No. 10-33

In the Supreme Court of the United States

SUQUAMISH INDIAN TRIBE,

Petitioner,

v.

UPPER SKAGIT INDIAN TRIBE, SWINOMISH INDIAN TRIBAL COMMUNITY, JAMESTOWN S'KLALLAM TRIBE, LOWER ELWHA KLALLAM TRIBE, LUMMI INDIAN NATION, NISQUALLY INDIAN TRIBE, PORT GAMBLE S'KLALLAM TRIBE, SKOKOMISH INDIAN TRIBE, AND TULALIP TRIBES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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It is telling that, because respondents cannot defend the Ninth Circuit's holding, they seek to obscure and recharacterize it. They insist that the court of appeals actually found the language of the controlling judicial order to be "unclear and ambiguous," and assert that the court of appeals looked past the order's plain terms for that reason. But respondents cannot wish away the holding below.

In fact, the Ninth Circuit applied its longstanding rule that requires courts to look behind the language of unambiguous judicial orders to determine whether the issuing judge really meant to say something else. There can be no question about that: the Ninth Circuit clearly and expressly explained its rule in those terms, and characterized Judge Boldt's order as *un*ambiguous – as it plainly is. The question now before this Court is whether the Ninth Circuit acted properly in disregarding the plain language of Judge Boldt's order. Because respondents' grounds for distinguishing the holding below from the decisions of this and other courts rejecting such an approach are insubstantial, and because that holding will lead to "extremely burdensome and expensive" rounds of unnecessary litigation (Pet. App. 12a-13a (Kleinfeld, J., dissenting)), both in the "vital" area of tribal fishing rights (*Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664 (1979)) and in the much broader universe of standing judicial orders, further review is warranted.

A. The Ninth Circuit Applied A Rule That Requires Departure From The Unambiguous Terms Of Court Orders.

To begin with, respondents appear to recognize that we have accurately stated the rule in the Ninth Circuit: that rule requires courts to determine whether the judge who initially issued a judicial order intended something other than what the order unambiguously says. They could hardly contend otherwise. The Ninth Circuit held in *Muckleshoot III*, expressly and advisedly, that the role of a court implementing a judicial order is to determine whether "*the court [issuing the order] intended something other than its apparent meaning.*" *United States* v. *Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir. 2000) (citation omitted; emphasis added by the court). This position was reaffirmed in identical terms by the holding below, which explained that an order's unambiguous language "is not a dispositive factor" in identifying its meaning. Pet. App. 8a-9a. Given this context, respondents' limited contention here accordingly is that the Ninth Circuit did not apply its troubling rule in *this* case.

But respondents should not succeed in confusing the issue here. Although they acknowledge that the district court below "found that the term 'Puget Sound,' as used by Judge Boldt, included Skagit Bay and Saratoga Passage" (Opp. 5), respondents insist that the Ninth Circuit "did *not* adopt the district court's approach." *Id.* at 12 (emphasis in original). Instead, they repeatedly maintain that the court of appeals found Judge Boldt's order "unclear [and] ambiguous" (Opp. 10; see also Opp. 2, 6-7, 12), and they proceed themselves to try to demonstrate that

the order was in fact ambiguous. Opp. 10-13. But they are wrong on both counts.

Accepting the district court's finding that "'Puget Sound' as defined by Judge Boldt included the waters of Saratoga Passage and Skagit Bay" (Pet. App. 6a), the Ninth Circuit recognized that the principal question on appeal was whether the district court should have "engaged in a sufficiency of the evidence analysis *instead of accepting Judge Boldt's unambiguous definition of 'Puget Sound.'*" *Id.* at 8a (emphasis added). Answering that question in the affirmative, the court of appeals found that the district court "faithfully followed the *Muckleshoot* construct" in looking behind that unambiguous definition. *Ibid.* The Ninth Circuit thus "agree[d]" with the district court's analysis, holding that the district court was correct in ruling that respondents met their burden of showing that Judge Boldt "'intended something other than its apparent meaning.'" *Id.* at 9a. Respondents therefore are simply wrong in asserting that the Ninth Circuit "did *not* adopt the district court's approach to the meaning of 'Puget Sound.'" Opp. 12.

Although that is enough to dispose of the matter of ambiguity – for present purposes, after all, the question is simply whether the Ninth Circuit applied its "look behind the unambiguous language" rule – it may be added that the order at issue here is *in fact* unambiguous. As the Ninth Circuit noted in its initial decision in this case, "Suquamish's adjudicated usual and accustomed grounds include 'the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River.' Saratoga Passage and Skagit Bay are in the Puget Sound between those two points." Pet. App. 22a. A glance at the map confirms that reality. See *id.* at 57a. Lest there be

any doubt, Judge Boldt defined "the term 'Puget Sound' [to] include[] the Strait of Juan de Fuca and **all saltwater areas inland therefrom**," as the district court explained below (*id.* at 36a (emphasis added by the court)), and there is no question but that this area includes Saratoga Passage and Skagit Bay. There is no ambiguity here.[1]

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[1] Respondents hint that the Ninth Circuit saw ambiguity in Judge Boldt's order because it noted "specific geographic anchors" in the description of the Suquamish U&A – *i.e.*, the U&A includes Puget Sound from Vashon Island to the Fraser River "including Haro and Rosario Straits * * * and also Hood Canal" – which in respondents' view "confuse and confound Petitioner's view of the meaning of 'Puget Sound.'" Opp. 11-12; see also Opp. 10-13. But that hint is not well taken. The Ninth Circuit expressly understood the order at issue to be *unambiguous*; its reference to "geographic anchor points" described *other* Tribes' U&As (see Pet. App. 10a-11a), which the court considered as part of its broader review of the record undertaken to determine whether Judge Boldt had an unexpressed intent that *differed* from his written order. *Id.* at 9a. Thus, the court's first step after stating that it was prepared to look behind the order's plain language was to consider the evidence before Judge Boldt "as of April 18, 1975," *after* which the court turned to the "geographic anchors" cited by respondents. See *id.* at 9a-11a. As for the "geographic anchors" themselves, Judge Kleinfeld noted in the Ninth Circuit's initial opinion that, although Judge Boldt generally provided "geographical definitions" setting the boundaries of other Tribes' U&As, "specifically identif[ying] bays, straits, and island areas that he intended to include," he "did not do so in Suquamish's determination," "includ[ing] the entire Puget Sound from Vashon Island to the Fraser River." *Id.* at 25a. That "suggests that he intended the boundaries not to be limited." *Ibid.* Of course, the only question here is the legal one whether the Ninth Circuit erred in straying from the plain language of Judge Boldt's order.

B. The Holding Below Is Inconsistent With *Travelers Indemnity* And Conflicts With the Holdings Of Other Courts Of Appeals.

1. Because the meaning of the controlling judicial order therefore is plain, respondents cannot reconcile the Ninth Circuit's holding with this Court's decision in *Travelers Indemnity* and the rulings of other courts of appeals that are cited in the petition. Pet. 20-25. Respondents' principal point regarding *Travelers Indemnity* is that the decision does not "require[] a case to be resolved based on the meaning of a key word or phrase [of a judicial order viewed] in isolation." Opp. 14. But that observation, although surely true, has no bearing on the issue here. The Court in *Travelers Indemnity* clearly, and repeatedly, explained that an order's unambiguous language *must* control: "where the plain terms of a court order unambiguously apply * * * they are entitled to their effect." 129 S. Ct. at 2204. And here, as we have just explained, both courts below found that Judge Boldt's order unambiguously gives the Suquamish the right to fish in the disputed waters. The Ninth Circuit committed its error when it went on to rummage through the record in an effort to determine whether Judge Boldt really meant what he said. That approach, which determined the outcome below, is flatly inconsistent with *Travelers Indemnity*.[2]

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[2] Respondents are incorrect in asserting that the Court found "the key operative term" of the order in *Travelers Indemnity* – "relating to" – to be ambiguous. Opp. 14. The Court noted that beyond some point a literal reading of the term would produce "absurd" results because, at the most abstract level, everything is related to everything else. 129 S. Ct. at 2203-2204. But the Court found that point not reached in *Travelers Indemnity*. *Ib-*

2. As a fallback, respondents assert that *Travelers Indemnity* and the decisions of other courts of appeals that are cited in the petition are distinguishable from the Ninth Circuit's ruling here because, assertedly unlike those decisions, "[t]his case involves a prior factual determination of a court." Opp. 15. *Travelers Indemnity* and the other decisions cited in the petition, respondents continue, involved the application of court orders that "do not reflect an external record in the same way." Opp. 17. But this is no distinction at all. The question in *all* of these cases is whether it is permissible to look behind a court order's language to see whether the issuing judge did not really mean what he or she plainly said. There will *always* be some "external record" available to the parties and a second judge if they care to make that sort of after-the-fact determination – testimony, the arguments that were presented to the first judge, and so on – just as there was in *Travelers Indemnity* itself. See 129 S. Ct. at 2204.[3] In this regard, there is

id. And here, too, there is nothing absurd about reading "Puget Sound" to mean Puget Sound. As for respondents' observation that the Court in *Travelers Indemnity* examined the detailed findings of the bankruptcy court (see Opp. 14-15), it did so to identify the nature of the plaintiffs' claims, not the hidden meaning of the court's order. See 129 S. Ct. at 2204.

[3] The same was true in the court of appeals decisions cited in the petition. In *Negron-Almeda* v. *Santiago*, 528 F.3d 15 (1st Cir. 2008), for example, the question was whether a 2004 order granting summary judgment against particular individual defendants precluded claims for both damages and equitable relief. In a subsequent decision the district court agreed with plaintiffs that equitable relief remained available, explaining that "'it was never its intention to bar Plaintiffs from seeking and obtaining equitable relief at the time of the [2004] dismissal of their monetary claims.'" *Id.* at 20. Defending this ruling on appeal, the plaintiffs observed that "the district court itself took this view of the order three years after entering it," "the

no difference at all between a ruling that sets fishing boundaries and one setting the scope of an anti-suit injunction.

The Ninth Circuit did not suggest otherwise, and did *not* premise its rule on respondents' theory that Judge Boldt's order was uniquely "tethered to the factual record before the court." Opp. 17. To the contrary, the court of appeals thought it appropriate to disregard unambiguous court-order language because "[t]here are important distinctions between interpreting a judicial opinion and a statute"; "the rules governing the interpretation of the two reflect this"; "there are no canons of construction for the interpretation of opinions"; and "[o]pinions, unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis." *Muckleshoot III*, 235 F.3d at 432-433. This reasoning applies uniformly to *all* court orders.

3. Respondents also maintain that *Travelers Indemnity* has no bearing here because it involved "a

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case law cited in the lead-up to the 2004 order deals with the prohibition against bringing section 1983 claims *for damages*," and additional contextual evidence supported that view of the district court's original intent. *Id.* at 23. But because the First Circuit found that the 2004 order was "clear on its face" in precluding injunctive claims, the court of appeals rejected reliance on record evidence in construing that order: "the district court was bound by the plain meaning of the 2004 order." *Id.* at 23-25. *See also, e.g.*, *SEC* v. *Hermil, Inc.*, 838 F.2d 1151, 1153-1154 (11th Cir. 1988) (notwithstanding "a substantial and convincing amount of evidence" that the district court entering an order had intended something different from its plain meaning, the court of appeals enforced the order as written because the district court "did not draft the [original] order to reflect this intent").

type of consent decree"; such decrees, in respondents' view, are subject to rules that differ from those governing other court orders because the parties to consent decrees "'agree[d] on their precise terms.'" Opp. 16 (citation omitted). But that, too, is wrong. The parties seeking to escape the plain terms of the court order in *Travelers Indemnity* included individual claimants who had *not* been involved in the bankruptcy reorganization that underlay the *Travelers Indemnity* litigation (see 129 S. Ct. at 2201-2202), and who therefore were not parties to the negotiation of any agreement. And in any event, the Court in *Travelers Indemnity* drew no such distinction: it did not indicate that the order before it was the product of agreement. It stated in universal terms that "a court should enforce a court order, a public governmental act, according to its unambiguous terms." *Id.* at 2004. The point is proved by the Court's reliance for its rule on *Negron-Almeda* and *Spallone*, which had nothing to do with consent decrees. See Pet. 20.

C. The Rule Applied By The Ninth Circuit Is A Broad One Of Substantial Practical Importance.

Respondents ultimately retreat to the contention that the Ninth Circuit applies its aberrant rule only to the *United States* v. *Washington* litigation. They maintain that the decision below and *Muckleshoot III* "embody an approach adapted and tailored to a particular type of sub-proceeding (interpretation of U&A findings) in the particular case in which it arose, *United States v. Washington*." Opp. 19. Even if that were so, however, review would be warranted. As we explained in the petition, the *United States* v. *Washington* set of proceedings themselves have enormous significance: they involve the treaty rights of no few-

er than twenty Tribes; determine matters that this Court has labeled "vital" to those Tribes and to the economy of the Pacific Northwest generally (*Fishing Vessel*, 443 U.S. at 664, 668, 678); and are continuing to consume judicial resources on a vast scale. It is a matter of considerable importance that the rules governing this body of litigation be appropriate ones. Respondents have not a word to say about this.

But more fundamentally, the rule applied by the Ninth Circuit here is *not* limited to cases growing out of *United States* v. *Washington*. The Ninth Circuit has stated a general rule for the interpretation of judicial orders that, as we have explained, is premised on the court's view that "[t]here are important distinctions between interpreting a judicial opinion and a statute." *Muckleshoot III*, 235 F.3d at 432-433. The Ninth Circuit nowhere suggested that its rule is limited to tribal fishing cases. And although *United States* v. *Washington* is a very big litigation, the issues it presents (insofar as is relevant here) are identical to those presented by any other judicial order that is applied over time – such as those involving school desegregation, water rights, environmental decrees, and innumerable others. Respondents' objection to the Suquamish U&A is not that it is different from other types of court orders because it is unworkable in practice (see Opp. 19-20); it is that the U&A is much broader than respondents would like.[4]

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[4] Respondents are simply wrong in asserting that there is "no evidence" that "Suquamish even traveled through Skagit Bay and Saratoga Passage" and that there is "uncontroverted evidence that these waters were specifically excluded." Opp. 20. The short answer is that Judge Kleinfeld, dissenting below, rejected both of these assertedly uncontroverted propositions. See also Pet. App. 24a ("the natural route" between two Suquamish

In that regard, respondents get no support for their assertion that the Ninth Circuit "is in complete agreement" with "the general rule" that unambiguous court orders are to be applied as written from their observation that the Ninth Circuit has several times stated that the meaning of a consent decree "'must be discerned within its four corners." Opp. 21-22 (citation omitted). Respondents themselves, of course, have insisted that consent decrees are subject to *different* interpretative rules than are other judicial orders. And respondents have not, in any event, denied that the Ninth Circuit *does* apply its peculiar "disregard the plain language" rule, at least in the *United States* v. *Washington* context; that is just what the court said (and did) in the decision below and in *Muckleshoot III*. This Court took a different approach in *Travelers Indemnity*.

D. The Decision Below Undermines Principles Of Finality And Repose.

Finally, it should go without saying that respondents are wrong in contending that the Ninth Circuit's approach furthers the interests of finality and repose. The rule we advocate, which is the one applied in *Travelers Indemnity* and by other courts of appeals, starts and ends with the plain language of an unambiguous court order. The Ninth Circuit, in contrast, allows a party and a subsequent court, decades after the fact, to look behind the language of an unambiguous order, revisit the record and review extrinsic evidence, and conclude that the first judge couldn't have meant what he or she plainly said. This is a formula calculated to produce uncertainty,

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fishing grounds "goes directly through Saratoga Passage and Skagit Bay").

unsettled expectations, and duplicative litigation – an approach that Judge Kleinfeld correctly labeled "extremely burdensome," "expensive," and "fundamentally futile." Pet. App. 13a. This and other courts therefore have good reason for insisting that, "where the plain terms of a court order unambiguously apply * * *, they are entitled to their effect." *Travelers Indemnity*, 129 S. Ct. at 2204. Review of the Ninth Circuit's contrary conclusion accordingly is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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