No. 17-1592

In the
Supreme Court of the United States

MAKAH INDIAN TRIBE,

PETITIONER,

v.

QUILEUTE INDIAN TRIBE AND
QUINAULT INDIAN NATION,

RESPONDENTS.

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

BRIEF OF RESPONDENT STATE OF WASHINGTON DEPARTMENT OF FISH AND WILDLIFE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the treaty right of "taking fish at usual and accustomed grounds and stations," which has been long interpreted by this Court and others as reserving fishing rights on grounds traditionally and customarily used for taking fish, has a different meaning for the Quileute and Quinault Indian Tribes, and reserves fishing rights in a vast area of the Pacific Ocean where those tribes did not customarily fish but traversed while hunting seals or whales.

PARTIES TO PROCEEDINGS

Petitioner, the Makah Indian Tribe, initiated this proceeding pursuant to an injunction entered in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) that allows additional cases to be filed as "subproceedings." Makah was the plaintiff in the district court and appellant in the Ninth Circuit.

Respondents are:

(1) the Quileute Indian Tribe and Quinault Indian Nation. These tribes were defendants in the district court and appellees in the Ninth Circuit.

(2) the State of Washington and its Department of Fish and Wildlife and agency directors. The State participated at trial and as an appellant at the Ninth Circuit aligned with the Petitioner.

(3) the Hoh Indian Tribe, Squaxin Island Tribe, Muckleshoot Tribe, Puyallup Tribe, Nisqually Indian Tribe, Suquamish Indian Tribe, Skokomish Indian Tribe, Swinomish Indian Tribal Community, Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe, Lummi Indian Nation, Lower Elwha Klallam Tribe, Stillaguamish Tribe, and Upper Skagit Indian Tribe.

(4) the United States of America, which is a named plaintiff but did not participate in the Ninth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treaties

Statutes

INTRODUCTION

The United States entered a number of treaties with Indians in the Pacific Northwest that secure rights of taking fish "at usual and accustomed grounds and stations." *See, e.g.*, Treaty with the Qui-nai-elt, Etc. (Olympia Treaty), art. III, 12 Stat. 791 (Jan. 25, 1856, ratified Mar. 8, 1859, proclaimed Apr. 11, 1859) and Treaty with the Makah, (Neah Bay Treaty), art. IV, 12 Stat. 939 (Jan. 31, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859). Twenty-one federally recognized tribes in Washington exercise fishing rights under the six "Stevens Treaties" described by the Petition. This case concerns the phrase "usual and accustomed grounds and stations"—the off-reservation places where the treaties secure a "right of taking fish."

The boundaries of an Indian tribe's "usual and accustomed fishing grounds" are critically important. Those boundaries determine which fish populations are subject to the court-ordered remedy to apportion harvests 50/50 between treaty Indians and other fishers. They determine where the Department of Fish and Wildlife must impose harvest limits on non-tribal fishing fleets to avoid depriving tribal fishers of a fair share of the catch from the usual and accustomed grounds. And, if multiple tribes have overlapping, usual and accustomed fishing grounds or stations, they compel those tribes to subdivide the treaty share.

Fish are a limited resource in high demand, and fishing area boundaries trigger continual litigation. For generations, this Court and others have

interpreted "usual and accustomed grounds" using established tools for construction of treaty language. The plain language shows the treaty is concerned with traditional fishing locations. Records from treaty negotiations emphasize the importance to the Indians of a right to continue taking salmon and other fish at traditional fishing grounds. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 666 (1979). And, as this Court long ago explained, the natural Indian understanding of these treaties views them as reserving rights to continue taking fish at fishing grounds customarily used at treaty-time. *United States v. Winans*, 198 U.S. 371, 381 (1905).

The Ninth Circuit, however, interpreted this treaty language so that usual and accustomed fishing areas are far larger than traditional fishing grounds. It did this below by concluding that the words "taking fish" were plausibly understood to refer to hunting seals and whales. Thus, by interpreting "usual and accustomed grounds" for "taking fish" as the distances traveled offshore to hunt whales or seals, Quileute and Quinault fishing grounds cover several thousand square miles of ocean—an area the size of a small state. *See* Pet. 31 (map). This interpretation breaks from every prior case interpreting "usual and accustomed" fishing grounds and conflicts with this Court's approach to treaty interpretation at every step. It also conflicts directly with the United States' and Ninth Circuit's prior interpretation of the treaties, where whale and seal hunting areas were legally distinct from, and did not prove the scope of, usual and accustomed *fishing* grounds.

The interpretation inflicts substantial harm on the State, the public, and the Makah Indian Tribe. State-managed coastal Dungeness crab harvests and several other valuable fisheries must be considerably limited. Makah's valuable trawl fishery for whiting will lose a major portion of its harvest. Pet. 32-33. Further, it sets the stage for more litigation of additional usual and accustomed grounds based on hunting areas for sea mammals, seabirds, or other aquatic animals outside traditional fishing grounds. This imposes an ongoing burden on courts, and exacerbates intertribal disputes when, as in this case, one tribe uses it to claim expanded treaty fishing grounds to the harm of another tribe.

The Court should grant the Writ and review the Ninth Circuit interpretation of this critically important treaty language. The Ninth Circuit's counter-textual interpretation disrupts the status quo achieved after 48 years. If not reviewed, uncertainty over fishing boundaries will undermine cooperative management and conservation efforts of the states, tribes, and the United States, when cooperation and certainty over fishing rights is needed to ensure sustainable use of valuable fishery resources.

STATEMENT

A. State of Washington Fishery Management in Pacific Ocean Waters

The State of Washington and its Department of Fish and Wildlife (WDFW) have long been involved in the proceedings that implement the judgment in *United States v. Washington*, 384 F. Supp. 312 (W.D.

Wash. 1974). It has direct responsibility for implementing the judicial decrees ensuring fair sharing of fishery resources.

State law authorizes WDFW to regulate fishing in state waters and landings at state ports. Wash. Rev. Code 77.12. WDFW works closely with fish management agencies of the United States, Indian Tribes, and other states to ensure conservation and allocate harvests of fish stocks. While federal agencies directly manage the Pacific whiting fishery described by Makah, Pet. 32-33, WDFW exercises management over other fisheries that take place within the area claimed as a treaty fishing area by Quileute and Quinault. *See generally Alaska v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984) (where the U.S. has not developed a fishery management plan under the Magnuson Act, states have authority to manage fisheries off their coasts for vessels registered in their jurisdiction).

WDFW-managed fisheries in the disputed area include coastal Dungeness crab, pink shrimp, and spot prawns, which provide significant income to fishing businesses and generate tax income for the State. Crab, prawn, and shrimp harvests from the disputed area can exceed twenty million dollars ex vessel value a year. And that is just a fraction of the value of other fisheries, such as halibut, black cod, and Pacific whiting, which are harvested from the disputed area by Washington-based businesses, landed in Washington ports, and taxed by the State.

B. This Court and Others Have Long Interpreted "Usual and Accustomed Grounds and Stations" as the Places Traditionally Fished at Treaty Time

Befitting the importance of salmon and other fisheries to the public, states, and tribes, this Court has interpreted these treaties several times over the past century.

The Court's first treaty fishing case, *United States v. Winans*, 198 U.S. 371 (1905), addressed a Yakama Indian fishing on the Columbia River. Non-Indian landowners had blocked a trail leading to a traditional, well-known fishing site, and further displaced Indian fishing by installing mechanical fish harvesting wheels that took all the catch available at that site. *Winans* held that landowners could not exclude Yakama Indians from the traditionally-used fishing site. *Id.* at 381. In doing so, *Winans* interpreted treaty language based on Indian understanding and announced the "reservation of rights" principle. "How the treaty in question was understood" reflected an Indian understanding that "[t]he right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians." *Id.* Applying this principle, the Court concluded that Indians understood the treaty to "reserve" continued fishing rights at places where they historically fished. *Id.* As a result, the treaty gave the Indians "'the right of taking fish at all usual and accustomed places,'" which included rights to cross

private land to the river and "the right to occupy it to the extent and for the purpose mentioned." *Id.*[1]

In later cases, the traditional grounds for taking fish became more important because they defined where federal law preempted state licensing fees. *Tulee v. Washington*, 315 U.S. 681 (1942). "[E]xaction of fees as a prerequisite to the enjoyment of *fishing in the 'usual and accustomed places'* cannot be reconciled with a fair construction of the treaty." *Id.* at 685 (emphasis added). Similarly, historic fishing locations defined where state laws could not bar Indians from using fishing nets to catch a fair share of fish. *Dep't of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44 (1973).

Eventually, "Final Decision #1" in *United States v. Washington* interpreted this treaty language as the grounds where each tribe took fish at treaty time:

> 'Usual and accustomed,' being closely synonymous words, indicate the exclusion of unfamiliar locations and those used

[1] The Court applied the same principle in *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919), to enjoin a non-Indian fishing company from interfering with Indian fishing on the south shore of the Columbia River. The company argued that Yakama treaty rights did not extend to the southern shore of the Columbia River in areas fished by other tribes. The Court disagreed and recognized that the Yakama Treaty was one of eleven treaties negotiated in a group with fishing rights at usual and accustomed grounds. *Id.* at 196-97.

> infrequently or at long intervals and extraordinary occasions.

United States v. Washington, 384 F. Supp. 312, 332 (W.D. Wash. 1974). Based on this, the court held,

> [T]hat every fishing location where members of a tribe *customarily fished* from time to time at and before treaty times, however distant from the then usual habitat of the tribe*, and whether or not other tribes then also fished in the same waters*, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right *to take fish.*

Id. (emphases added) (footnote omitted).

This Court affirmed, concluding that it was clear "that the Indians were vitally interested in protecting their right to take fish at usual and accustomed places, whether on or off the reservations[.]" *Fishing Vessel*, 443 U.S. at 667 (1979) (citing *United States v. Washington*, 384 F. Supp. at 355). To interpret the treaty, *Fishing Vessel* reviewed negotiations from several treaties. *Id.* at 666 n.9 (quoting Washington Territorial Governor Stevens' statements made during the signing of the Treaty of Point Elliott), at 667 n.11 (quoting Governor Stevens' statement made during negotiations of the Point-No-Point Treaty), at 668 (referencing negotiations with the Makah Tribe). The Court also relied heavily on W*inans. Id.* at 678-81.

Twenty-one tribes have had fishing grounds adjudicated based on this interpretation. *See United*

States v. Washington, 384 F. Supp. at 359-82. Subsequent cases or additional subproceedings in *United States v. Washington* used this interpretation when tribes returned to court to expand fishing areas, refine fishing boundaries, or address competing fishing rights among tribes. *See id.* at 419 (retaining jurisdiction to define additional usual and accustomed fishing areas); *see, e.g., United States v. Washington*, 626 F. Supp. 1405, 1531 (1985) (adjudicating Tulalip Tribes fishing grounds).

C. The Ninth Circuit Rejects Use of Whale and Seal Hunting Areas as Fishing Grounds for the Makah Indian Tribe

The district court did not initially determine boundaries of fishing areas in the Pacific Ocean along Washington's west coast. *United States v. Washington*, 384 F. Supp. at 364 (FF 65), 372 (FF 108), 374 (FF 120). In 1977, Makah filed a supplemental proceeding to seek a declaration of the boundaries of its ocean fishing area. Makah showed that its fishers at treaty time regularly fished for salmon, halibut, and other "finfish" between zero and forty miles offshore. Makah showed that its historic whalers and sealers hunted their quarry up to 100 miles offshore. The court held that Makah's customary fishing grounds extended *only* where they customarily went to take fish—forty miles offshore. *United States v. Washington*, 626 F. Supp. 1405, 1467 (1982), *aff'd* 730 F.2d 1314, 1317-18 (1984).

That ruling reflected the United States' treaty interpretation. "[T]here are essential differences between whaling and fishing," and therefore evidence

that Makah Indians whaled as far out as "90 or 100 miles" offshore could not prove that Makah usual and accustomed fishing grounds extended ninety miles offshore. *See* Makah ER 1253 (U.S. Suppl. Memo re Makah Renewed Request for Determination of Ocean Fishing Grounds, at 5 (Oct. 12, 1982)); State of Washington CA9 Reply Br. at 5-6 (discussing the United States' "legal argument" that "whale hunting cannot establish usual and accustomed grounds or stations for fishing finfish as a matter of treaty interpretation."). *See also United States v. Lummi Indian Tribe*, 841 F.2d 317, 320 (9th Cir. 1988) (concluding that whaling and sealing by Makah failed to prove "that [Makah] customarily fished" in the more distant whaling area).

D. To Determine Quileute and Quinault Fishing Grounds, the Ninth Circuit Relied on Whale and Seal Hunting Distances Far Outside Traditional Fishing Grounds

This appeal arises from a new supplemental proceeding where Makah invoked the district court's jurisdiction to determine the boundaries of the fishing grounds of two neighboring tribes to the south, the Quileute and Quinault. The State supported Makah and argued that the Quileute's and Quinault's usual and accustomed grounds for taking fish could not be interpreted to create fishing rights in a vast area of the Pacific Ocean where those two tribes did not customarily take fish at treaty time.

1. The District Court decision

The district court found that Quileute Indians customarily fished twenty miles or less from shore, and that Quinault Indians customarily fished six miles or less. Pet.App. 49a-50a (FF 5.2-5.3; Quinault), 73a-74a (FF 9.7; Quileute). But the court also addressed whether the "whaling and sealing practices can be the basis for establishing the tribe's offshore" usual and accustomed fishing grounds. *Id.* at 115a. It declared a "right of taking fish" forty miles offshore for the Quileute and thirty miles offshore for Quinault, based solely on a legal conclusion that the treaty should be interpreted to include waters where members of those tribes had hunted whale or seal, regardless of whether it was outside the customary fishing grounds. *Id.* at 129a (CL 3.1-3.3).

The district court interpretation relied heavily on canons of construction for Indian treaties. Pet.App. 116a. Finding the word "fish" had been used for many aquatic animals, the court found it ambiguous. It then looked at linguistic possibilities for interpreting "taking fish" and concluded that it was possible the treaty had been understood as hunting seals or whales. *Id.* at 122a. It held that "Quinault and Quileute's usual and accustomed fishing locations encompass those grounds and stations where they customarily harvested marine mammals—including whales and fur seals—at and before treaty time." Pet.App. 128a-129a.

2. The Ninth Circuit decision

Makah and the State of Washington appealed, and the Ninth Circuit affirmed in relevant part.

The Ninth Circuit ruled that its prior decision regarding Makah fishing grounds was irrelevant, reasoning that the Treaty with the Makah had a textual difference by including "whaling or sealing." Pet.App. 9a. The court concluded it could therefore interpret the phrase "usual and accustomed fishing grounds" for Quileute and Quinault without regard to that prior holding rejecting use of seal or whale hunting areas as "fishing" grounds. *Id.*

Next, the court decided that treaty language did not "nail down whether the term 'fish' was meant to include or exclude" seal hunting or whale hunting. Pet.App. 10a. The court concluded that the "context" of the treaty did "nothing to resolve the ambiguity." Pet.App. 11a. But, to make that conclusion, the court disregarded context provided by the contemporaneous Makah treaty that explicitly distinguished whaling and sealing from taking fish. *Id.* It concluded that it had to discern a "particular tribe's understanding" without looking elsewhere. Pet.App. 12a.

Next, the court invoked canons of construction used to interpret Indian treaty language. Pet.App. 12a-13a. It concluded that it should infer the "sense" in which Quileute or Quinault Indians understood the treaty, and that it should ensure that "'ambiguous provisions [are] interpreted to'" the benefit of Quileute and Quinault, but not Makah. Pet.App. 12a-13a (quoting *Choctaw Nation of Indians v. United*

States, 318 U.S. 423, 432 (1943) and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)). The court held that it would follow the district court's conclusion that Quileute and Quinault would have understood the treaty language to cover hunting seals and whales, because the district court was not "clearly erroneous." Pet.App. 15a. As evidence, the court cited the district court's use of a "linguistic clue," which was that negotiations likely used the limited-vocabulary "Chinook jargon" word for fish, which sometimes broadly meant "food." Pet.App. 17a. Meanwhile, the court gave no weight to the record showing that the Quileute, Quinault, and Chinook trading languages easily distinguished fishing from hunting seals or whales. Pet.App. 18a. It gave no weight to the cultural distinctions between fishing activities and hunting seals or whales. *Id.* It called upon Makah and the State to "preclude" the understanding of language applied by the district court and show it to be "clearly erroneous." *Id.*

Last, the court ruled that its interpretation "respects the reserved-rights doctrine[.]" Pet.App. 20a (citing *Winans*, 198 U.S. at 381). The court concluded that this doctrine meant it should be "reluctant to conclude that a tribe has forfeited previously held rights[.]" *Id.*

The court summed up by stating that the district court interpretation was "neither illogical, implausible, nor contrary to the record." Pet.App. 21a. Thus, the court held that the treaty secured fishing rights for Quileute and Quinault in areas that the court found were historically traversed to hunt seals

or whales, but which were outside the grounds those tribes usually and customarily fished. *Id*.

REASONS FOR GRANTING THE WRIT

The interpretation of this treaty fishing language is an issue of great importance to Washington State, the Makah and other Indian Tribes, the United States, and the citizens and businesses of the Pacific Northwest. The Ninth Circuit has adopted a new interpretation of this treaty language for Quileute and Quinault. That interpretation results in extraordinarily large treaty fishing areas for those two tribes, covering a portion of the Pacific Ocean the size of a small state. Those immense fishing grounds harm the long-established fishing rights of the Makah Indian Tribe. And, they place new demands on state and federal management of valuable ocean fisheries, requiring them to substantially limit fishing boats and businesses that have invested in developing fisheries in this area. This case thus exemplifies a circumstance where the meaning of this language is a matter of "public importance" for which this Court must provide a final answer. *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392, 393 (1968); *see also Fishing Vessel*, 443 U.S. at 669 (meaning of the treaty language is "critical" to the tribes, non-treaty fishing interests and the public at large).

The Ninth Circuit decision conflicts with fundamental principles of treaty interpretation established by this Court. In particular, rather than follow the language of the treaty, the decision defies it. Rather than interpret the treaty language de novo

in light of historical context, the Ninth Circuit applies a mistaken standard of review and defers to the district court's strained conclusions about how the treaty language could be understood. As a result, the interpretation rewrites the treaty to supply terms omitted, all the while disregarding indicia of intent that would limit the treaty fishing rights to areas customarily fished, including the text of the most relevant treaty provisions. The Court should grant the writ in light of the enormous and permanent effect this issue has on the Makah Indian Tribe's ocean fishing rights, on the State power to manage fisheries, and on existing fishing businesses that rely on this area of the Pacific Ocean.

A. The Ninth Circuit Decision Conflicts with Rulings of this Court that Establish Principles for Predictable and Fair Interpretation of Treaty Language

The Petition describes how the Ninth Circuit ruling conflicts with decisions of this Court and others. This brief concurs in those reasons for granting the writ and adds the following.

1. By interpreting "usual and accustomed grounds" based on supplying terms omitted from this treaty, the Ninth Circuit decision conflicts with this Court on an important principle of treaty interpretation

Reflecting their intense use of ocean resources, Makah Indians negotiated for "whaling and sealing,"

and the right is expressly included in that treaty. *See United States v. Washington*, 384 F. Supp. at 363 ("most of [Makah Indian] subsistence came from the sea where they *fished* for salmon, halibut and other fish, and *hunted* for whale," and Makah Indians used canoes for "sea mammal *hunting* and ocean *fishing*") (emphases added). Makah Indians were "greatly concerned about their marine *hunting and fishing rights*," and Governor Stevens thus reassured them these two activities could continue. *Id.* (Emphasis added). But, six months after negotiating the Makah Treaty, Stevens' team returned to a negotiation with the neighboring Quileute and Quinault Indians. That later treaty omits any reference to whaling or sealing, and no record shows that the negotiation even discussed seal or whale hunts.

Clearly, the United States' team and Indians knew how to discuss and include whaling and sealing and did so in the Makah's treaty. Thus, the omission from the treaty with Quileute and Quinault is conspicuous and a strong textual signal that the plain language—"taking fish"—cannot be rewritten as a term that covers distinct activities for hunting seals or whales. But the Ninth Circuit decision evades this signal and conflicts with this Court's cases in two respects.

First, treaty interpretation must consider the intent of both parties to a treaty. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1942) ("[W]e may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."). By

ignoring the significantly different words in two contemporaneous treaties, the Ninth Circuit decision disregards the obligation to consider congressional understanding of otherwise plain treaty language. Thus, the Ninth Circuit ruling conflicts with *Choctaw* and with *Fishing Vessel*, both of which reject interpreting treaty language based upon one side's view. *Fishing Vessel*, 443 U.S. at 675 ("[I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties."). The Ninth Circuit's attempt to view treaty language in isolation, and give no effect to a treaty ratified on the same day, avoids giving any effect to the United States' intentions with this treaty language. *See* Pet.App. 12a ("Rather than comparing and contrasting language and rights across treaties, courts 'must interpret a treaty right in light of the particular tribe's understanding of that right at the time the treaty was made.'") (quoting *United States v. Smiskin*, 487 F.3d 1260, 1267 (9th Cir. 2007)).[2]

Second, the decision below conflicts with *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1998), which the decision cites but misapprehends. Pet.App. 12a. *Mille Lacs* addressed whether an 1855 treaty with the Mille Lacs Band

[2] *Smiskin* compares the Yakama Treaty to another contemporaneous Pacific Northwest Treaty to interpret language present in one treaty and missing in the other. *Smiskin*, 487 F.3d at 1267 ("ambiguous treaty language [in the Puyallup Treaty] stands in stark contrast to the text of the Yakama Treaty . . . ."). It thus provides no support for the Ninth Circuit's disregard of the omission of sealing and whaling language in the Quileute and Quinault treaty.

abrogated off-reservation rights the tribe secured in an earlier 1837 treaty. The later treaty was silent regarding those rights. To construe the 1855 treaty language, this Court declined to consider treaty language from a decade later on the other side of the country. *Mille Lacs*, 526 U.S. at 202. But it compared and contrastd the 1855 Mille Lacs language with a contemporaneous treaty negotiated by the same Indian Commissioner and the Chippewa of Sault Ste. Marie. *Id.* at 196. Where "the United States treaty drafters had the sophistication and experience to use express language" in one treaty, the absence of such language in a contemporaneous treaty was "telling." *Mille Lacs*, 526 U.S. at 196. The Ninth Circuit decision squarely contradicts *Mille Lacs* by ignoring the "telling" omission of whaling and sealing rights in the face of this Court's ruling that contemporaneous distinctions in treaty negotiation and language should be considered.

Treaties cannot "be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians*, 318 U.S. at 431-32. Courts must look "beyond the written words to the larger context that frames the [t]reaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Mille Lacs*, 526 U.S. at 196 (quoting *Choctaw Nation of Indians*, 318 U.S. at 432). By discounting the history showing significantly different language in two contemporaneous treaties and by interpreting the Quileute and Quinault treaty as if it could be rewritten to contain additional terms, the Ninth

Circuit decision conflicts with this Court's fundamental rules for treaty interpretation.

2. The Ninth Circuit decision adopts a flawed view of this Court's "reservation of rights" principle

This Court has long held that a "right of taking fish at all usual and accustomed places" should be interpreted to reserve "rights previously exercised." *Fishing Vessel*, 443 U.S. at 678 (citing *Winans*, 198 U.S. at 381). As discussed above at pages 5-6, this "reservation of rights doctrine" describes the obligation to give effect to the Indian understanding that this treaty language acted to reserve continued access to historic fishing sites already used, for the purpose of taking a share of the fish. *Winans*, 198 U.S. at 381. In *Winans*, this principle helped rebut a landowner's argument that the treaty right of taking fish "in common with" citizens did not include any access to private land containing traditional fishing sites of the Yakama Indians.

The Ninth Circuit cites this principle, Pet.App 20a, but adopts a significantly different principle to justify supplying terms omitted from the treaty. That misuse of the reservation of rights doctrine turns treaty interpretation and Indian understanding on its head. Each Stevens Treaty starts with "cession language" where the assembled tribes and bands expressly agree to cede to the United States "all their right, title, and interest in and to the lands and country occupied by them[.]"*E.g.*, Treaty with the Qui-nai-elt , Etc. (Olympia Treaty), art. I, 12 Stat. 791 (Jan. 25, 1856, ratified Mar. 8, 1859, proclaimed Apr.

11, 1859).The treaty then specifies exceptions to this otherwise complete cession, such as a reservation of lands in article II of the Olympia Treaty, and off-reservation fishing and hunting rights in article III. The reservation of rights doctrine is used to interpret the fishing rights language, but it cannot supply additional rights based on silence. *E.g.*, *Choctaw Nation of Indians,* 318 U.S. at 431-32 (treaties cannot "be re-written or expanded beyond their clear terms"); *see also Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S.753, 769 n.20 (1985). ("The only question presented [in *Winans*] was whether that clearly stated [fishing] right was to be frustrated because of subsequent transfers of ceded lands to private parties. . . . The present case, however, involves the necessarily precedent question whether any off-reservation rights were intended to be preserved at all. *Winans* sheds no light on how that question should be resolved.").

Thus, the reservation of rights principle does not aid the Quileute or Quinault claim that "usual and accustomed grounds" for "taking fish" include thousands of square miles of ocean not customarily used for fishing. Rather, the logical application of *Winans* and the reservation of rights principle points to the opposite, where this treaty language is best understood as reserving the continued use of the fishing grounds where Quileute and Quinault went to take fish in 1855, not a vast area where fishing was not customary. Thus, the reservation of rights doctrine confirms that "usual and accustomed grounds" are best understood as limited to historic

fishing grounds as found by the court. Pet.App. 49a-50a, 73a-74a; *see also* Pet.App. 22a, n.5.

Moreover, even if Quileute or Quinault could use reservation of rights to claim seal or whale hunting rights, supplying such rights still provides no basis to interpret the words "usual and accustomed grounds" for "taking fish" as encompassing a huge area where those tribes did not customarily take fish. Supplying those terms as silently reserved would merely make their treaty parallel the Makah treaty, where the United States and Ninth Circuit cogently rejected that interpretation of this treaty. *See supra* pp. 8-9, above. Again, this shows why the reservation of rights principle supports an interpretation that the tribes understood this language to reserve continued access to the grounds where fishing occurred at treaty time.

The Court should grant the writ to review the Ninth Circuit's conflicting approach to this fundamental principle of treaty interpretation.

3. The Ninth Circuit decision fails to interpret treaty language de novo in conflict with rulings of this Court

The Ninth Circuit's decision also adopts an unduly deferential standard of review for treaty interpretation, in conflict with this Court's decisions.

In *Fishing Vessel*, this Court considered treaty language, historic circumstances, reservation of rights, and Indian understanding in order to determine the meaning of this same treaty language. *Fishing Vessel*, 443 U.S. at 674-79. For example,

Fishing Vessel considerd the "'sense' in which the Indians" would understand assurances regarding fishing rights communicated by United States officials. *Id.* at 676. It examined "technical meanings" of words and natural Indian understandings revealed by the treaty negotiations, where the tribes unambiguously sought to continue "taking fish" from the annual salmon runs at traditional sites. *Id.* at 678. And *Fishing Vessel* also made legal conclusions about the purposes of these treaties. *Id.* at 679. It used all of these tools to reach its legal conclusion regarding the meaning of treaty language. In doing so, the Court applied de novo review to the legal question of the meaning of the treaties.

In contrast, when the Ninth Circuit applies the canons of construction to interpret the Olympia Treaty, it abdicates de novo review. The circuit court describes linguistic clues that "support the district court's finding that the tribes 'would have understood that the treaty reserved to them the right to take aquatic animals, including . . . sea mammals, as they had customarily done.'" Pet.App. 17a. And it also recognizes that linguistic evidence goes the opposite way, and showed that "taking fish" was readily understood in the Quileute and Quinault languages (and Chinook jargon) as activities distinct from hunting seals or whales. *Id.* at 17a-18a. It further recognizes that practical and cultural differences allowed people to distinguish between persons who fish and persons who hunted seals or pursued whales. But while these linguistic signals and historic context are established in the record, the circuit court largely dismisses these considerations and did not look at the

treaty language de novo. Instead, it boils treaty interpretation down to a factual determination of "Indian understanding" that it reviews under the deferential, "clearly erroneous" standard. Pet.App. 18a.

Failure to interpret treaty language and apply canons of construction de novo has enormous consequences. First, it shifts extraordinary power to declare the meaning of a law to a district court. Indeed, the Ninth Circuit imposed a virtual presumption of correctness for the district court interpretation once it insulated its interpretation within its sense of how historic Indians might have understood the treaty. *See* Pet.App. 15a, 18a (applying "clearly erroneous" standard); 21a (concluding that the district court interpretation is not "implausible nor contrary to the record"). This problem cuts both ways, too, because de novo interpretation would be equally important to the respondents if the district court had adopted the Makah interpretation of the treaty language and couched it in a sense that the linguistic and historic context supported Makah's view of Quileute and Quinault understanding.

Moreover, the de novo standard of review for Indian treaty language is rooted in seminal Indian law cases. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 77 (1831) (Thompson, J., dissenting on lack of jurisdiction) (If a claimed "right rests upon the laws of the United States, and treaties made with the Cherokee nation" then "construction of these laws and treaties are pure questions of law, and for the decision

of the court."). Circuit courts often invoked the de novo standard of review when evaluating treaty language and applying canons of construction.[3] This Court has not squarely addressed the issue and this case provides that opportunity.

The Court recently discussed an analogous error in *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831 (2015). In that case, the Court carefully explained the difference between the "ultimate question of claim construction," which is a legal question reviewed de novo, and "subsidiary factfinding[s]" that inform that question, which are reviewed for clear error. *Id.* at 838. The Ninth Circuit here seized upon the existence of fact findings as a substitute for the ultimate legal interpretation of what the treaty means as a matter of law.

Applying the features of statutes discussed by the majority in *Teva Pharmaceuticals*, it is clear that treaties warrant de novo interpretation and application of the tools for interpretation. While one of the canons of construction considers Indian understanding of treaty language, the meaning of treaty language remains a question of law. Treaties "address themselves to the general public" as much as to any individual tribe. *Id.* at 840. Ratification of a treaty "typically (though not always) rest[s] upon congressional consideration of general facts related to a reasonably broad set of social circumstances." *Id.* And, just as with a statute, the primary indicator of a

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[3] *E.g.*, *Jones v. United States*, 846 F.3d 1343, 1356 (Fed. Cir. 2017).

treaty's meaning is its text. *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text.").

In short, a district court must apply the canon of interpretation that considers Indian understanding of treaty language after considering historic record and evidence. But labeling the application of that canon of construction as a finding should not insulate the ultimate meaning of the treaty from de novo review any more than finding the commonly understood meaning of a given word at the time a statute was enacted would insulate a district court's interpretation of a statute, and limit that interpretation to review for clear error.

To be sure, historic facts can trigger deferential review. Whether a tribe fished at a particular river at treaty time depends on evidence and does not construe treaty language. *See generally United States v. Washington*, 384 F. Supp. at 359-82. But the Question Presented here depends on the meaning of treaty language—whether "usual and accustomed grounds" for "taking fish" means thousands of square miles of ocean that were not traditional fishing grounds, or whether it means an area used to hunt seals or whales but not for fishing. This issue, even if based in part on subsidiary factual findings, is ultimately a legal question about what the treaty—a law—means, and therefore is a question to be reviewed de novo.

The Ninth Circuit's failure to apply de novo review provides an important reason to grant the writ. It also rebuts any argument by Respondents that the

Petition seeks to challenge evidentiary findings. The Court should see through any such objection, and recognizes that any such objection to the Petition simply confirms the importance of this Court addressing the de novo standard of review for treaty interpretation.

B. The Issue Presented is Important Because It Permanently Affects Valuable Fisheries and Sovereign Interests of the State and Three Tribes

A state's interests in fish resources are recognized and critically important aspects of state sovereignty. *E.g.*, *Skiriotes v. Florida*, 313 U.S. 69, 77-79 (1941); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 288 (1977) (Rehnquist, J., concurring) (citing history of cases "consistent in recognizing that the retained interests of States in such common resources as fish and game are of substantial legal moment"). A tribe's interest in protecting its treaty fishing rights is of similar significant importance.

The Ninth Circuit interpretation results in permanent changes to existing commercial fisheries. The Dungeness crab fishery managed by WDFW faces permanent curtailment of harvests by non-tribal boats, as it imposes permanent limits on crab harvests in order to ensure that non-tribal boats do not preempt a Quileute or Quinault share of the crab from the area. The Ninth Circuit interpretation visits even greater harm upon Makah and its fisheries for Pacific whiting and other ocean species. *See* Pet. at 31-32. Non-tribal boats, crews, and businesses that currently harvest from the disputed area will be directly

affected by harvest limits. And the State is harmed by diminished tax revenues when these fleets harvest and deliver less crab, Pacific whiting, and other fish from the disputed area. *See* Wash. Rev. Code 82.27 (tax on food fish landed in Washington).

This case is also important because it invites litigation of additional "usual and accustomed grounds" based on this new standard, under the district court's continuing jurisdiction. *See generally United States v. Washington*, 573 F.3d 701, 704-05, 709-10 (9th Cir. 2009) (describing the ongoing litigation over fishing areas and intertribal sharing). In short, the Court should grant the writ to preserve 48 years of precedent and the status quo for twenty-one tribes and the non-tribal fleets.

C. This Case Provides a Perfect Vehicle for the Question Presented Because the Lower Court Made Findings about Historic Fishing Areas and then Bypassed Those Findings Based on its Treaty Interpretation

As the Petition explains, the district court decision determined the historic fishing areas of the Quileute and Quinault and made separate findings about the larger expanse of the Pacific Ocean historically traveled during seal or whale hunts. Pet. 12. Whether treaty language here should be interpreted to secure a right of taking fish upon ocean grounds where these tribes did not usually or customarily take fish is a legal issue that is squarely presented by this case. If the answer to that legal question is no, then the treaty fishing areas of these

two tribes should be limited to traditional, customarily-used fishing grounds.

CONCLUSION

The Petition should be granted.

RESPECTFULLY SUBMITTED.

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