaska Acquisition Treaty) and subsequent federal legislation including the Alaska Statehood Act, (72 Stat. 339) Public Law 85-508, 85th Congress, H.R. 7999, July 7, 1958, the Alaska Native Claims Settlement Act ("ANCSA," 43 U.S.C. § 1601 *et. seq.*), and violation of the duties and obligations of the State of Alaska thereunder], with devastating impacts on the Metlakatlans and their thousands of years of culture tradition and heritage under the guise of the misapplied "conservation necessity principle," where said misapplication is discriminatory against the Tsimshian Metlakatla Tribe and natives such as John Albert Scudero, Jr.

and there will be no real impact on the Alaska limited entry fishing program or the fisheries of Alaska if the natives' vested rights are honored?

3. Can the State of Alaska by such criminal prosecution abolish those Alaska Natives' fishing rights when allowing the small number of Metlakatlans to exercise their rights will in reality have little impact on the State of Alaska Limited Entry Fisheries Program, or salmon fisheries; although such discriminatory ban and prohibition and criminal prosecution abrogates and emasculates those vested fishing rights and destroys the basic purpose for which the Reserve was established by presidential proclamation and congressional action, as a reserve for the Alaska Natives to enjoy and practice their historical and traditional fish harvesting lifestyle, as opposed to an agrarian

lifestyle which was and is not possible on the Reserve; or does the State of Alaska have to honor those vested rights of the Alaska Natives, Metlakatlans, as the Courts have held as to vested native fishing rights and allow them to fish on equal footing and par with non-native fishers, merely perhaps equally subject to true conservation regulatory measures as to "manner and means," and "seasons" of harvest and not subject to a criminal prosecution impressed discriminatory total ban on un-permitted natives so exercising their vested fishing rights?

PETITION FOR WRIT OF CERTIORARI

John Albert Scudero, Jr., a blood member of the Tsimshian Nation and the Metlakatla Indian Community and Tribe, respectfully petitions for a Writ of Certiorari to review the Opinion of the Supreme Court for the State of Alaska, issued on July 23, 2021, styled: *John Albert Scudero, Jr., v. State of Alaska*, Supreme Court Case No. S-17549, 496 P.3d 381 (Alaska 2021), *reconsideration and reh'g denied* (Oct. 22, 2021).

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(i), the following list identifies all of the parties appearing herein and before the Supreme Court for the State of Alaska.

Petitioner is JOHN ALBERT SCUDERO, JR., Defendant in the District/Superior Court for the

State of Alaska, First Judicial District at Ketchikan, and Appellant in the Supreme Court for the State of Alaska.

Respondent is the STATE OF ALASKA, Plaintiff in the District/Superior Court and Appellee before the Alaska Supreme Court.

RULE 29.6 DISCLOSURE

No corporate ownership exists that need be disclosed.

RULE 14(b)(iii) LIST OF PROCEEDINGS

1. Initial criminal prosecution of Mr. Scudero was in *State of Alaska v. John A. Scudero, Jr.*, Case No. 1KE – 14-00672 CR in Superior / District Court for State of Alaska, First Judicial District at Ketchikan: Initial Orders and Judgment, entered June 22, 2016, and September 19, 2016, and final order on November 29, 2021. [App. 54–72].

2. Direct appeal to Alaska Court of Appeals, in *Scudero v. State*, Case No. A-12729 was transferred to the Alaska Supreme Court in Supreme Court Case No. S-17549 on September 10, 2019. [App. 42–44].

3. Alaska Supreme Court Opinion No. 7544, in *Scudero v. State*, Alaska Supreme Court No. S-17549, Alaska Court of Appeals No. A 12729, Alaska Superior Court Case No. 1KE- 14- 00672, denied the appeal on July 23, 2021. [App. 1-39].

4. A timely Petition for Rehearing, was filed in the Alaska Supreme Court on August 2, 2021. [App. 80–91]. Rehearing was denied on October 22, 2021. [App. 40–41].

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The Alaska Supreme Court Opinion is styled: *John Albert Scudero, Jr. v. State of Alaska,* Case No. S-17549, Opinion No. 7544 (7/23/2021), 496 P.3d 381, (Alaska 2021); *reconsideration and rehearing denied* (October 22, 2021); Petitioner's Appendix (hereinafter "App."), at 1-39.

The Trial Court Opinion in State of Alaska v. John A. Scudero, Jr. Case No. 1KE – 14–00672 CR in Superior/District Court for State of Alaska First Judicial District at Ketchikan is not reported; Relevant Order on Pending Motions of June 22, 2016, is set out in Appendix. [App. 54-62].

BASIS FOR JURISDICTION

The Alaska Supreme Court entered the Opinion on July 23, 2021, [App. 1-39]; denied rehearing and rehearing *en banc* on October 22, 2021 [App. 40].

This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The case involves: 18 U.S.C. § 1162; 25 U.S.C. § 495 (1988); 28 U.S.C. § 1257; 43 U.S.C. § 1618(a); Alaska Statehood Act, (72 Stat.339) Public Law 85-508, 85th Congress, H.R. 7999, July 7, 1958; Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601, *et. seq.*; Annette Islands Reserved for Metlakatla Indians, Act of March 3, 1891, 25 CFR § 241.2, 26 Stat. 1095, 1101 (formally codified at 48 U.S.C. § 358 and transferred to 25 U.S.C. § 495 prior to deletion from the Code); Presidential Proclamation No. 1331, April 28, 1916, 39 Stat. 177; United States Regulations, 25 C.F.R. § 241.2 Annette Islands Reserve; Definition; Exclusive Fishery, Licenses; 5 AAC 33.310. Fishing Seasons and Periods for Net

Gear (Excerpt); 5 AAC 39.197. Unlawful Possession of Fish; Alaska Statute 16.05.723(a) Misdemeanor Commercial Fishing Penalties; Alaska Statute 16.05.940 Definitions; Alaska Statute 16.43.140(a) Permit Required; and Alaska Statute 16.43.970 (Excerpt). *See* Appendix 109-118.

STATEMENT OF THE CASE

A. Raising and Preservation of Federal Issues as to Which Review is Sought for State Court Judgment.

Under Rule 14 (g) (i), federal questions sought to be reviewed, as to state-court judgment, were initially raised, preserved and ruled on in Trial Court and on Direct Appeal to Alaska Court of Appeals with transfer of the appeal as to those issues to the Alaska Supreme Court, which issues were addressed by the Alaska Supreme Court in its Opinion Below, Opinion No. 7554 of July 23, 2021. [App. 1-39].

Mr. Scudero's Petition for Rehearing as to same of August 2, 2021 [App. 80-91] was denied by the Alaska Supreme Court on October 22, 2021. [App. 40–41].

Initial Orders and Judgment in *State of Alaska v. John A. Scudero, Jr.*, Case No. 1KE – 14-00672 CR in Superior / District Court for the State of Alaska, First Judicial District at Ketchikan, were entered June 22, 2016, September 19, 2016; final order on November 29, 2021. [App. 54–72].

Trial Court's Order on Pending Motions of June 22, 2016 [App. 54-62] demonstrates issues were raised by motions and ruled on and preserved.

Issues were raised and preserved on Direct Appeal to Alaska Court of Appeals, in *Scudero v. State*, Case No. A-12729.

Appeal, given importance of the issues, pursuant to an Order Certifying Appeal No. A-12729, to the Alaska Supreme Court, issued by the Court of Appeals on August 5, 2019, was transferred to Alaska Supreme Court by Order of Transfer from

Court Of Appeals Rule 408 in Supreme Court Case No. S-17549, September 10, 2019. [App. 42-44].

Alaska Supreme Court Opinion No. 7544, in *Scudero v. State*, Alaska Supreme Court No. S-17549, Alaska Court of Appeals No. A 12729, Alaska Superior Court Case No. 1KE- 14- 00672, denied the Appeal on July 23, 2021. [App. 1-39].

A Timely Petition for Rehearing, was filed in Alaska Supreme Court on August 2, 2021. [App. 80-91]; denied October 22, 2021. [App. 40-41].

Under Rule 14 (g) (i), "as the … portions of the record relied on under this subparagraph are voluminous, they are … included in the Appendix referred to in subparagraph 1(i)."

B. Introductory Statement

The Alaska Supreme Court held that the State of Alaska can interfere with, criminally prohibit and

prosecute, via the threat of conviction, and fine, and incarceration, the exercise of the Pacific Ocean waters fishing rights of Alaska Native John Albert Scudero, Jr., and the Metlakatla Natives (herein "Metlakatlans"), Members of the Metlakatlan Indian Community, a federally recognized Indian Tribe (which Tribe is a part of the Tsimshian Nation), including their aboriginal fishing rights, as well as their fishing rights under presidential proclamation, congressional legislation, and treaty, via the guise of the discriminatory misapplication of the doctrine of "conservation necessity." The Metlakatlans have vested aboriginal fishing rights given the fact that the Alaska Native Claims Settlement Act ("ANCSA"), which recognized settled and extinguished aboriginal rights of many Alaska Natives, did not act as a forfeit of Metlakatlans'

rights since they "opted out" and never received any money, lands, corporate status, or benefits to settle, waive, or relinquish their aboriginal rights. This includes the right to fish for salmon in the traditional Pacific Ocean waters where Mr. Scudero was fishing, which the Metlakatla Natives, as a part of the Tsimshian Nation, have exercised for thousands of years. Metlkatlans live on the Annette Islands Reserve in Southeast Alaska, which is a reserve established by presidential proclamation, and congressional legislation in the late 1800's to protect the Metlakatlan Natives and allow them to exercise their heritage and lifestyle of fishing and harvesting from the sea in their traditional fishing waters, which waters include both waters within 3000 feet off the Annette Island(s), i.e., "Metlakatlan exclusive fishing zone," and the traditional areas of

"off-reservation" fishing and harvest, which are essential to the purpose for which the reservation/reserve/sanctuary was created and intended: To enable the Metlkatlans to pursue a non-agrarian lifestyle by harvesting fish from the sea and operating an on island fish packing cannery.

The Metlkatlans operated the cannery for decades both before and after statehood, but now have had to close the cannery because of the State of Alaska's criminal prohibition against certain "non-limited entry permitted Metlakatlan Natives" such as Petitioner Scudero from fishing outside the 3000-foot zone. Those off-reservation traditional and necessary waters include the waters where Petitioner Scudero was fishing. The Alaska Supreme Court upheld a criminal prosecution and conviction for John Albert Scudero who is a native blood

member of the Metlakatla Tribe and was merely exercising his "off-reservation" fishing rights as a "protest" to attempt to protect those rights for the Metlkatlans.

The Alaska Supreme Court assumed that those broad off-reservation fishing rights existed, and were held by the Metlkatlans, but that under the guise of "conservation necessity" the Metlakatlan Natives such as John Scudero could be criminally prohibited from exercising those rights, since they did not have an "Alaska Limited Entry Permit." Those fishing permits actually sell for tens of thousands of dollars, and possibly well in excess of $100,000, and for far beyond the financial means of most Metlakatlans to purchase.

When the limited entry program was first enforced under the 1973 Alaska Statute, and a

limited number of permits were granted, there was discrimination against Metlakatlans, as they did not receive any points or credits toward permits, regarding prior fishery participation for the fishing they had engaged in within the "3000-foot exclusive zone." No new permits have been or are being granted.

When the Annette Islands Reserve was established by Act of Congress in 1891, it reserved for the Metlakatlan Indian Community members of the Tribe and Tsimshian Nation, the right to fish in waters surrounding the reserve concurrent with their unrelinquished aboriginal rights. President Wilson's Proclamation of 1916 *enhanced* that reserved right by establishing an "exclusive fishery" for the Community's protection. The Proclamation did not diminish or detrimentally affect in any way

the off-reservation fishing rights reserved by Congress, but rather created a sanctuary for the Metlakatlans, not a cage to restrict their exercise of those rights. However, those off-reservation rights were in effect unlawfully and by criminal prosecution extinguished, when the State passed its limited entry regulatory program in 1973 and refused to credit the Metlakatlans as to their prior on-reservation fishing catch(s) for purposes of issuing permits.

On at least two prior occasions, the United States Supreme Court has acted as necessary to recognize and protect the rights of the Metlakatla Tribe and Natives as to ocean fishing, recognizing the unique nature of the Metlakatlans as to those fishing rights. This Court has previously held that the statute creating the Annette Islands Reserve also

reserved fishing rights. In *Alaska Pacific Fisheries Company v. United States*, 248 U.S. 78, 39 S.Ct.40, 63 L.Ed. 138 (1918), the Court acknowledged that Metlakatlans were a fishing people who "could not sustain themselves" without fishing rights. This Court held that "the use of the adjacent fishing grounds was equally essential" to the purpose of the Annette Islands Reserve, which the Court viewed as providing Metlakatlans with the means to become self-sustaining. *Id.* In *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 82 S.Ct. 552, 7 L.Ed. 262 (1962), this Court also recognized that the Metlakatlans depended on fishing for their livelihood and that Congress had reserved their fishing rights by creating the Reserve. The Alaska Supreme Court, despite presuming and assuming the Metlakatlans' rights to fish off-reservation are grounded in both

aboriginal and presidential proclamation, congressional legislation, and treaty-based authority, has nevertheless allowed the State by criminal prosecution to convict, fine, and threaten incarceration of John Albert Scudero, Jr., a Tribe Member with vested rights, for exercising those rights in waters open only to state limited entry permit holders. The doctrine of conservation necessity (even if applicable to aboriginal rights which application is not clear), has never been applied, and cannot be properly applied to prohibit natives such as Metlkatlans from exercising their fishing rights, as that doctrine merely applies to equal par application of across-the-board regulatory measures as to manner and means of harvest, and in some instances seasons, and not as here to prohibit or limit native fishers' entry to a fishery, nor

especially as to criminal prohibition against natives exercising their fishing rights.

The Alaska Supreme Court specifically assumed existence of those "broad off-reservation fishing rights," but allowed the State of of Alaska to abrogate same [including blessing the violation(s) of the duties and obligations of the State of Alaska owed to natives under the Alaska Statehood Act], by criminalizing and prohibiting Metlakatlan Natives such as Mr. Scudero from exercising those rights. It is necessary for the United States Supreme Court to again act to protect those rights and the Metlakatla Natives.

Doing so will, in reality, have very little impact on the Alaska Limited Entry Program, since the number of Metlakatla Natives (and their annual harvest) who in fact possess such rights that would

allow them to fish in those traditional areas are minimal as compared to the overall annual harvest of salmon.

C. History and Law Demonstrate Metlakatlans' Vested Fishing Rights.

John Albert Scudero, Jr., is a native blood member of the Tsimshian Nation and the Metlakatla Indian Community, a federally recognized Indian Tribe. Mr. Scudero was criminally convicted by the State of Alaska for exercising as a "protest," to assert and protect same, his traditional aboriginal and treaty, presidential proclamation, and congressional legislative grants of specific and/or implied fishing rights to fish in Alaska Pacific Ocean waters, and was fined $20,000 and his commercial fishing rights were suspended for five years, and he was placed on probation for five years (sentence and judgment of probation later reversed due to variance with oral

sentence). He was fishing in "traditional" and "reserve related waters." The Tsimshian Nation and Tribe and its native members such as Mr. Scudero have fished those waters with aboriginal rights to do so as a part of their cultural tradition and heritage and livelihood for both subsistence and commercial purposes for literally thousands of years.

They trace their oral history back before the time of Christ, with references for instance to the "great flood." They traditionally roamed the oceans as far north/west as the Aleutian Islands and as far south as California, but certainly exercised their Pacific Ocean fishing rights, including for subsistence and to barter and engage in commercial activities within the Pacific Ocean areas of the Alaska waters where Mr. Scudero was fishing.

In addition to aboriginal rights, the Metlakatla Indian Community and Tribe and Mr. Scudero have vested fishing rights stemming from several avenues of federal law. In 1891, Congress established the Annette Islands Reserve. Act of March 3, 1891, ch. 561 Sec. 15, 26 Stat. 1095 [App. 110 and 113], and by President Wilson proclamation of 1916, 39 Stat. 1777 (1916), [App. 111] with exclusive Metlakatla Native fishing rights within 3000 feet of the Annette Islands. The statute creating the reserve also created rights benefitting the Community, including "off-reservation rights" to fish in the waters surrounding the Annette Islands. These rights were and are necessary to fulfill the purpose of the Annette Islands Reservation and Reserve in southeast Alaska for the Metlakatlans, established to allow its members to survive utilizing

their necessary historic and traditional dependence on harvesting fish from the sea as opposed to an agrarian economy, and free from the persecution they were experiencing in Canada and fleeing from at the time.

President Wilson's Proclamation of 1916 *enhanced* that reserved right by establishing an exclusive fishery (within 3000 feet of the islands) for the Community's protection – a sanctuary, not a cage. The Tsimshian Nation and the Metlakatla Tribe operated a fish packing cannery for decades on the island (both pre and post Statehood), processing fish caught within the exclusive 3000-foot off the island shores fishing zone specifically reserved for the Metlakatla natives and commercially processing fish caught outside the zone in the "off-reservation

waters" free from Territory of Alaska or State of Alaska interference for such decades.

Mr. Scudero was exercising both aboriginal rights and federally conferred rights to fish in Alaska waters in an area that was actually open to commercial fishing (not closed to commercial harvest as to the area where he is asserting said rights), and was not season restricted or otherwise restricted, except as to the Alaska Limited Entry Permit Program, which effectively rendered illegal, and "gutted," Metlakatlan Native rights in that area.

While the Alaska Supreme Court, based upon the record and law, assumed that Mr. Scudero had traditional aboriginal rights to fish including to harvest barter and commercially fish, and similar "off-reservation" treaty/ proclamation/congressional legislation fishing rights, that is implied off-

reservation rights, they affirmed his criminal conviction, i.e., the criminal prohibition for his exercising his and the Metlakatlans' fishing rights, because he did not possess a so-called "limited entry permit' which is a permit given only to certain residents of Alaska and citizens of other states under a "limited entry program," said permits bought and sold at great sums on the open market. The Alaska Supreme Court abrogated Mr. Scudero's and the Metlakatlans' aboriginal and treaty/presidential proclamation/congressional legislation rights, based solely on the guise of the "interests of conservation": Although the fishing activity in the area in question where Petitioner Scudero is asserting his rights, was not closed or restricted for conservation purposes by seasonal restrictions at the time, or other restrictions, and was open to those possessing

limited entry permits, including non-natives. Mr. Scudero challenges his conviction for fishing in Alaska waters that were in fact open to commercial fishing to persons holding a limited entry permit, which are commercially bought and sold permits restricting persons fishing commercially in Alaska.[1] Mr. Scudero has a history of attempting to "protest fish" to assert and protect his and his fellow native Metlakatla Tribe members' rights to fish. The unique status of the Tsimshian Nation/Metlakatla Tribe and Natives and their rights, as a result of the Annette Islands Reserve/Reservation, and the presidential proclamation and congressional legislation, have been twice recognized, honored, and enforced by the

[1] Mr. Scudero did not challenge at the Alaska Supreme Court level and does not do so before this Court, any conviction for fishing in actual closed waters, but only in the waters that were actually open for fishing, but not to him without possessing a limited entry permit.

United States Supreme Court in the cases of *Alaska Pacific Fisheries Company v. United States*, 248 U.S. 78, 39 S.Ct.40, 63 L.Ed. 138 (1918), and *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 82 S.Ct. 552, 7 L.Ed. 262 (1962). The subject of implied off-reservation rights for the Metlakatla natives is the subject of a pending lawsuit in the United States District Court Alaska, *Metlakatla Indian Community v. Dunleavy, et. al.,* Case No. 5:20-cv-0008 (U.S.D.C. Alaska), and a pending appeal in the Ninth Circuit United States Court of Appeals, *Metlakatla Indian Community v. Michael Dunleavy, et al.,* 9th Cir. Case No. 21-35185.

It is noteworthy aboriginal rights of Alaska Natives were recognized but resolved and "settled" or extinguished as to all tribes other than the Metlakatla Tribe with the Alaska Native Claims

Settlement Act ("ANCSA") at time of construction of the Alaska pipeline.

However, Tsimshian Nation and Metlakatla Tribe natives, "opted out" of the act and never settled, compromised, or forfeited, or modified, or gave up their traditional rights and received no corporate status, or money or land, as the other Alaska Natives did for doing so. To this extent, the ANCSA and the Metlakatla natives "opt out" should be viewed as a treaty. As discussed in Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 Tulsa Law Review 17 (2013), the State of Alaska has obligations under the Alaska Statehood Act, to honor rights possessed by the Metlakatla Tribe and natives and members at the time of Statehood.

D. The Alaska Supreme Court Conceded for Their Opinion Broad Off-Reservation Fishing Rights but Then Abrogated Them.

As the Alaska Supreme Court recognized in its opinion, Mr. Scudero maintains that he and the Tsimshian Nation and the Metlakatlans have such rights, "broader sovereign historic and aboriginal rights, than "the members of other Alaska Tribes," because "the sovereign historic and aboriginal rights of the Tsimshian and Metlakatla Natives have been recognized by unilateral statute and presidential proclamation, and the

Tsimshian Nation and its people have never relinquished, surrendered, or modified, their rights by treaty or statute" [Slip Opinion 16; App. 16]. The Alaska Supreme Court also recognized Mr. Scudero's position was that "these rights permit members of the Tsimshian Nation to fish in state waters for

subsistence purposes, which traditionally include bartering and other commercial activities" [Slip Opinion 17; App. 17]. The Alaska Supreme Court recognized the important questions about the "status of aboriginal and reserve fishing rights for citizens of the Metlakatla Indian Community" [Slip Opinion 17; App. 17][2] but stated "we do not need to reach those issues today; even assuming the existence of off-reservation fishing rights, Scudero's appeal may be decided on the basis of well-established principles governing the interrelationship of aboriginal or treaty-based rights and the state police powers." [Slip Opinion 17; App. 17].

[2] The Metlakatla Indian Community filed an *Amicus Curiae* Brief which supported Scudero's right to unregulated (no limited entry permit required) fishing i.e., "free of state interference," "as reserve members have a "reserved right to fish on a non-exclusive basis, in the off-reservation waters surrounding the reserve" [App. 92, 100].

If the State of Alaska properly honors the rights of Mr. Scudero and his brother and sister natives i.e., members of the Tsimshian Nation and the Metlakatla Indian Community and Tribe to fish as they historically have done in waters near (one days travel round trip), or relating to Annette Islands Reserve, and to do so without a limited entry permit, there will be little impact on the general limited entry program in the State of Alaska or the annual harvest of salmon in the Alaska commercial fishing industry. However, criminally stripping Mr. Scudero and his fellow native members of the Tsimshian Nation and the Metlakatla Indian Community and Tribe of their aboriginal and treaty/presidential proclamation/congressional legislation rights is a violation of their aboriginal and federal rights, and the Alaska Statehood Act and

these issues were specifically preserved at all stages below.

This case involves the question of whether the State of Alaska can abrogate it's duties under the Statehood Act, and further violate the vested rights of the Tsimshian Nation and the Metlakatla Indian Community and Tribe, and fail and refuse to recognize and honor the Nation's and the Tribe's and the blood native member John A. Scudero's vested rights to exercise aboriginal rights to fish in their traditional fishing grounds in State of Alaska Pacific Ocean waters, and the rights to fish in said waters under their aboriginal rights and the presidential proclamation of President Wilson, and congressional legislation of the late 1800s which established the Annette Islands Reserve/Reservation and protected the Tsimshian Nation and Metlakatla Tribe Natives,

who were fleeing from persecution in Canada in the late 1800s, and allowed them to pursue their traditional livelihood of subsistence, and bartering regarding commercial trading of fish by a non-agrarian lifestyle, including operating a commercial fish packing cannery on the Annette Islands Reserve/Reservation.

The Tsimshian Nation and the Metlakatla Indian Community and Tribe and its members, such as Mr. Scudero never relinquished nor compromised or settled or gave up their aboriginal rights, or the rights under the presidential proclamation or the congressional act or treaty to so fish even though similar such rights were recognized by the Alaska Native Claim Settlement Act as to the other Alaska Native Tribes, and the Metlakatla Tribe and Tsimshian Nation and their Native American

Members "opted out of the act," and did not receive, or request, any compensation or money, or land, or benefit(s), or native corporation status under the act as the other Tribes did i.e., as the other Alaska Natives did, to settle and waive and extinguish and forgo their rights.

E. Alaska Supreme Court's Use of "Conservation Necessity" to Justify the Criminal Prohibition and Threat of Conviction, Fine, and Incarceration of Metlakatlans from Exercising Their Vested Fishing Rights Is Invalid.

Alaska Supreme Court, under the guise of misapplying the doctrine of "conservation necessity," held that the State of Alaska could criminally prosecute and convict and sentence Mr. Scudero (who has been for many years traditionally "protest fishing" to protect and assert the Tsimshian Nation and Metlakatla Tribe Native Rights to fish on a non-exclusive basis in off-reservation waters without a

limited entry permit). Alaska Supreme Court assumed i.e., recognized these rights, but affirmed Scudero's criminal conviction based on a misapplication of the principle of "conservation necessity," stating that "it is thus well settled that the state can regulate commercial fishing in its waters for conservation purposes, even by persons whose fishing rights are aboriginal and reserved by treaty" [Slip Opinion 26; App. 26]. Alaska Supreme Court held that "Scudero's convictions fall within the conservation necessity principle," based upon the Limited Entry Act of 1973 [Slip Opinion 26; App. 26], stating, "as explained above the state has the authority to enforce fishing as necessary to conservation regardless of aboriginal and treaty-based rights" [Slip Opinion 29; App. 29]. *See* also Slip Opinion at 28; App. 28. Alaska Supreme Court

held that the State of Alaska could do so if the "regulation is a reasonable and necessary conservation measure… and that its application to the Indians is necessary in the interest of conservation." *See* Slip Opinion at 24 [App. 24]; *citing Antoine v. Washington,* 420 U.S. 194, 207 (1975), in turn citing "*Puyallup II*" i.e., *Washington v. Puyallup Tribe*, 414 U.S. 44, 46-47 (1973). Petitioner Scudero filed a timely Petition for Rehearing in the Alaska Supreme Court, pointing out the errors in the Alaska Supreme Court's rulings regarding conservation necessity as an excuse for abrogating Mr. Scudero's and the Tsimshian Nation and the Metlakatlans' vested fishing rights, including the Alaska Supreme Court's misapplication of the United States Supreme Court and Ninth Circuit authority [*See* App. 80]. The

Petition for Rehearing was denied on October 22, 2021, such that this Petition for Writ of Certiorari is jurisdictionally proper and timely. This was an improper application of the "conservation necessity" doctrine as the Pacific Ocean waters in question were open to commercial fishing, there was no closed season (as to the area where Petitioner Scudero asserts his rights), and no restrictions on taking the fish, except for the discriminatory limited entry permit license criminal statute: That is, a criminal bar as to Mr. Scudero and other Metlakatla Natives, who cannot fish without a limited entry permit, and as to permits, which were only granted in a discriminatory fashion, and Metlakatla Natives, such as Mr. Scudero, cannot realistically obtain or afford to purchase on the market for the tens of thousands

of dollars and even well over $100,000 for which the permits sell.

The limited entry permits are few and far between and are commercially bought and sold under the Alaska Limited Entry Fisheries Act of 1973. As a practical matter an Alaska Native/Tsimshian Nation/Metlakatla Tribe Member such as Mr. Scudero cannot afford to purchase such a permit. Moreover, when the permits were issued, credits were refused to Tsimshian Nation and Metlakatla Tribe Native fisherpersons for their pre limited entry act fishing activities in the Reserve/Reservation waters. Honoring the rights of Mr. Scudero and the Nation, and the Tribe and its members, will have little real impact on the State of Alaska fisheries, or the State of Alaska limited entry program; since other fisherpersons even other Alaska Natives, that

is, those fisherpersons other than the small number of Nation/Tribe members, will still have to obtain limited entry permits.

In contrast, failing to honor those rights, is devastating to the Nation/Tribe/Reserve, and the native blood members such as Mr. Scudero. Doing so actually strips them of their heritage and tradition, and the very means by which they have always survived, and the means that was and is essential and contemplated for their survival when the Reserve/Reservation was created and later further protected by President Wilson.

ARGUMENT

FACTUAL BACKGROUND

John Albert Scudero is a blood member of the Tsimshian Nation and Metlakatla Indian Community and Tribe, a federally recognized tribe in

Alaska who resides on Annette Islands Reserve which was established as a sanctuary for Tsimshian/Metlakatla Natives fleeing persecution in Canada, returning from Canada to practice their historic practices of fishing and bartering and engaging in commercial activity with fish from the sea i.e., the Pacific Ocean in a non-agrarian fashion as necessary, a practice that dates back many tens of centuries. Mr. Scudero was criminally prosecuted and fined $20,000 and placed on five (5) years of probation (probation sentence and judgment later reversed due to variance from oral sentence), and his fishing rights suspended for five (5) years when he was "protest fishing" to protect and assert the rights of the Tsimshian and Metlakatla Indian Community/Tribe and native members and their aboriginal rights and their treaty/presidential

proclamation/congressional legislation rights, including the rights to fish outside the 3000-foot exclusive fishing zone in traditional reserve related waters. Note, Mr. Scudero had actually only harvested a limited number of fish as a protest case: In contrast to other commercial fisherman who routinely harvest literally tens of thousands of fish. As Mr. Scudero has consistently advanced to the Courts, that 3000-foot exclusive fishing zone, is a "sanctuary" and "not a cage," and the Metlakatla Nation and Tribe, natives, need to be able to fish outside the sanctuary on a nonexclusive basis, to exercise their vested rights and survive and preserve their culture, heritage, and tradition, and the very purpose for which the Reserve was created. The United States Supreme Court, as noted, on two occasions has recognized the importance of the rights

vested in the Tsimshian Nation and the Metlakatla Native Tribe by the presidential proclamation and congressional legislation and acted to protect same. This Court is urged to do likewise. Alaska Supreme Court's misapplication of the limited doctrine of "conservation necessity" cannot withstand scrutiny to abrogate and abolish these rights, that is, to prohibit them with the criminal threat of conviction, fines, and incarceration, since "conservation necessity" as it relates and applies to American Natives' fishing and hunting rights does not apply to these rights, and in any event, the fishing in question was not prohibited, due to closed seasons, regulation, or any regulations, other than the naked improper criminal requirement of a limited entry permit, which discriminates against these vested native rights, as to the Metlakatlans.

GROUNDS FOR GRANTING CERTIORARI

A. The Court Should Grant Certiorari and Reverse and Remand to Protect the Vested Rights of the Tsimshian Nation and the Metlakatla Native Community and Tribe as to These Aboriginal Rights and Rights Under the Presidential Proclamation, Congressional Legislation, Quasi-Treaty.

1. This Court Should Protect the Important Rights in Question as the United States Supreme Court Has Done on Two Prior Occasions Regarding the Annette Islands Reserve and the Metlakatla Indian Community and Tribe and Their Fishing Rights.

As noted in two landmark cases, the United States Supreme Court acted to protect the Metlakatla Indian Community and Tribe and their vested fishing rights regarding the Annette Islands Reserve. It is respectfully suggested that this Court should act again, as to this new, totally devastating abrogation of those rights by the State of Alaska under the criminal prohibition based limited entry

permit program, which discriminates against Metlakatlans.

The congressional legislation provided as follows.

25 U.S.C. § 495 (1988):

Annette Islands reserved for Metlakatla Indians

> Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakatla Indians, and those people known as Metlakatlans who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.

(Mar. 3, 1891, ch. 561, § 15, 26 Stat. 1101). (Emphasis added).

President Wilson's Proclamation stated as follows:

Whereas the Secretary of the Interior, with a view to assisting the Metlakatlans to self-support, has decided to place in operation a cannery on Annette Island; and

Whereas it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery;

Now, therefore, I, Woodrow Wilson, President of the United States of America .... do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets .... are hereby reserved for the benefit of the Metlakatlans and such other Alaskan natives as have joined them or may join them in residence on these islands to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

Warning is hereby expressly given to all unauthorized persons not to fish in or

> use any of the waters herein described or mentioned.
>
> Presidential Proclamation No. 1331, April 28, 1916, 39 Stat. 1777. (Emphasis added).

It is in clear also, that as to the assuming, by the Alaska Supreme Court, the aboriginal fishing rights were at stake, those aboriginal fishing rights are crucial and necessary to the Metlakatlans to preserve their historic lifestyle of harvesting fish from the sea, and cannot be abrogated under the guise of "conservation necessity" by way of a discriminatory criminal based limited entry permit program and permits that are bought and sold for sums of thousands of dollars and even well over $100,000 between nonnatives within Alaska and nonnatives residing outside of Alaska that are far outside the reach and means of the Metlakatlans. As discussed more fully *supra* and *infra*, those rights

under the United States Supreme Court and United States Ninth Circuit Court of Appeals caselaw, cannot be abrogated under the guise of "conservation necessity."

2. The Doctrine Of "Conservation Necessity" Cannot Justify the Criminal Prosecution Abrogation of the Metlakatlans' Off-Reservation Fishing Rights.

Where Natives/Indians such as Mr. Scudero have "broad off-reservation" treaty or aboriginal or presidential proclamation and congressional legal fishing rights (as the Alaska Supreme Court assumed in its Opinion), while it may be, that for mere true regulatory conservation purposes i.e., regulations as to the manner and means of harvest and/or season, they may be applied in a proper manner without discrimination i.e., "across the board," there cannot be a "limited entry" criminal conviction threat based prohibition to foreclose such

vested Metlakatlan Native participation.

While the Alaska Supreme Court "[assumed] the existence of broad off-reservation fishing rights" [Slip Opinion 17; App. 17] (emphasis added): The Court held it could decide (i.e., deny), the appeal regarding the merits, solely on the "basis of well-established principles governing the interrelationship of aboriginal or treaty-based rights and the State's police powers," *id.* and did so on an erroneous basis of "conservation purposes, even [as to] persons whose fishing rights are aboriginal and reserved by treaty" [Slip Opinion 26; App. 26].

The Alaska Court incorrectly applied the principle of "conservation necessity," holding the Alaska Legislature Limited Entry Act of 1973, could preclude Mr. Scudero's rights given "…intertwined purposes of conserving fisheries resources and

maintaining a healthy fishing industry" (footnote omitted) [Slip Opinion 28; App. 28]; and further holding "[w]hatever the status of Scudero's aboriginal and reserved rights, they do not shield him from the non-discriminatory (sic) operation of State fishing laws that are necessary for the conservation of the resource" [Slip Opinion 28; App. 28].

This holding, "ducked and avoided," the issues of multiple source(s) and nature of Mr. Scudero's rights, which stem from both: 1) Treaty and United States Congress Legislation, and Presidential Proclamation; and 2) Aboriginal Rights which have never been relinquished, forfeited, nor ceded away by the Metlakatla Indian Community and Tribe members of the Annette Islands Reserve and the

Sovereign Tsimshian Nation.[3]

The Alaska Court misapplied authority concerning tribal/sovereign rights, treaty rights, congressional statutory rights, presidential proclamation rights, aboriginal rights, and prohibition against discrimination against natives with vested rights such as Mr. Scudero: Doing so under the guise of "conservation necessity"; which here is discriminatory prohibition by threat of criminal conviction and fine and incarceration

[3] The aboriginal rights were preserved and not relinquished under the Alaska Native Claims Settlement Act since the Act recognized and settled those rights, as to other Alaska natives, but the Metlakatla Indian Community and Tribe opted out of that Act and never relinquished their aboriginal rights or other rights to fish in their traditional and customary places (i.e., where Mr. Scudero was fishing), for subsistence, which included commercial activity and barter. The Alaska Supreme Court recognized that the Metlakatla Indian Community is a federally recognized tribe, located on the only existing Indian Reservation in Alaska, citing *John v. Baker*, 982 P.2d 738, 750 (Alaska 1999) [Slip Opinion at 4; App. 4].

against "un-permitted" Metlakatlans (such as Petitioner Scudero) from commercial fishing at all, for salmon in Alaska Pacific Ocean waters "off-reservation," by any means, in any seasons, or in any areas. Metlakatlan Natives such as Mr. Scudero, have certain quasi-treaty rights, and/or statutory/congressional rights, presidential proclamation rights, under the 1891 statute creating the Annette Islands Reserve, and President Wilson's 1916 Proclamation. All Metlakatla Natives, due to their status of members of the Tsimshian Nation and Tribe, also have vested aboriginal rights, which have never been relinquished, ceded, forfeited, abandoned, or given up.[4]

[4] The Alaska Native Claims Settlement Act (ANCSA) recognized Alaska Tribes/Natives historical aboriginal rights, and settled and extinguished same as to participating Tribes, but the Metlakatla/Tsimshian Natives opted out. *See, e.g.,* Robert T. Anderson, *The Katie John Litigation: A Continuing Search for Alaska Native Fishing Rights after ANCSA,* Arizona State Law Journal, Vo. 51, No. 3 (2019), and Ninth Circuit, and

Doctrine of "conservation necessity," the limited principle inappropriately relied upon by the Alaska Supreme Court, under cited case authority, may only apply in a limited fashion to treaty rights. Aboriginal rights are not addressed by cited authority; and may not be so abrogated due to "conservation necessity."[5]

Doctrine of "conservation necessity," even if it could be applied to aboriginal rights, as opposed to treaty rights, under the case authority, clearly cannot justify any discrimination against, or flat

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United States Supreme Court cases cited at note 1 therein. *See also* Robert T. Anderson, *Sovereignty and Subsistence: Native Self-Government and Rights to Hunt Fish and Gather After ANCSA,* 33 Alaska Law Review 187 (2016).

[5] Especially not so criminally voided and violated, as here, with such flat criminal prohibition as to Metlakatla/Tsimshian Natives fishing at all in "off-reservation" Alaska waters without a discriminatory limited entry permit. In that regard, as noted, limited impact of allowing a small band of Metlakatla Native fishers such as Mr. Scudero to exercise their aboriginal rights, cannot truly be claimed to have any serious impact on conservation of salmon in Alaska.

criminal-based prohibition or preclusion of the "un-permitted" Metlakatla/Tsimshian Natives from fishing without a limited entry permit "off-reservation." Cases relied upon by the Alaska Supreme Court, which address state regulations that have been upheld as reasonable exercise of a state's ability to regulate in the name of conservation, only deal with the manner and means of harvest or times of harvest i.e., season (not such discriminatory prohibition of all such natives from participating).[6]

By its very terms, the Alaska Limited Entry Fisheries Act, discriminates against all "un-permitted" Natives such as Mr. Scudero, who do not have limited entry permits, and prohibits them

[6] *Anderson v. Evans*, 371 F.3d 475, 499 (9th Cir. 2004), dealt with a quota requirement under the Federal Marine Mammal Protection Act of regulation of taking gray whales and applied across the board to all persons with no discrimination as to harvest re "limited permits."

absolutely from fishing for salmon in Alaska waters outside the boundaries of the reserve by any commercial method including doing so for subsistence or bartering in their traditional ways (which Mr. Scudero was doing). Note, it is significant, as to quasi-treaty rights or congressional statute rights and presidential proclamation rights, it was precisely for native commercial fishing purposes and the packing plant cannery, that the Reserve was created, and exists, and those rights were granted. As discussed by Amicus Briefing of the Metlakatla Indian Community in this case (*See* App. 92), and related pleadings in United States District Court Alaska, *Metlakatla Indian Community v. Dunleavy*, et al., 5:20-cv-00008-JMK (U.S.D.C. Alaska), related off-reservation related fishing must

be allowed.[7]

Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962) [cited at Slip Opinion 18; App. 18] regarding United States Supreme Court dicta, as to State's possible power to regulate the exercise of aboriginal Indian rights regarding hunting and fishing dealt with only means for commercial fishing (fish traps) and not a discriminatory criminal prohibition i.e., such prohibition as here under a limited entry permit system which discriminates against natives such as Mr. Scudero, an absolute

[7] Note, there may be separate questions, as to whether Mr. Scudero could have been prosecuted for fishing in a "conservation/season" closed area, as opposed to being prosecuted for fishing in an unclosed but "limited permit only area." As set out in Amicus Briefing, given the establishment of the Reserve (which is a "sanctuary and not a cage"), there are certain quasi-treaty rights and congressional statutory rights for natives such as Mr. Scudero to fish in related off-reserve adjacent waters, without limited entry permit(s), off-reservation (*See* Slip Opinion at 17; [App. 17]). *See* Amicus Brief [App. 92-108].

criminal prohibition against such "un-permitted" Metlakatla/Tsimshian Natives fishing for salmon off-reserve without a permit.[8]

Tulee v. Washington, 315 U.S. 681, 682 (1942) [cited at Slip Opinion 19; App. 19], recognized that even under treaty rights, states could not require a permit or permit fee. *See Grunert v. State,* 109 P.3d 924, 932-35 (Alaska 2005) as to the prohibition against interfering with traditional native rights, be they treaty, statutory, or aboriginal. *Antoine v. Washington,* 420 U.S. 194, 207 (1975) [cited at Slip Opinion 24; App. 24], dealt with a 1891 agreement between the United States Executive Branch and the Confederated Tribes of the Colville Indian

[8] Mr. Scudero alerted the Alaska Supreme Court to the distinction between non-discriminatory conservation regulations, regarding methods, means, season, etc., and an inappropriate total "limited entry" criminal ban i.e., discrimination prohibition as here.

Reservation, and was a square holding, regarding treaty rights, that notwithstanding the abolishment of the "contract by treaty method," by Congress in 1872, that Legislation in 1891 passed by Congress, gave vested rights to fish (as was done here via the 1891 Annette Islands Reserve Congressional Act). The two United States Supreme Court "*Puyallup*" cases of 1968 and 1973, "*Puyallup I and II*," *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392, 88 S. Ct. 1725, 20 L. Ed. 2d 689 (1968) ("*Puyallup I*"), and *Dep't of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44, 47, 94 S. Ct. 330, 332–33, 38 L. Ed. 2d 254 (1973) ("*Puyallup II*") (cited in Slip Opinion at 21-25; [App. 2-25]), establish clearly, that even as to treaties, the State of Washington could not discriminate against natives, as to method and means of harvest (with a criminal prohibition as here). *Minnesota v. Mille Lac*

Band of Chippewa Indians, 526 U.S. 172, 205 (1999) (cited in Slip Opinion at 26; [App. 26]), likewise, dealt only with treaty rights and conservation management regarding recognized treaty rights, and held unless they were specifically relinquished or revoked by congressional action (as in this case not so relinquished or revoked), they were still preserved; and distinguished the "Red Horse" cases. *Washington State Department of Licensing v. Cougar Den,* 139 S. Ct. 1000, 1015 (2019) (cited in Slip Opinion at 25; [App. 25]), upheld sanctity of treaty rights, as to a "gas tax" imposed upon fuel re ground transportation to be used for Indian use of roads.

The Alaska Supreme Court is clearly in error in many respects, including "ducking the issues" on aboriginal rights, and further upholding an Alaska

State criminal prohibition scheme, under the guise of "conservation necessity," when it is in fact, total discrimination and a total criminal prohibition of off-reservation fishing by "un-permitted" Tsimshian and Metlakatla Natives, such as Mr. Scudero who have vested rights under the treaties, congressional act, and presidential proclamation, and most importantly still vested aboriginal rights to fish.[9]

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[9] As reflected by Amicus Briefing of the Metlakatla Indian Community [App. 92-108], not only as noted do Tsimshian/Metlakatla Natives have treaty rights to fish in certain related off-reservation water, but the Limited Entry Act, de facto, in essence, discriminates against Tsimshian/Metlakatla Natives regarding obtaining permits, as their pre-act "reservation fishing history" did not count for qualifying points for limited entry permits. Rights of Tshimshians/Metlakatlans cannot be prohibited under the Alaska Limited Fisheries Act as a purported regulatory means of conservation necessity (which regulations and statutes may merely only regulate in a nondiscriminatory fashion the means and methods of fishing or seasons or areas of fishing), but may not constitute an absolute prohibition for "un-permitted" Metlakatla/Tsimshian Natives who do not have a limited entry permit, from taking any salmon in Alaskan Pacific Ocean waters by fishing boats and traditional commercial gear, even for subsistence purposes or traditional bartering or commercial activities which is their historical and vested right to do.

3. The Tsimshian Nation and the Metlakatla Community and Federally Recognized Tribe and Their Native Members Clearly Have Implied Rights to Fish in the Traditional Off-Reservation Waters Where Mr. Scudero Was Fishing.

As set out in the Amicus Brief of the Metlakatla Community (*See* App. 92), when Congress established the Annette Islands Reserve in 1891 and Congress and/or the President reserved for Metlakatla the rights to fish in waters surrounding the Annette Islands, they impliedly granted rights to fish in the areas currently designated by the Alaska Department of Fish and Game as Areas 1 and 2. President Wilson's Proclamation of 1916 enhanced those reserved rights by establishing an exclusive fishery for the community's protection within 3000 feet of the island. That proclamation and enhancement does not diminish or affect in any way the off-reservation fishing rights reserved by

Congress. As a three-judge panel of the United States Court of Appeals for the Ninth Circuit recently addressed at oral argument in the appeal, which relates to the pending lawsuit in the United States District Court for the District of Alaska by the Metlakatla Indian Community, asserting such off-reservation fishing rights by Metlakatla Natives without requiring a limited entry permit, there must be a broad interpretation of the rights granted. The 1891 statute, that is the Act of March 3, 1891, ch.561 § 15, 26 Stat. 1095, 1101 (formally codified at 48 U.S.C. § 358 and transferred to 25 U.S.C. § 495 prior to deletion from the Code), is similar to a treaty creating a reserve, and also created rights benefiting the community, including off-reservation rights necessary to fulfill the purpose of the Reserve and Reservation's ocean harvest and fishing lifestyle and

packing plant cannery. In determining the scope of the rights, not specifically articulated in the statute itself, a Court "must consider the [statute], the circumstances surrounding [its] creation, and the history of the [Metlakatlans] for whom [the reservation was] created." *See* Amicus Brief at 10, (citing *Confederated Tribes of Chehalis v. State of Wash.*, 96 F.3d 334, 342 (9th Cir. 1996)) [App. 101]. The Reservation/Reserve was created to preserve the Metlakatla Natives' historic i.e., non-agrarian lifestyle engagement in commercial fish trade and to establish a self-sustaining permanent community, and the fulfillment of that purpose would be an impossibility if the rights of the Reserve, and the Metlakatlan Natives, such as Mr. Scudero did not include the associated fishing rights i.e., reasonable off-reservation fishing rights on a non-exclusive basis

in the traditional areas. The legal canons of construction which are applied to any such issue strongly support this result.[10] *See Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247, 105 S.Ct. 1245, 1258, 84 L.Ed.2ds 169 (1985); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767, 105 S.Ct. 2399, 2404, 85 L.Ed.2d 753 (1985). *Parravano v. Babbitt,* 70 F.3d 539, 544 (9th Cir. 1995). *Parravano* addressed the affirmance by the Ninth Circuit, of the United States District Court for the Northern District of California, which approved efforts by the United States Secretary of Commerce under the Magnuson Act to protect the fishing rights of the Hoopa Valley and Yukok Indian Tribes to 50% of the annual harvest of the Klamath River fall

[10] Note, that much of the language, style, and briefing of this portion of the Petition for Writ of Certiorari draws on the language from the *Amicus Curie* Brief of the Metlakatla Indian Community, and acknowledgment of same is hereby given.

Chinook Salmon run, which was essential to their lifestyle and heritage. The Ninth Circuit cited *Choctaw Nation v. Oklahoma* 39 U.S. 620, 631, 25 L. Ed. 2d 615, 90 S. Ct. 1328 (1970), that any "doubtful expressions as to interpretation of executive orders no less than treaties should be resolved in the Indians favor" (E.A.). The Ninth Circuit cited numerous authorities as to that proposition of interpretation including that the interpretations should be such that any ambiguities are resolved in favor of the Indians, and their rights arising from such Indian fishing rights, and statues must be interpreted liberally in favor of the Indians. There was likewise a holding by the Ninth Circuit that "the rule of construction applicable to executive orders," as to Indian rights, "is the same as that governing the interpretation of Indian treaties" (Emphasis

added). [11] Most of the rights for the Hoopa Valley and Yurok Indian tribes as to fishing for and harvesting the Klamath chinook salmon were based on

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[11] *Parravano v. Babbitt*, 70 F. 3d 539 (1995):

> The rule of construction applicable to executive orders creating Indian reservations is the same as that governing the interpretation of Indian treaties. Executive orders, no less than treaties, must be interpreted as the Indians would have understood them "and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 25 L. Ed. 2d 615, 90 S. Ct. 1328 (1970) *United States v. State of Washington*, 969 F.2d 752, 755 (9th Cir 1992), cert. denied 123 L. Ed 2d 651, 113 S. Ct. 1945 (1993). In interpreting statutes that terminate or alter Indian reservations, we construe ambiguities in favor of the Indians. *DeCoteau v. District County Court for Tenth 1-**12J Judicial Dist*, 420 U.S. 425, 444, 43 L. Ed. 2d 300, 95 S. Ct. 1082 (1975) *Confederated Salish and Kootenai Tribes of Flathead Reservation, Mont. V. Namen*, 665 F.2d 951, 955 (9th Cir. 1982), cert. denied, 459 U.S. 977 74 L. Ed 2d 291, 103 S. Ct. 314 (1982). Rights arising from these statutes must be interpreted liberally, in favor of the Indians. Pacific Coast, 494 F Supp. at 633 n. 6 (citing Choate v. Trapp, 224 U.S. 665, 675, 56 L. Ed 941, 32 S. Ct. 565 (1912)). (Emphasis added).

executive orders i.e., presidential orders dating back to 1876.

Thus, all the rights of the Metlakatlans, by executive order rights, congressional legislation grant rights, treaty rights, must be similarly liberally interpretated and construed in favor of the Metlakatlans, as to implied off reservation fishing rights, in addition to their aboriginal rights.

See also citations to Answer to Complaint in Intervention, Secretary of the Interior of the People of the Annette Islands Reserve at page 4 to 5, set out in Amicus Brief at App. 103 and 104 and as set out verbatim in the Appendix at. 103 and 104. *See* also, discussion in Amicus Brief at footnote 2 (App. 106).

SUMMARY AND CONCLUSION

The Metlakatla Indian Community is a federally recognized Tribe in Alaska, composed of a

group of blood members of the Tsimshian Nation, living on the Annette Islands Reserve/Reservation, which was created by Congressional Act in 1891, and further, bolstered by President Wilson's presidential proclamation in 1916.

The Nation, Tribe, and John Albert Scudero, Jr., who is a blood member of the Nation and Tribe, have vested rights to fish off-reservation in traditional Alaska Pacific Ocean waters where they have fished for thousands of years, as a continuation of their culture, tradition, heritage, and lifestyle, and as impliedly granted by presidential proclamation and congressional legislation under the normal rules and cannons of construction regarding Indian rights. They have such rights, in addition, by virtue of their aboriginal rights, similar, to the aboriginal hunting and fishing rights of other Alaskan Natives, which

were recognized and settled by quasi-treaty via the Alaska Native Claims Settlement Act (ANCSA), but which rights as to the Tsimshian Nation and Metlakatla Indian Community Tribe were never extinguished, compromised, forfeited, given up, or bargained away; as the Tribe and Nation "opted out of the Act," and all of their rights still fully exist and must be recognized and honored by the State of Alaska.

John Albert Scudero, Jr., as a blood member of the Tsimshian Nation and Metlakatlan Indian Community and Tribe, has been attempting for years to "protest fish" to protect and assert those rights, and he cannot be criminally prosecuted and convicted and threatened with fine and incarceration by the State of Alaska for "protest fishing" in waters that were not actually closed to fishing by virtue of

any season closure or other regulations as to method and means gear restrictions. Those illegal acts by the State of Alaska were affirmed by the Alaska Supreme Court merely under the misapplication of the doctrine of "conservation necessity." Conservation necessity does not justify abrogation of those rights, and especially by using the requirement, that is, the discriminatory criminal requirement, of a grossly expensive limited entry permit for the Natives traditionally obtaining food as a part of their culture, heritage, and tradition for tens of centuries, as the State of Alaska passage of the limited entry regulatory program in 1973, unlawfully effectively criminally extinguished those rights; particularly since the State discriminated and denied credit to the Nation and Metlakatla Indian Community and Tribe members for 3000-foot

reservation waters pre act fishing harvests to qualify for permits for purposes of issuing the limited permits, and the permits are now bought and sold for many tens of thousands of dollars by Alaska citizens and/or out-of-state residents, and are well out of the economic reach of natives such as Mr. Scudero.

Just as the United States Supreme Court protected the rights of the Metlakatla Indian Community, and Tsimshian Nation, and their Indian/Native Members on two prior occasions regarding the Annette Islands Reserve, this Court should grant Certiorari and again protect those rights from State of Alaska criminal prosecution interference amounting to extinguishment.

As noted, when the 1973 Alaska Limited Entry Fisheries Act was implemented, and permits were granted, the Metlakatla Natives did not receive

credit toward fishery participation to obtain a permit as to their own reservation fishing activities, and thus, they were discriminated against. They are now discriminated against because they do not have permits, in light of denial of that credit, and they cannot afford to buy same which sell for tens of thousands of dollars and even well over $100,000 on the market and are traded between Alaska non-native citizens and non-native buyers and sellers from outside of Alaska.

Moreover, the State of Alaska had and has obligations and duties under the Alaska Statehood Act to recognize the aboriginal rights of the Tshimshian Nation and the Metlakatlans and their rights under the treaty, presidential proclamation, and congressional act, and they ignore and violate same.

Thus, the Supreme Court is respectfully requested to grant certiorari and protect these important rights and remedy these grave errors as to said American Native rights, aboriginal rights, and rights under presidential proclamation, treaty, and congressional act.

RESPECTFULLY submitted this 20th day of January 2022.

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