No. 21-840

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

AARON M. FREY, ATTORNEY GENERAL OF MAINE, ET AL.

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

## REPLY BRIEF FOR THE PETITIONER

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## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:



Statutes:

Statutes—Continued: Page



Miscellaneous:

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**REPLY BRIEF FOR THE PETITIONER**

Under the Maine Indian Claims Settlement Act of 1980 (MICSA), Pub. L. No. 96-420, 94 Stat. 1785, and the Maine Implementing Act (MIA), Me. Rev. Stat. Ann. tit. 30 (1979) (collectively, the Settlement Acts), members of the Penobscot Nation have a right to "take fish, within the boundaries of" the Penobscot Nation's "Indian reservation[]." MIA § 6207(4). That right to fish "within the boundaries" of the Penobscot "Indian reservation" includes the right to fish in the Main Stem of the Penobscot River—as every judge to have participated in this case has agreed. See Pet. App. 42a-43a (en banc majority); *id.* at 49a (Barron, J., concurring in part and dissenting in part); *id.* at 172a-175a (Torruella, J., dissenting); *id.* at 254a-263a (district court). Under any ordinary understanding of language and logic, therefore, the Penobscot Nation's Indian Reservation must include the Main Stem: the Main Stem cannot be simultaneously "within the boundaries" of the Reservation,

MIA § 6207(4), and *not* "within the boundaries" of the Reservation.

Respondents offer no persuasive defense of the court of appeals' contrary conclusion. And respondents are likewise incorrect in arguing that the errors in the en banc decision do not warrant this Court's intervention. Border disputes between sovereigns implicate fundamental interests of the sort that this Court regularly adjudicates even in the absence of questions of broader legal significance. And here, the en banc majority resolved the border dispute against the Penobscot Nation only by taking a strikingly parsimonious view of ambiguity that effectively nullified this Court's Indian-canon precedents and frustrated the congressional and tribal reliance those decisions have engendered. The petition for a writ of certiorari should accordingly be granted.

**A. The Decision Below Is Incorrect**

As we have explained (Pet. 19-29), interpreting the Settlement Acts in light of ordinary principles of statutory interpretation and a faithful application of the Indian canons leads to the conclusion that the Penobscot Indian Reservation includes the Penobscot River's Main Stem. Respondents' attempts to defend (Br. in Opp. 12-31) the en banc majority's contrary determination are unpersuasive in multiple respects.

1. a. Respondents primarily contend (Br. in Opp. 13-14) that the word "islands" in Section 6203(8) of the MIA, along with the phrase "in the Penobscot River," unambiguously exclude the Penobscot River from the Reservation. That is incorrect.

The relevant legal and linguistic background demonstrates that the term "islands" does not necessarily exclude surrounding submerged land and waters. See Pet. 20-21 (collecting cases). Most notably, in *Alaska*

*Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918), this Court held that the phrase "body of lands known as Annette Islands" included "the intervening and surrounding waters as well as the upland." *Id.* at 86, 89 (citation omitted). The Court explained that the "area comprising the islands" included the waters in which the uplands were situated. *Id.* at 89.

Respondents seek (Br. in Opp. 15-16) to distinguish *Alaska Pacific Fisheries* on the basis that it interpreted the phrase "body of lands known as Annette Islands," *Alaska Pacific Fisheries*, 248 U.S. at 86, rather than the phrase "islands in the Penobscot River reserved to the Penobscot Nation by agreement." MIA § 6203(8).[1] But while the overall phrases at issue differ, the cases are fundamentally alike in that both require looking to the meaning of the word "islands" in context rather than simply assuming that it can never encompass adjacent waters. Here, for example, Section 6203(8) defines the covered group of islands by reference to agreements that reserved not just uplands but also surrounding waters between the river's banks. See Pet. 21-22. Moreover, the Settlement Acts were enacted against the background of Maine's common-law rule that island parcels in nontidal portions of a river presumptively include not just the uplands but also a portion of the riverbed. See *Warren* v. *Westbrook Manufacturing Co.*, 29 A. 927, 927-928 (Me. 1893). Respondents never explain how

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[1] Respondents also contend (Br. in Opp. 16) that *Alaska Pacific Fisheries* presented an easier case because President Wilson had issued a proclamation in 1916 regarding waters within 3000 feet of the shorelines. But as respondents concede (*ibid.*), this Court did not refer to that proclamation in its decision, which instead focused on the statutory language that Congress used in establishing the reservation in 1891.

their view that the word "islands" unambiguously *excludes* any portion of the riverbed is consistent with that background principle.[2]

Respondents attempt (Br. in Opp. 14) to locate an upland-based limit in Section 6203(8)'s specification that the covered islands consisted "*solely* of Indian Island * * * and all islands in said river northward thereof that existed on June 29, 1818," excluding islands transferred after that date. MIA § 6203(8) (emphasis added). But because "islands" can include the area surrounding uplands, referring "solely" to a specific group of islands does not establish that solely uplands are included. Instead, as we have explained (Pet. 26 n.3) and respondents do not dispute, that limitation simply ensures that elevated areas of riverside land that were surrounded by water as a result of post-1818 dam construction would not be included in the Reservation.

b. Respondents are likewise incorrect in arguing (Br. in Opp. 18-22) that other parts of the Settlement Acts support reading Section 6203(8) to unambiguously exclude the Main Stem.

As discussed above, pp. 1-2, *supra*, the most significant provision in that regard is MIA § 6207(4), which guarantees members of the Penobscot Nation the right to "take fish, within the boundaries of" the Penobscot

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[2] Without acknowledging *Warren*, respondents offer (Br. in Opp. 17 n.7) a straw-man version of the government's argument about the understanding of "islands" and claim that it was not preserved below. That is incorrect. See, *e.g.*, Gov't C.A. Principal Panel Br. 19-20; Gov't C.A. Resp. Panel Br. 12. And respondents' related claim (*e.g.*, Br. in Opp. 28-29) that the United States no longer asserts the Penobscot Nation's ownership of submerged lands in the Main Stem is likewise incorrect: the United States continues to maintain that the Main Stem, including its submerged lands, is part of the Reservation.

Nation's "Indian reservation[]." Even the en banc majority recognized that Section 6207(4) "grants the Nation sustenance fishing rights in the Main Stem." Pet. App. 42a. And respondents do not dispute that determination here. See Br. in Opp. 22 n.9. Logically, therefore, the Main Stem must be part of the Reservation: if the sustenance fishing right can be exercised only "within the boundaries of" the Penobscot Nation's "Indian reservation[]," MIA § 6207(4), and the sustenance fishing right can be exercised "in the Main Stem," Pet. App. 42a, then the Main Stem must be within the borders of the Reservation.

Respondents offer no solution to that glaring problem with their position. They do not endorse the en banc majority's odd suggestion that the "reservation" in Section 6207(4) must be a different (and undefined) "reservation" of the Penobscot Nation than the one identified in Section 6203(8). See Pet. App. 44a; Pet. 28-29. Instead, they just assert (Br. in Opp. 21) that Section 6207(4) is an "ancillary provision[]" and should be disregarded. But the sustenance fishing right was by no means "ancillary"; the legislative record shows that fishing was an "area[] of particular cultural importance." Pet. App. 101a (citation omitted). And the fact that respondents' interpretation of Section 6203(8) cannot be logically reconciled with the scope of that important sustenance fishing right itself strongly reinforces the conclusion that respondents' interpretation of Section 6203(8) is incorrect. See *United Savings Ass'n* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) (explaining that the meaning of a given provision "is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or

because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law") (citation omitted).

Nor do the other provisions on which respondents rely (Br. in Opp. 18-22) support their view that the Settlement Acts unambiguously exclude the Main Stem from the Reservation. Respondents observe (*id.* at 19) that Section 6207(1) of the MIA gives the Maine Indian Tribal-State Commission authority to regulate fishing on rivers within or along Indian territory. But contrary to respondents' assertion (*ibid.*) that granting the Commission that authority "would make little sense" if the Main Stem were part of the Reservation, the Settlement Acts give Maine greater authority to regulate on-reservation activities (on uplands and waters alike) than Congress has generally allowed to other States. See Pet. 7. The Commission thus *tempers* the State's otherwise applicable authority in areas within the Commission's jurisdiction. See Commission Amicus Br. 3-4.

Respondents likewise err in relying on MIA § 6205(3), which provides for the replacement of reservation lands taken by state eminent domain authority with land "contiguous to the affected Indian reservation," and further provides that "land along and adjacent to the Penobscot River shall be deemed to be contiguous to the Penobscot Indian Reservation." See Br. in Opp. 20-21. Respondents contend (*ibid.*) that no such "deem[ing]" would be necessary if the Main Stem is part of the Reservation. But Section 6205(3) is not limited to just the 60-mile Main Stem portion of the Penobscot River. It encompasses land adjacent to any part of the Penobscot River, thereby allowing state entities flexibility to obtain replacement parcels up- or down-river of the Reservation. See Pet. App. 77a (Barron, J.,

concurring in part and dissenting in part). Our reading, unlike respondents', accordingly produces no intrastatutory conflict or superfluity.[3]

c. Respondents also assert (Br. in Opp. 22-29) that the Settlement Acts' purpose and history support their current reading. That assertion, too, is mistaken.

Respondents ignore that Congress intended to provide the Maine tribes "with a fair and just settlement of their land claims." 25 U.S.C. 1721(a)(7) (Supp. 2015). And respondents' historical claims are also highly contestable. While respondents represent (Br. in Opp. 26) that Maine conveyed to private parties "riverfront parcels along the Main Stem together with adjacent submerged lands" early in the 19th Century, none of the cited deeds referred to "adjacent submerged lands." Instead, the deeds generally described parcels by reference to points—the "bank," trees, a "stake on the shore"—on the east or west "side of [the] Penobscot River," with the parcel then running "by the side of the River." See C.A. J.A. 1464-1474. The deeds did not indicate that Massachusetts or Maine had taken title to the river itself, beyond the "lands on both sides of the River Penobscot" that the Nation's earlier agreements with the States had purported to convey. Pet. App. 89a (citation omitted); see Pet. 21-22.[4]

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[3] Respondents are also incorrect in arguing (Br. in Opp. 19-20) that Section 6203(8) must specify an uplands-only reservation because it does not mention "natural resources" or the specific resource "water." If that were correct, the Reservation would not include even timber or terrestrial wildlife on the island uplands.

[4] Elsewhere, respondents claim (Br. in Opp. 29 n.11) that the deeds conveyed the riverbed to the center of the river under the same common-law presumption that they ignore in their interpretation of "islands." See pp. 3-4, *supra*. But that presumption is overcome when "the contrary appears" from the circumstances of the

Conversely, the Penobscot Nation entered into leases that specifically authorized third parties' use of the river. See Pet. 28. Respondents discount (Br. in Opp. 29) those leases by arguing that they were negotiated by an agent appointed under a state statute. But the statute in question required the agent to assist with "the care and management of [the Penobscot Nation's] property, for the use and benefit of said Indians." 1821 Me. Laws 667. The negotiation by an agent appointed under that statute of leases for portions of the Main Stem to third parties on the Nation's behalf is accordingly evidence that the Main Stem was regarded as the Nation's "property." *Ibid.*

Respondents also observe (Br. in Opp. 25-26) that the State has regulated fishing and other activities on the river, and claim that such regulation constitutes an exercise of "dominion" that "transfer[red]" ownership to the State under Section 1722(n) of MICSA. But MICSA ratifies only transfers "from, by, or on behalf of" the Penobscot Nation, 25 U.S.C. 1723(a)(1) (Supp. 2015), which would not encompass the State's unilateral assertion of "dominion." Moreover, because the Penobscot Nation had no federally recognized reservation prior to the Settlement Acts, Maine had exercised regulatory authority over *all* territory owned by the Nation. See Resp. C.A. Panel Br. 8 ("Before 1980, the Tribe, its members *and their lands* were regarded as fully subject to the State's jurisdiction.") (emphasis added). If such state regulation had transferred

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deed. *Charles C. Wilson & Son* v. *Harrisburg*, 77 A. 787, 787 (Me. 1910). Here, Massachusetts' and Maine's lack of title to the Main Stem under the earlier agreements with the Penobscot Nation meant that they could not convey portions of the riverbed as implicit appurtenances to riverside parcels.

property interests, then all of the uplands would also have been "transferred" to the State—leaving the reservation confirmed in Section 6203(8) to include only Indian Island. See MIA § 6203(8) (providing that the portion of the reservation north of Indian Island excludes "any island transferred" after 1818). Not even respondents suggest that reading is plausible.[5]

Finally, respondents resort (Br. in Opp. 27-29) to the Settlement Acts' legislative history. But as Judge Barron demonstrated (Pet. App. 97a-107a), that history does not reflect any agreement that the Penobscot Nation would cede ownership of the riverbed. For example, respondents attribute to "the Nation" an "understand[ing] that * * * the Nation would not own 'the bed of any Great Pond or any waters of a Great Pond or river or stream,'" but the quoted letter expressed the views of Maine's then-Attorney General, not the Penobscot Nation. Br. in Opp. 27-28 (quoting Pet. App. 197a). And even taken on its own terms, the quoted statement simply indicated that the Nation would not own rights to divert waters flowing downstream, not that it would have no ownership of the area in which the river flows. Indeed, the letter states that the Nation would not own "the bed of any Great Pond," but omits

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[5] Respondents' contention (Br. in Opp. 29) that Maine exercised "exclusive jurisdiction" to regulate in the Main Stem is inaccurate, as respondents do not dispute that Penobscot game wardens patrolled the Main Stem at the time of the Settlement Acts. See Pet. 8. Given those overlapping regulatory claims, a transfer-by-regulation approach would not have "br[ought] clarity," Br. in Opp. 24, to property titles in the State. Moreover, contrary to respondents' assertions (*id.* at 7-8), the Nation does not seek for itself exclusive regulatory authority over the Main Stem, but only the specific on-reservation authorities the Settlement Acts recognized.

any similar statement as to the bed of any river. Pet. App. 197a.

2. As Justice Scalia explained in *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), "[w]hen [a court is] faced with * * * two possible constructions" of a statute implicating the sovereign rights of Indian tribes, the court's "choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Id.* at 269 (citation omitted; third set of brackets in original).

The en banc majority declined to apply that principle on the ground that the statute unambiguously forecloses a reading favoring the Penobscot Nation. See Pet. App. 3a.[6] But for all of the reasons discussed above and in the petition (see Pet. 19-29), that determination is incorrect. Even Maine itself acknowledged in 1994 and 1995, in issuing permits for eel pots, that "[t]he portions of the Penobscot River and submerged lands surrounding the islands in the river are part of the Penobscot Indian Reservation." Pet. App. 215a (citation omitted).

**B. The Question Presented Warrants This Court's Review**

Contrary to respondents' contentions (Br. in Opp. 31-34), the en banc majority's decision and doctrinal errors warrant review—and reversal—by this Court.

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[6] Respondents also assert (Br. in Opp. 30-31) that Sections 1725(h) and 1735(b) of MICSA foreclose application of the Indian canons to the Settlement Acts. Those provisions have nothing to do with the Indian canons; they refer to federal "laws and regulations" that govern the substantive authority of most other States to regulate on Indian reservations within their borders. 25 U.S.C. 1725(h) (Supp. 2015).

This Court regularly adjudicates disputes involving Indian tribes even in the absence of a circuit conflict. See Pet. 32-33 (collecting recent examples). Respondents attempt (Br. in Opp. 34) to distinguish this case on the ground that it involves only "Maine and one of four tribal nations located within Maine's borders." But disputes between sovereigns about the "recognition of borders" implicate fundamental "sovereign interests" that make them a "frequent subject of litigation * * * in this Court." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982).

Such review is particularly appropriate here, because of the broader implications of the en banc majority's approach to ambiguity and the Indian canons. Those canons reflect the "sovereign-to-sovereign, structural relationship" between Indian nations and the United States established under the Constitution. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 421-422 (1993); see, *e.g.*, *United States* v. *Lara*, 541 U.S. 193, 202 (2004) (describing the "framework of a 'government-to-government relationship'" that Congress has adopted with Indian tribes) (citation omitted). If allowed to stand, however, the en banc majority's parsimonious approach to ambiguity would provide a roadmap for avoiding the Indian canons—and the important constitutional principles they embody—in future cases.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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