No. 21-840

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

AARON M. FREY, Attorney General for the State of Maine, *et al.*,

Respondents.

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

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AND USET SOVEREIGNTY PROTECTION FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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 of Maine that the Penobscot Reservation encompasses the Main Stem of the Penobscot River.

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INTERESTS OF AMICI CURIAE[1]

Amicus curiae National Congress of American Indians ("NCAI") is the nation's oldest and largest organization made up of American Indian and Alaska Native Tribal Nation governments and their citizens. NCAI's mission is to advocate for the protection of treaty rights, inherent rights, and other rights guaranteed to Tribal Nations through agreements with the United States and under Federal law; to promote the common welfare of American Indians and Alaska Natives; and to promote a better understanding of Indian peoples. NCAI has a strong interest in preserving the time-honored principles of Indian law, including the construction of Indian statutes consistent with the Indian law canons of construction.

Amicus curiae USET Sovereignty Protection Fund ("USET SPF") is a nonprofit, inter-tribal organization advocating on behalf of 33 Federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico. USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and assist-

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[1] In accordance with Rule 37.2 of the Rules of the Supreme Court, counsel of record for all parties received timely notice of this brief and provided their written consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

ing its membership in dealing effectively with public policy issues.

Amici curiae share an interest in preserving Tribal sovereignty, which is the foundation of the long-established Indian canons of construction implicated by this case. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In addition, *amici* are uniquely suited to assist the Court; *amici* both have expertise in the interpretation of Indian statutes, and *amicus* USET SPF has particular expertise in the interpretation of statutes Federally recognizing Tribal Nations, whether by land claims settlement, Tribal restoration, or otherwise.

BACKGROUND AND SUMMARY OF ARGUMENT

This case concerns the construction of two statutes enacted to settle land claims brought by the Passamaquoddy Tribe and the Penobscot Nation, the latter a petitioner in this case.[2] First, the State of Maine ("State") enacted the Maine Implementing Act. Me. Rev. Stat. Ann. tit. 30 (1980) ("MIA"). Subsequently, Congress enacted the Maine Indian Claims Settlement Act of 1980. 94 Stat. 1785 (previously codified as 25 U.S.C. §§ 1721-1735)[3] ("MICSA") (together, "Settlement

[2] *Amici* submit this brief in support of both the Penobscot Nation, petitioner in case No. 21-838, and the United States, petitioner in case No. 21-840. All citations to the Appendix herein are to case No. 21-838.

[3] This Brief identifies sections of MICSA by their former location in the U.S. Code.

Acts"). Together, the Settlement Acts set forth the boundaries of the Penobscot Indian Reservation. MICSA defines "Penobscot Indian Reservation" by reference to the MIA. MICSA § 1722(*i*). The MIA, in turn, defines "Penobscot Indian 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, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818, and prior to the effective date of this Act.

MIA § 6203(8).[4]

The decision below failed to properly consider the unique history of the Settlement Acts, and in that failure ignored a key tenet of Indian law: "Historical perspective is of central importance in the field of Indian law," COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.01, at 5 (Nell Jessup Newton ed., 2012) ("COHEN'S HANDBOOK"). Moreover, in failing to properly account for that history, the decision below disregards this Court's well-established jurisprudence concerning statutory construction in Indian law. Although the decision

[4] The definition also allows for certain after-acquired lands to be included within the Penobscot Indian Reservation that are not relevant to this litigation.

below concerns a single act of Congress that governs in a single state, this interpretive error has implications for scores of reservations that were reserved or otherwise created by statute or executive order in the 150 years since the Federal Government stopped making treaties with Tribal Nations.

The decision below also failed to apply the "settled principles of statutory construction" applicable in Indian law. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 149 (1984). First, treaties and statues that ratify agreements between Tribal Nations and a state or the United States must be construed "in the sense in which they would naturally be understood by the Indians." *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) ("*Fishing Vessel*"). Second, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Third, "[o]nce a block of land is set aside for an Indian reservation . . . the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). The decision below refused to apply these "settled principles of statutory construction," *Three Affiliated Tribes*, 467 U.S. at 149. Its reasons for doing so cannot withstand scrutiny.

ARGUMENT

I. The decision below conflicts with decisions of this Court.

The fundamental flaw in the decision below is its failure to respect the Penobscot Nation as the sovereign that it is. Since the founding of this Republic, the United States has recognized the inherent sovereignty of Tribal Nations. *See* U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause, recognizing "the Indian Tribes" as sovereigns alongside "foreign Nations" and "the several States"). This Court has recognized Tribal sovereignty from its earliest Indian law decisions. *See Worcester*, 31 U.S. at 559-60 ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . . . The very term 'nation,' so generally applied to them, means 'a people distinct from others.' . . . The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.")

A Tribal Nation's sovereignty, including its sovereign territory, remains intact unless and until it is expressly diminished by treaty or statute. "The powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never*

been extinguished.'" *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945 ed.) (emphasis in original)). Tribal Nations sometimes cede aspects of their sovereignty by treaty or other agreement, or are divested of aspects of their sovereignty by Act of Congress. However, "until Congress acts . . . Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute . . . ." *Id.* at 323.

For centuries, this Court has respected Tribal sovereignty by establishing certain baseline rules for Indian cases—rules the decision below flatly disregarded.

A. The decision below disregards the reserved rights doctrine.

The Penobscot Nation has had inherent sovereignty over the Main Stem of the Penobscot River "from time immemorial." App. 89a (Barron, J., dissenting). A Tribal Nation may cede aspects of its sovereignty, including its territory, and Congress claims the power to abrogate Tribal sovereignty, but a Tribal Nation retains its sovereignty unless it is expressly ceded or abrogated. *Wheeler*, 435 U.S. at 323. Moreover, any treaties or other agreements with a Tribal Nation are "not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). This principle is commonly referred to as the reserved rights doc-

trine—a doctrine that the First Circuit respected until it issued the decision below.[5]

Moreover, this Court has long held that Tribal lands may be diminished only by a clear statement by the Tribal Nation or Congress. *See, e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020) ("Disestablishment . . . require[s] that Congress clearly express its intent to do so, 'commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests.'") (quoting *Nebraska v. Parker*, 577 U.S. 481, 488 (2016) (cleaned up)); *South Dakota v. Yankton Sioux Tribe*, 552 U.S. 329, 343 (1998) ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain.") (internal citations and quotation omitted); *Solem*, 465 U.S. at 470.[6]

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[5] *See, e.g.*, *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701 (1st Cir. 1994) (construing Rhode Island Indian Claims Settlement Act, Pub. L. 95-395, 92 Stat. 813 (1978)) ("[T]ribes retain their sovereign powers in full measure unless and until Congress acts to circumscribe them."); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1066 (1st Cir. 1979) ("[U]ntil Congress acts, the tribes retain their existing sovereign powers.") (quoting *Wheeler*, 435 U.S. at 322-23); *cf. Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 624-25 (1st Cir. 2017) (sovereign powers not expressly denied in settlement act are retained).

[6] Tribal lands are not the only Tribal sovereign prerogatives protected by this clear statement rule. *See, e.g.*, *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019) ("If Congress seeks to abrogate treaty rights, 'it must clearly express its intent to do so.'") (quoting *Minnesota v. Mille Lacs Band of Chippewa*

The decision below, however, eschews these principles. It searches the Settlement Acts for express language reserving the waters and submerged lands of the Penobscot River to the Penobscot Nation and, finding none, it presumes that no such reservation was made. But under the reserved rights doctrine and clear statement rule, the proper inquiry instead is whether the Settlement Acts, or any previous enactment, expressly ceded those lands and waters that the Penobscot Nation had held from time immemorial.

Simply put, there has never been an express cession of the Main Stem of the Penobscot River. None appears in the 1818 Treaty between Massachusetts and the Penobscot Nation.[7] To the contrary, that treaty secures to the citizens of Massachusetts "a

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Indians, 526 U.S. 172, 202 (1999)); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) ("To abrogate [tribal] immunity, Congress must unequivocally express that purpose.") (quoting *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting, in turn, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978))) (cleaned up).

[7] The decision below states that the State Intervenors found such a cession earlier, in the 1713 Treaty of Portsmouth. App. 32a n.16. But neither the decision below nor the State Intervenors identified any text in that treaty that would evince such a cession. In fact, that treaty proves the opposite: While providing that the Penobscot Nation and other Tribes would respect the British settlements "within the eastern parts of the Provinces of said Massachusetts Bay and New Hampshire," the treaty also "[s]av[es] unto the said Indians their own Grounds." Treaty of Portsmouth (1713), available at *http://www.1713treatyofportsmouth.com/*.

right to *pass and repass* any of the rivers, streams, and ponds, which run through any of the lands hereby reserved," App. 325a-326a (emphasis added), language that would not be necessary unless Massachusetts recognized those rivers and ponds were within the Penobscot Nation's territory. In the Nineteenth Century, the United States frequently used the phrase "pass and repass" when securing the right of one people to cross the territory of another.[8]

Likewise, no language in the Settlement Acts expressly divests the Penobscot Nation of the waters and submerged lands of the Penobscot River. And this Court, when construing similar statutes that established other Tribal Nations' reservations, has held that the Tribal Nations retained waters and submerged lands were not expressly ceded. *See Idaho v. United States*, 533 U.S. 262 (2001) (construing treaty substitute, holding that the Coeur d'Alene Reservation included

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[8] *See, e.g.*, Treaty with the Kickapoos, art. 7, 7 Stat. 200, 201 (1819) ("The United States promise to guaranty to the said tribe the peaceable possession of the tract of land hereby ceded to them, . . . [b]ut any citizen or citizens of the United States, being lawfully authorized for that purpose, shall be permitted to pass and repass through the said tract . . . ."); Treaties between the United States and Great Britain, art. III, 8 Stat. 117 (1794) ("It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties . . . .").

submerged lands even though the treaty substitute made no express reference to submerged lands); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918) (construing treaty substitute, holding that the Metlakahtla Reservation included waters around the Annette Islands even though the treaty substitute made no express reference to waters).

Because the decision below disregards the reserved rights doctrine, this Court should grant the petitions and reverse the decision below.

B. The decision below disregards this Court's rules concerning the construction of Indian treaties and statutes.[9]

"[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law." *Blackfeet*, 471 U.S. at 766.[10] Thus, this Court employs three distinct rules of construction, each with its origins in *Worcester*: First, treaties

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[9] The decision below purports to rest upon "ordinary tools of statutory construction." App. at 10a. The Petitions ably demonstrate that the decision fails even this standard. Penobscot Nation Pet. at 17-23; United States' Pet. at 24-26. *Amici* need not duplicate that analysis here, but instead focus on the flawed analysis of the Indian canons of construction in the decision below.

[10] Even the Court's most avowed textualist acknowledged the force of the Indian canons. *See, e.g.*, *Cty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (Scalia, J., describing the Indian canons of construction as "deeply rooted in this Court's Indian jurisprudence").

and certain statutes must be interpreted as the Indians would have understood them. *Worcester*, 31 U.S. at 546-47, 552-54 (Marshall, C.J.) (construing "protection," "allotted," "hunting grounds," and "managing all their affairs" as the Cherokee would have understood them); *see also id.* at 582 (McLean, J., concurring) ("How the words of the treaty were understood by [the Indians], rather than their critical meaning, should form the rule of construction."). Second, ambiguities in treaties and statutes touching on Indian interests must be construed to the Indians' benefit. *Id.* at 582 (McClean, J., concurring) ("The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense."). Third, only a clear statement of Congressional intent is sufficient to diminish Tribal lands or Tribal sovereign authority. *Id.* at 554 (Marshall, C.J.) (any intent to diminish Tribal sovereignty must "have been openly avowed").

The decision below refused to employ these canons, and its reasons for doing so, App. 36a-40a, cannot withstand scrutiny.

1. The decision below failed to construe the Settlement Acts as the Penobscot Nation would have understood them.

This Court has consistently held that "the words of a treaty must be construed 'in the sense in which they would naturally be understood by the Indians.'" *Herrera*, 139 S. Ct. at 1699 (quoting *Fishing Vessel*, 443 U.S. at 676); *Worcester*, 31 U.S. at 552-54, 582. This canon has its origins in the United States' trust responsibility to Tribal Nations, *see Worcester*, 31 U.S. at 556 (Marshall, C.J.) (noting the United States in Indian treaties "assum[es] [a] duty of protection, and of course pledg[es] the faith of the United States for that protection"), and accounts for the structural inequalities in Indian treaty making. For example, while international treaties traditionally are recorded in the languages of both parties,[11] Indian treaties were drafted only in English, and the formal negotiation records were kept by the non-Indian side. Kristen A. Carpenter, *Interpretive Sovereignty: A Research Agenda*, 33 AM. INDIAN L. REV. 111, 112, 120-21 (2008); *see also Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1012 (2019) (language barrier as one justification for the canon on Indian understanding). Moreover, the Senate often amended Indian treaties after negotiations with the Tribal Nation had been completed.

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[11] *See, e.g.*, *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 736-37 (1832) (treaty with Spain was executed "in both languages").

See FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 435-39 (1994). Consequently, "[a] number of treaties were ratified and carried into effect without any attempt to get the Indians' approval." *Id.* at 436. When a treaty, like any other contract, is drafted exclusively by one side, its terms are construed "against the drafter who enjoys the power of the pen." *Cougar Den, Inc.*, 139 S. Ct. at 1016 (Gorsuch, J., concurring).

This canon applies even when treaty language appears to have a clear meaning. For example, the treaty analyzed in *Worcester* referred to the Cherokee Nation's reserved lands as "[t]he boundary *allotted* to the Cherokees for their hunting grounds . . . ." Treaty with the Cherokees, art. IV, 7 Stat 18, 19 (1785) (emphasis added). Chief Justice Marshall acknowledged that the word *allotted* ordinarily "indicates a favour conferred, rather than a right acknowledged." *Worcester*, 31 U.S. at 582. Nevertheless, the Chief Justice concluded, to construe *allotted* according to its technical meaning would be an "injustice." *Id.* Accordingly, he wrote: "How the words of the treaty were understood by [the Cherokees], rather than their critical meaning, should form the rule of construction." *Id.*; *see also Jones v. Meehan*, 175 U.S. 1, 11 (1899) ("[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.").

The decision below dispenses with this canon by glibly declaring that "the Settlement Acts are not treaties. They are statutes. The treaty canon has no bearing on their interpretation." App. 38a (citation omitted). There are two reasons to reject the simplistic explanation in the decision below.

a. Although the canon on Indian understanding was first used in treaty construction, this Court has long applied it when construing a specific category of statutes: statutes enacted to ratify an agreement entered into by a Tribal Nation. In 1871, the United States unilaterally stopped making treaties with Tribal Nations. Indian Appropriations Act of 1871, 16 Stat. 544, 566. The United States nevertheless continued to negotiate the terms of its relationships with Tribal Nations through various "treaty substitutes," which were negotiated with the Tribal Nations and ratified not by the Senate as treaties, but by Congress through bicameralism and presentment as statutes. PRUCHA, *supra*, at 311-33. Such treaty substitutes were subject to many of the same structural inequalities as treaties: the United States created and maintained the official record of the negotiation, the United States drafted the legislation, and Congress (which sometimes changed the terms of the agreement) had the final say as to the statute's language. DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 170 (2001).

For almost as long as there have been treaty substitutes, this Court has construed such statutes as

if they were treaties, *i.e.*, it has construed them as the Indians would have understood them.[12] *See, e.g.*, *Marlin v. Lewallen*, 276 U.S. 58, 64 (1928) (construing Act of March 1, 1889, 25 Stat. 783) ("In taking up this question it must be remembered that the Agreements were between the United States and a dependent Indian tribe then under its guardianship, and therefore that they must be construed, 'not according to the technical meaning of their words to learned lawyers, but according to the sense in which they would naturally be understood by the Indians.'") (quoting *Jones*, 175 U.S. at 1); *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930) (construing the Curtis Act, 30 Stat. 495 (1898)) ("[T]ax exemptions secured to the Indians by agreement between them and the national government . . . must be construed, not according to their technical meaning, but 'in the sense in which they would naturally be understood by the Indians'") (quoting *Jones*, 175 U.S. at 1); *Choate v. Trapp*, 224 U.S. 665, 675 (1912) (construing the Curtis Act as the Indians would have understood it) (citing *Jones*, 175 U.S. at 1); *cf. Alaska Pac. Fisheries*, 248 U.S. at 89 (construing Act of March 3, 1891,

[12] This Court takes a similar approach when construing statutes that ratify interstate compacts. Even though such statutes are enacted through bicameralism and presentment, this Court recognizes that they are "both a contract and a statute," *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991), and construes them as the parties would have understood them; *i.e.*, it construes them as if they were treaties. *See, e.g.*, *Vermont v. New Hampshire*, 289 U.S. 593, 605 (1933).

26 Stat. 1095, 1101) ("The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation."). In fact, this Court has even referred to such statutes as treaties. *See, e.g.*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977) (referring to the Act of March 2, 1889, 25 Stat. 888, as "the 1889 Treaty").

The Settlement Acts are precisely the sort of statutes that this Court construes as if they were treaties—*i.e.*, the Settlement Acts are statutes that this Court would construe as the Indians understood them. As the District Court below recounted, the Settlement Acts have their origins in an agreement between the Penobscot Nation, the State, and the United States; the MIA was enacted to settle land claims litigation brought by the Penobscot Nation and other Maine Tribal Nations, and MICSA was enacted to ratify the MIA. App. 202a-216a.

Moreover, the Settlement Acts suffer from the same structural inequalities that justify the use of the canon. Of course, by 1980 the use of English did not create the same imbalance it once did. However, the Penobscot Nation still had no control over the Settlement Acts' final terms—the State had complete control in drafting the MIA, and Congress had complete control in drafting MICSA. *See, e.g.*, *To Provide for the Settlement of the Maine Indian Land Claims: Hearings on S. 2828 before the S. Select Comm. on Indian Affairs*, 96th Cong., 2d Sess. vol. 1 411 (1980) ("*Senate Hearing*") (pre-

pared statement of Dana Mitchell, Bear Clan, Penobscot Nation) ("[I]mportant information has not been supplied to the Indian people, or explained to them. There has been no impartial interpretation of these bills presented to the Penobscot or Passamaquoddy people."). In fact, the District Court below found that, in drafting the MIA and compiling its legislative history, the State excluded materials submitted by the Tribal Nations expressing their understanding of the scope of their territory, thus ensuring that only the State's understanding would be part of the official record. App. 208a-211a & nn.17-18.

b. A second reason to use the canon on Indian understanding when construing the Settlement Acts is that the Settlement Acts can only be understood by reference to the 1818 Treaty. Congress, in enacting MICSA, retroactively ratified the 1818 Treaty. MICSA § 1723(a)(1). In addition, the MIA's definition of the Penobscot Reservation makes express reference to, and thus incorporates, the 1818 Treaty. MIA § 6203(8).

The decision below dismisses the 1818 Treaty by declaring that "[t]he treaties no longer have any meaning independent of the Settlement Acts." App. 26a. But while the 1818 Treaty, itself, no longer provides the operative definition of the Penobscot Indian Reservation, there is no question that the Settlement Acts define the scope of the Penobscot Indian Reservation by reference to what was "reserved" to the Penobscot Nation in the 1818 Treaty. MIA § 6203(8). Nothing in the Settlement

Acts evinces any understanding by the Penobscot Nation that it was being divested of waters and submerged lands that were implicitly recognized as Penobscot Nation territory in the 1818 Treaty and that it had controlled since time immemorial.

Because the decision below failed to properly consider the Penobscot Nation's understanding of the Settlement Acts, as this Court's jurisprudence instructs, this Court should grant the petitions and reverse the decision below.

2. The decision below failed to construe ambiguities in the Settlement Acts liberally in favor of the Penobscot Nation.

This Court consistently instructs that ambiguities in treaties, treaty substitutes, and other statutes touching on Indian interests *must* be construed in the Indians' favor. *See, e.g.*, *Herrera*, 139 S. Ct. at 1699 ("Indian treaties 'must be interpreted . . . with any ambiguities resolved in favor of the Indians.'") (quoting *Mille Lacs*, 526 U.S. at 206); *Blackfeet*, 471 U.S. at 766. This canon has its roots not only in the United States' trust responsibility to Tribal Nations, but also in "traditional notions of sovereignty and . . . the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

Statutes that Federally recognize or restore Tribal Nations, including land-claim settlement acts that do so, are no exception to this rule; in fact, both the court below and other circuit courts consistently construe such statutes according to this canon. *See, e.g.*, *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999) ("Before we examine the language of the [MIA], we must acknowledge some general principles that inform our analysis of the statutory language. . . . [S]pecial rules of statutory construction obligate us to construe 'acts diminishing the sovereign rights of Indian tribes strictly,' 'with ambiguous provisions interpreted to the Indians' benefit.'") (quoting, respectively, *Narragansett*, 19 F.3d at 702; and *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985)) (internal alterations omitted); *Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior*, 228 F.3d 82, 92 (2d Cir. 2000) (construing ambiguities in Connecticut Indian Land Claims Settlement Act, 97 Stat. 851 (1983)); *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003) (construing ambiguities in Auburn Indian Restoration Act, 108 Stat. 4533 (1994)).

The Settlement Acts' failure to expressly address submerged lands in the Penobscot River creates precisely the sort of ambiguity that this canon was intended to resolve. *Alaska Pacific Fisheries* is instructive because it involved the same ambiguous language: "The principal question for decision is whether the reservation . . . embraces only the upland of the islands or includes as well the adja-

cent waters and submerged land." 248 U.S. at 87. There, as here, the relevant statute referred only to "lands" and "islands," which this Court found to be ambiguous with respect to the issues of waters and submerged lands. *Id.* at 86-87. Yet the decision below found no ambiguity because dictionaries define the words "lands" and "islands" so as not to include waters. App. 12a. The approach of the decision below does not answer the question—it elides it.[13]

Because the decision below, facing a clear statutory ambiguity, refused to construe the statute liberally in favor of the Indians, this Court should grant the petitions and reverse the decision below.

[13] Even the most ardent textualists acknowledge that "[a]dhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text. In the words of Learned Hand: 'a sterile literalism . . . loses sight of the forest for the trees.'" ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 356 (2012) (quoting *New York Trust Co. v. Comm'r of Internal Revenue*, 68 F.2d 19, 20 (2d Cir. 1933) (Hand, J.)) (emphasis in original, ellipses in SCALIA & GARNER). The fact that a word is defined in a dictionary does not mean that its meaning in a statute is clear, especially in Indian law, where history and context are so crucial to interpretation. *See Herrera*, 139 S. Ct. at 1699.

3. The decision below construed the Settlement Acts to diminish the Penobscot Reservation without a clear statement of Congress effecting such a diminishment.

As explained in Part I.A, *supra*, when Congress diminishes a Tribal Nation's territory or otherwise impairs a Tribal Nation's sovereignty, it must do so by a clear and express statement. This canon has its origins in the United States' recognition of and respect for Tribal sovereignty, and in the Constitution's separation of powers. From the beginning, the United States has recognized Tribal Nations as sovereigns. U.S. CONST. art. I, § 8, cl. 3 (recognizing Foreign Nations, States, and Indian Tribes as sovereigns with which Congress may regulate commerce); *White Mountain Apache*, 448 U.S. at 143-44; *Worcester*, 31 U.S. at 540 (finding that United States' treaties with Tribal Nations acknowledge Tribal Nations as sovereigns). Out of respect for Tribal Nations' sovereignty, which predates that of the United States, *Wheeler*, 435 U.S. at 322-23 ("Before the coming of the Europeans, the tribes were self-governing sovereign political communities."), courts today "will not lightly assume that Congress in fact intends to undermine self-government." *Bay Mills*, 572 U.S. at 790. Moreover, because the Constitution assigns Indian affairs to Congress, the courts must tread lightly so as not to impinge upon the Legislative domain. *McGirt*, 140 S. Ct. at 2462 ("the Constitution . . . entrusts Congress with the authority to regulate commerce

with [Indians]," and "courts have no proper role in the adjustment of reservation borders"); *Santa Clara Pueblo*, 436 U.S. at 60 ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.").

The Penobscot Nation has had inherent sovereignty from time immemorial over both the waters and lands of the Penobscot River, and it ceded only those lands expressly surrendered in treaties as affirmed in the Settlement Acts. And, as demonstrated in Part I.A, *supra*, no treaty expressly cedes, and no act of Congress expressly divests the Penobscot Nation of, the waters and submerged lands of the Penobscot River. Thus, those waters and submerged lands remain the domain of the Penobscot Nation.

The decision below simplistically dismisses this canon, declaring the canon "inapplicable" because "[t]his is not a traditional diminishment case." App. 38a. Here again, the decision below framed the question incorrectly. This canon does not apply only to "traditional diminishment case[s]," but rather to any case in which a party asserts that a Tribal Nation has been divested of its lands or other sovereign prerogatives. *See* fn.6, *supra*. No one disputes that the Penobscot Nation once held sway over all the waters and lands of the Penobscot River. Thus, the relevant inquiry is not, "Is this a traditional diminishment case," but rather, "Has the Penobscot Nation ever expressly ceded, or

expressly been divested of, the waters and submerged lands within the Penobscot Reservation"? Absent a clear statement of cession or divestiture, those waters and submerged lands continue to belong to the Penobscot Nation. *See generally McGirt*, 140 S. Ct. 2452.

Because the decision below fails to properly use the clear statement rule that this Court has established for the diminishment of Tribal lands and sovereign prerogatives, this Court should grant the petitions and reverse the decision below.

II. The Petitions present a question of exceptional national importance.

Literally hundreds of treaties, statutes, and executive orders identify lands constituting Indian reservations. *See* COHEN'S HANDBOOK, *supra*, §§ 15.04[3][a]-[b], 15.04[4].[14] Like MICSA, those statutes necessarily identify lands that constitute the reservation recognized or created by that statute; but not all of them address Tribal rights in adjacent waters and/or submerged lands. *See, e.g.*,

[14] *Amici* are not aware of any precise accounting of all of the statutes that establish Tribal Nation reservation boundaries; most likely there is no such list, because many such statutes were not codified in the U.S. Code, and those that were codified were not all codified together. However, such a list likely would include most (if not all) of the statutes previously codified at 25 U.S.C. ch. 19 (Indian Land Claims Settlements), many of the statutes codified at 25 U.S.C. ch. 14 (Miscellaneous), and countless sections of various omnibus bills and appropriations acts.

Act of March 3, 1891, § 15, 26 Stat. 1095, 1101 (setting aside the Annette Islands in Alaska as a reservation for the Metlakatla Indian Community, without addressing Tribal rights in water and/or submerged lands).

Moreover, Congress continues to enact Federal recognition, restoration, and settlement acts. *See, e.g.*, National Defense Authorization Act for FY 2020, Pub. L. 116-92, 133 Stat. 1198, 1907-09 (2019) (extending Federal recognition to the Little Shell Tribe of Chippewa Indians); Thomasina E. Jordan Indian Tribes of Virginia Recognition Act, Pub. L. 115-121, § 2870, 132 Stat. 40 (2018) (extending Federal recognition to six Tribal Nations).

Tribal Nations negotiate in light of the well-settled legal principle that what is not clearly ceded by the Tribal Nation or divested by Congress is retained by the Tribal Nation. Thus, the decision below, if allowed to stand, would disrupt negotiating parties' expectations based on a longstanding body of case law.

Finally, the decision below cannot be reconciled with the Second Circuit's decision in *Blumenthal*, which applied the Indian canons to the Connecticut Indian Land Claims Settlement Act (which, as the Second Circuit noted, was modeled on the MICSA). *See Blumenthal*, 228 F.3d 82. The lack of a more definitive circuit split should be no bar to this Court granting the petitions. The decision below, if allowed to stand, not only would deprive the Penobscot Nation of its sovereignty over the

Penobscot River, it also would govern construction of other settlement acts enacted for Tribal Nations within the First Circuit, *see* Rhode Island Indian Claims Settlement Act, Pub. L. 95-395, 92 Stat. 813 (1978), and could reshape the construction of such statutes nationwide. This Court has granted petitions under similar circumstances, especially when the subject of the petition conflicts so clearly with this Court's decisions, as the decision below does. *See, e.g.*, *McGirt*, 140 S. Ct. 2452; *Herrera*, 139 S. Ct. 1686; *Cougar Den*, 139 S. Ct. 1000.

CONCLUSION

The State repeatedly has promised to respect the Penobscot Nation's sovereign territory. Only this Court can "hold the [State] to its word." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020); *see also Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great [States], like great men, should keep their word."). To hold the State to its word—and to effect the Federal Government's trust responsibility to the Penobscot Nation and all Tribal Nations—this Court first must grant the Petitions.

For the reasons articulated above, the Court should **GRANT** the petitions.

Respectfully submitted,

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