No. _____

In the
Supreme Court of the United States

JAMESTOWN S'KLALLAM TRIBE and PORT GAMBLE S'KLALLAM TRIBE,

Petitioners,

v.

LUMMI NATION, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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December 17, 2021

QUESTION PRESENTED

In 1855, the Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe, Lower Elwha Indian Tribe, and Lummi Nation all entered treaties with the United States that guaranteed each tribe the "right of taking fish at usual and accustomed grounds and stations." Under settled principles of treaty interpretation, that phrase means what it meant to the treaty negotiators and signatories. And under undisputed precedent interpreting that phrase, a tribe's "usual and accustomed" fishing grounds—or "U&A"—include only those areas the tribe regularly and customarily fished at treaty times, *not* areas the tribe only occasionally or incidentally fished while traveling. Applying those principles, the Ninth Circuit long ago affirmed that the Lummi do not possess any U&A in the Strait of Juan de Fuca, where the S'Klallam and Lower Elwha primarily fish.

Yet over the course of four increasingly spurious decisions, the Ninth Circuit gradually abrogated the long-settled and original understanding of the treaty phrase "usual and accustomed," morphing it first to allow the Lummi to claim U&A based on mere incidental fishing and ultimately to permit the Lummi to claim 300-plus square miles of U&A in the Strait of Juan de Fuca. To avoid the clear contradiction with its previous exclusion of the Strait from the Lummi U&A, the Ninth Circuit essentially redefined the eastern boundary of the Strait by appellate fiat.

The question presented is whether the Ninth Circuit—in conflict with decisions of this Court and other courts—properly abrogated the long-settled and original understanding of a central treaty term,

without any legal or factual basis for doing so, and while redefining the boundary of a major body of water to accommodate its novel treaty interpretation.

PARTIES TO THE PROCEEDING

Petitioners, the Jamestown S'Klallam Tribe and Port Gamble S'Klallam Tribe (together, the S'Klallam), initiated this proceeding seeking a determination pursuant to the injunction entered in *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974); they were plaintiffs in the district court and appellees and cross-appellants in the Ninth Circuit. Respondents are (1) the Lower Elwha Indian Tribe, which was a plaintiff in the district court and appellee and cross-appellant in the Ninth Circuit; (2) the Lummi Nation, which was the defendant in the district court and appellant and cross-appellee in the Ninth Circuit; (3) the Tulalip Tribes and Suquamish Tribe, which participated as real parties in interest in the Ninth Circuit; and (4) the Makah Indian Tribe, Nisqually Indian Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, State of Washington, Stillaguamish Tribe, Swinomish Indian Tribal Community, and Upper Skagit Indian Tribe, which were real parties in interest but did not participate in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

The Jamestown S'Klallam Tribe and Port Gamble S'Klallam Tribe are federally recognized Indian tribes. They do not have parent corporations, and no publicly held corporation owns stock in the tribes.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii): *United States v. Washington*, No. 19-sp-1 (RSM), 2021 WL 4264340 (W.D. Wash. Order Sept. 20, 2021), and 2021 WL 4592383 (W.D. Wash. Order Oct. 5, 2021), *appeal docketed*, *Swinomish Indian Tribal Cmty., et al. v. Lummi Nation*, No. 21-35812 (9th Cir. Sept. 28, 2021), and No. 21-35874 (9th Cir. Oct. 18, 2021).

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PETITION FOR WRIT OF CERTIORARI

This case presents an important question of treaty interpretation that affects the traditional fishing rights of Pacific Northwest Indian tribes. In the 1850s, the United States entered similar treaties with various Pacific Northwest tribes, including the parties here. Those treaties guaranteed each tribe the right to continue fishing in the tribe's "usual and accustomed" fishing grounds. The treaty negotiators and signatories understood that phrase to signify those areas where a tribe regularly and customarily fished at the time the treaties were signed. Conversely, they understood the phrase to exclude areas where a tribe only occasionally or incidentally fished while traveling. That original understanding of the treaty was articulated in the foundational *United States v. Washington* decision, 384 F.Supp. 312 (W.D. Wash. 1974), and affirmed by the Ninth Circuit, 520 F.2d 676 (9th Cir. 1975).

Applying that understanding, the courts further determined that the S'Klallam possess usual and accustomed fishing grounds—or "U&A"—in the Strait of Juan de Fuca, a significant body of water between Puget Sound and the Pacific Ocean, where S'Klallam tribe members have lived and fished for countless generations. The larger Lummi tribe, meanwhile, possesses U&A generally further east and north in the Puget Sound area, and it does not possess any U&A in the Strait of Juan de Fuca.

Beginning some 30-odd years ago, however, the Lummi have increasingly sought to expand their large commercial fishing operations further west into the Strait, displacing smaller S'Klallam fisheries and

threatening the S'Klallam's traditional way of life. The S'Klallam resisted the Lummi's incursions, expecting that a straightforward application of the "usual and accustomed" treaty provision would prevent the Lummi from fishing in the Strait. At first, it did: The district court reaffirmed that there was no evidence of Lummi U&A in the Strait at treaty times.

In a series of increasingly spurious and ultimately self-contradictory panel decisions, however, the Ninth Circuit gradually eroded and at last nullified the long-settled understanding of "usual and accustomed" fishing grounds. Before, a tribe's U&A did *not* include areas where the tribe only incidentally fished while traveling. Now, a tribe may claim U&A in any area where the tribe merely traveled—or even where the tribe "likely" traveled—at treaty times. Put simply, the Ninth Circuit redefined "fishing" to mean "travel," and "usual and accustomed" to mean "likely and incidental." The result is a clear departure from the original understanding of a central treaty guarantee, which the Ninth Circuit arrived at only by parting ways with this Court and other courts on fundamental principles of treaty interpretation.

Wielding the Ninth Circuit's new treaty interpretation, the Lummi now claim U&A in a 300-plus-square-mile area of the Strait where there was no actual evidence of either fishing or travel. The Lummi's larger and more aggressive fleets threaten to displace the S'Klallam and other smaller tribes from their traditional fishing grounds and disrupt their way of life. Moreover, the Ninth Circuit's new treaty interpretation has the effect of codifying a definition of the Strait that is not grounded in any factual findings

and defies recognized regulatory definitions and geographic reality. The result is a disaster for the S'Klallam, chaos for regulators, and a quagmire for future treaty interpretation. This Court's review is both warranted and urgently needed.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 849 F.App'x 216 and reproduced at App.1-5. The opinion of the district court is unreported but reproduced at App.9-31.

JURISDICTION

The Ninth Circuit issued its opinion on June 3, 2021, and denied a timely petition for rehearing on July 20, 2021. On September 3, 2021, Justice Kagan extended the time for filing this petition to and including December 17, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

TREATY PROVISIONS INVOLVED

Pertinent portions of the Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927, and the Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933, are reproduced at App.83-87.

STATEMENT OF THE CASE

A. Background

1. In the 1850s, the United States negotiated a series of treaties with the Pacific Northwest Indian tribes living in what was then Washington Territory. In exchange for relinquishing most of their territorial interests, the tribes received certain guarantees, including "protection of their 'right of taking fish, at all usual and accustomed grounds and stations.'"

Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 662 (1979), *modified sub nom.*, *Washington v. United States*, 444 U.S. 816 (1979) (quoting Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132, 1133). The S'Klallam Tribe entered one such treaty with the United States, and the Lummi Nation entered another with similar provisions and terms. *See* App.83-87.

For tribes in the Pacific Northwest, the treaty right to fish in their "usual and accustomed grounds and stations" was—and still is—of "vital importance." *Fishing Vessel*, 443 U.S. at 666. Now, as then, fish constitutes a "major part" of tribe members' diets, is "used for commercial purposes," and is "traded in substantial volume." *Id.* at 665. For each tribe, fishing in its ancestral waters is both a traditional way of life and a fundamental source of livelihood.

2. Over the years, courts have been called upon to resolve disputes about the location and extent of tribal fishing grounds under the treaties. In 1970, the United States, on its own behalf and as trustee for a group of tribes, filed suit in the Western District of Washington, "seeking an interpretation of the treaties" and an injunction to protect tribal fishing rights. *Id.* at 669-70. In 1974, Judge Boldt issued a foundational decree that resolved certain issues and provided a procedural framework for addressing future treaty disputes. *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

As relevant here, the Boldt decree first interpreted the key treaty phrase "usual and accustomed fishing grounds and stations"—or "U&A,"

to use the court's shorthand. Examining the treaty language in light of the understanding of the treaty negotiators, Judge Boldt determined that the term "usual and accustomed" indicated "the exclusion of unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions." *Id.* at 332. As a result, Judge Boldt concluded that a tribe's U&A comprises "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." *Id.* As an important corollary, a tribe's U&A does *not* include areas where the tribe only "occasional[ly]" or "incidental[ly]" fished as it traveled from one place to another in open marine waters. *Id.* at 356. That principle—that U&A fishing does *not* include occasional or incidental fishing while in transit—establishes a critical limitation on the area that any tribe can claim as its treaty-reserved fishing territory. It also undergirds jurisdictional boundaries among tribes and between tribes and the state.

In addition to interpreting the central treaty language, Judge Boldt made findings of fact—grounded in historical evidence of tribal fishing practices—about the U&A of several tribes, including the Lummi Nation. Based on his "exhaustive examination" of hundreds of exhibits and thousands of pages of witness testimony, including the reports and testimony of two anthropologists, *id.* at 349-50, Judge Boldt determined that the Lummi U&A included reef netting sites around the San Juan Islands, as well as "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle,

and particularly Bellingham Bay." *Id.* at 360. In their trial testimony, the Lummi also tried to claim U&A in areas further west, including in the Strait of Juan de Fuca and "in" Whidbey Island. *United States v. Washington*, 18 F.Supp.3d 1123, 1161 (W.D. Wash. 1987) (order issued Feb. 15, 1990) (quoting testimony). But Judge Boldt did not rely on that testimony or include those waters in his Lummi U&A findings. *See id.* at 1162; *Washington*, 384 F.Supp. at 360-61.

3. Recognizing that further disputes over treaty fishing rights would arise, Judge Boldt established a procedure for "resolving future matters" and retained jurisdiction "to take evidence, to make rulings and to issue such orders as may be just and proper upon the facts and law and in implementation of this decree." *Washington*, 384 F.Supp. at 408, 413-14. To invoke that continuing jurisdiction, a tribe may file a "Request for Determination" (RFD) in the district court.

In follow-on decisions under its continuing jurisdiction, the district court defined the U&A of the S'Klallam and Lower Elwha tribes. Their U&A includes the Strait of Juan de Fuca, from the Hoko River east to the mouth of Hood Canal, as well as the waters of the San Juan archipelago and "the waters off the west coast of Whidbey Island." *United States v. Washington*, 626 F.Supp. 1405, 1442-43 (W.D. Wash. 1985); *see also United States v. Washington*, 459 F.Supp. 1020, 1048-49 (W.D. Wash. 1978) (orders issued March 28, 1975, April 18, 1975).

B. Procedural History

1. The present dispute arises out of events that began more than 30 years ago, when the Lummi started allowing their tribe members to fish in areas further south and west of the waters Judge Boldt had designated as their U&A—areas included in the S'Klallam U&A. Fearing the effect of the Lummi's larger fleets and heavier fishing on those areas, the S'Klallam and two other tribes filed an RFD asking the district court to determine that the Lummi U&A did not include the Strait of Juan de Fuca, Admiralty Inlet, or the mouth of Hood Canal. *Washington*, 18 F.Supp.3d at 1155 (order issued Feb. 15, 1990). Finding the Boldt decree's description of the Lummi's boundary ambiguous, the district court examined the evidence that was before Judge Boldt at the time. *Id.* at 1157. Interpreting the Boldt decree in light of that evidence, the court agreed with the S'Klallam that Judge Boldt did not intend to include the Strait of Juan de Fuca, Hood Canal, or Admiralty Inlet in the Lummi U&A. *Id.* at 1162. The Lummi appealed.

In a decision known as *Lummi I*, the Ninth Circuit largely affirmed. *United States v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000); App.32. Agreeing that the Boldt decree was "ambiguous" because it did "not delineate the western boundary" of the Lummi U&A, the panel concluded that the district court correctly excluded the Strait of Juan de Fuca and Hood Canal from the Lummi U&A. App.42-49. In particular, the panel rejected the Lummi's argument that the term "Puget Sound" included the Strait of Juan de Fuca, explaining that Judge Boldt "viewed Puget Sound and the Strait of Juan de Fuca as two

distinct regions, with the Strait lying to the west of the Sound." App.48.

The panel reversed, however, with respect to Admiralty Inlet, concluding that the Inlet fell within Judge Boldt's description of the Lummi U&A as including the "marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle." App.50. The panel reasoned—without reference to factual findings, and apparently based on its own map-reading—that Admiralty Inlet "would *likely* be a *passage* through which the Lummi would have *traveled* from the San Juan Islands in the north to the 'present environs of Seattle.'" App.50 (emphasis added). To the panel, that seemed "natural." App.50.

2. After *Lummi I*, the Lummi again began fishing in the Strait of Juan de Fuca. Tracing an imaginary line from Trial Island on British Columbia to Point Wilson on Admiralty Inlet, the Lummi fishing commissioner authorized the Lummi to fish much further west, in a 300-square-mile area of the Strait of Juan de Fuca. The S'Klallam and Lower Elwha filed another RFD, and the district court again ruled against the Lummi, concluding that, under the law of the case, the Lummi U&A did not include "the eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey Island." *United States v. Washington*, 20 F.Supp.3d 899, 980 (W.D. Wash. 2008) (order issued Oct. 11, 2012). Drawing on the settled treaty principle that "usual and accustomed" fishing excludes "incidental trolling during travel," the court pointedly rejected the Lummi's contention that "logic" required including this area in their U&A simply

because the tribe would have traveled through it in treaty times. *Id.* at 979.

In *Lummi II*, the Ninth Circuit reversed. *United States v. Lummi Nation*, 763 F.3d 1180 (9th Cir. 2014); App.53. The panel acknowledged that *Lummi I* affirmed the exclusion of the Strait of Juan de Fuca from the Lummi U&A. App.64-65. It also acknowledged that the district court decision preceding *Lummi I* determined that the "waters west of Whidbey Island" were a subset of the waters of the Strait of Juan de Fuca, suggesting that *Lummi I* necessarily also excluded those lesser-included waters from the Lummi U&A. App.64-65. But the panel then focused on the "likely" travel rationale that *Lummi I* employed to include Admiralty Inlet in the Lummi U&A. App.65. Applying that rationale anew "suggest[ed]" to the panel that the waters "directly" to the west of Whidbey Island might also be included in the Lummi U&A. App.65. Over a dissent, the panel concluded that *Lummi I* was "ambiguous" about whether the waters "immediately to the west of northern Whidbey Island" were included in the Lummi U&A, and it remanded for further proceedings. App.67.

3. On remand, the district court again ruled against the Lummi, explaining that the record before Judge Boldt contained "*no* factual evidence … that the Lummi customarily fished *at any time*" in the "eastern portion of the Strait of Juan de Fuca or the waters west of Whidbey Island." *United States v. Washington*, No. 70-cv-9213, 2015 WL 4405591, at *8, *14 (W.D. Wash. July 17, 2015) (emphasis added).

In *Lummi III*, the Ninth Circuit again reversed and remanded, concluding that the "waters west of Whidbey Island," which the panel now described more expansively as lying "between the southern portion of the San Juan Islands and Admiralty Inlet," were "encompassed in" the Lummi U&A. *United States v. Lummi Nation*, 876 F.3d 1004, 1011 (9th Cir. 2017); App.82. Taking the non-evidence-based "likely" travel rationale of *Lummi I* and *Lummi II* one step further, the panel reasoned—again, apparently based on its own map-reading and guesswork—that the Lummi would have used the "waters at issue" as a "passage to Seattle," thereby rendering the entire travel route part of the Lummi U&A. App.73.

4. On remand, the parties disagreed about how to proceed. The S'Klallam understood *Lummi III* to hold only that the Lummi must possess *some* undefined U&A in the disputed waters, so the S'Klallam sought to file an amended RFD requesting determination of the precise extent of the Lummi U&A, as well as the eastern boundary of the Strait of Juan de Fuca. The Lummi, on the other hand, sought to characterize *Lummi III* as holding that the Lummi possess U&A in the *entirety* of the disputed waters east of the Lummi's imaginary line from Trial Island to Point Wilson.

The district court agreed with the S'Klallam about the limited holding of *Lummi III*. After all, the "sole issue" presented on appeal was whether the Boldt decree permitted *any* Lummi fishing in the waters west of Whidbey Island, and in concluding that the decree permitted *some* Lummi fishing in those waters along the tribe's undefined travel route, *Lummi III* never mentioned the Lummi's imaginary line.

CA.ER.16, 5-6.[1] But the district court also denied the S'Klallam's motion for leave to amend, citing futility and prejudice concerns. CA.ER.12-14. The S'Klallam and the Lummi both appealed.[2]

In *Lummi IV*, the Ninth Circuit rounded out the progression from *Lummi I* to *Lummi III*, disposing of voluminous briefing in a terse, unpublished decision without oral argument. *Lower Elwha Klallam Indian Tribe v. Lummi Nation*, 849 F.App'x 216 (9th Cir. 2021); App.1. The panel reversed with respect to the district court's interpretation of *Lummi III*, affirmed denial of the S'Klallam's request for leave to amend, and remanded for entry of judgment in favor of the Lummi. In a cursory paragraph, the panel characterized *Lummi III* as equating the "waters west

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[1] "CA.ER" refers to the Court of Appeals Excerpts of Record, and "CA.JSER" refers to the Court of Appeals Supplemental Excerpts of Record.

[2] The Lower Elwha also participated on remand and also appealed. In all previous rounds of litigation, the Lower Elwha had been aligned with the S'Klallam, arguing that the Lummi possessed no U&A in the Strait of Juan de Fuca or the waters west of Whidbey Island. In this round, however, the Lower Elwha—evidently weary of litigation, and less affected by the Lummi's westward incursions—abruptly changed their position, asking the district court to hold that *Lummi III* made a "factual determination[]" and adopted the Lummi's imaginary self-serving line as the western boundary of the Lummi U&A. CA.ER.37. The Lower Elwha's position differed from the Lummi's, however, in that the Lower Elwha asked the district court to hold that the Lummi's imaginary line marked the treaty boundary of the Lummi U&A, while the Lummi wanted the court to leave open the possibility that the Lummi might possess even *more* U&A further west in the Strait. CA.ER.7, 32, 36-37; CA.JSER.5.

of Whidbey Island" with the entirety of the waters east of the Lummi's imaginary line from Trial Island to Admiralty Inlet—even though *Lummi III* never so much as mentioned that line. App.3-4. The panel ignored its own previous description of the disputed waters as including only those waters "*immediately*" west of northern Whidbey Island. App.65 (emphasis added). And it brushed aside the contradiction between its new definition of the Lummi U&A and its previous exclusion of the entire Strait of Juan de Fuca from the Lummi U&A. Apparently not worried about defining the eastern boundary of the Strait by appellate fiat, the panel breezily proclaimed that the Strait and the Lummi U&A "do not necessarily share a boundary." App.4.

The S'Klallam filed a petition for rehearing and rehearing en banc, which the Ninth Circuit denied. App.6.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has gradually eroded and finally abrogated the long-settled and original understanding of the central treaty phrase "usual and accustomed fishing grounds." As understood by the treaty negotiators and signatories—whose understanding is the interpretive touchstone under this Court's precedents—that treaty phrase excluded from tribal U&A any area that a tribe only occasionally or incidentally fished while traveling. That original understanding has long determined the U&A of the tribes here, foreclosing the Lummi from claiming any U&A in the Strait of Juan de Fuca.

Yet under the Ninth Circuit's novel interpretation, "fishing" is redefined to mean "travel,"

and "usual and accustomed" is redefined to mean "likely and incidental." As a result, tribal U&A now includes areas that a tribe merely *likely traveled through*—regardless of whether the tribe can produce evidence of regular and customary fishing at treaty times. The Ninth Circuit's new interpretation of established treaty language is irreconcilable with the long-settled understanding of the relevant tribes, and it hands the Lummi hundreds of square miles of U&A that the Lummi never previously possessed, thereby taking property rights away from other tribes that have been fishing in the same waters since treaty times. Making matters worse, the Ninth Circuit's new U&A determination is an exercise in appellate guesswork, untethered from record evidence and geographic reality. No other court has ever drawn a treaty boundary—over a century after the relevant treaty was signed—based on nothing more than appellate conjecture and one tribe's self-serving, imaginary boundary line.

In replacing the original understanding of a central treaty guarantee with its own novel interpretation, the Ninth Circuit broke with the cardinal rule—long articulated by this Court, and faithfully applied by other courts—that the meaning of treaty language is determined by its plain language, as understood by the treaty negotiators and signatories in light of the manifest purpose of the treaty. And while the Ninth Circuit's freewheeling and elastic approach to treaty interpretation would alone warrant this Court's review, several additional considerations make review even more imperative. For one, the Ninth Circuit's massive expansion of the Lummi U&A has profound—and potentially

devastating—implications for the S'Klallam's own tribal fishing and traditional way of life in the Strait of Juan de Fuca. For another, the Ninth Circuit's decision in effect codifies a judicial definition of a major body of water that conflicts with all recognized regulatory definitions and the treaty itself. For a third, the Ninth Circuit's bizarre method of proceeding—essentially rewriting a treaty piecemeal through back channels over a series of increasingly spurious and contradictory panel decisions—represents an unprecedented departure from acceptable methods of treaty interpretation.

Only this Court can bring the Ninth Circuit back to settled principles of treaty interpretation and correct the grave injustice engendered by *Lummi IV*. Certiorari is thus imperative.

I. The Ninth Circuit's Decision Is Profoundly Wrong.

A. The Ninth Circuit Abrogated the Long-Settled Understanding of the Central Treaty Term "Usual and Accustomed Grounds and Stations."

Lummi IV marks the final step in the Ninth Circuit's gradual but steady abrogation of the original understanding of the central treaty guarantee at issue in this litigation: the right to fish at "usual and accustomed grounds and stations." App.83-87. It has long been settled that the treaty negotiators and signatories understood "usual and accustomed grounds and stations" to include all—and *only*—those waters that a tribe regularly and "customarily" fished at the time the treaties were executed. *Washington*, 384 F.Supp. at 332. Examining evidence of the treaty

negotiations, Judge Boldt found that the phrase "usual and accustomed" signified "the exclusion of unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions." *Id.* More particularly, Judge Boldt found that while open marine waters were "used as thoroughfares for travel by Indians who trolled en route," such "occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians." *Id.* at 353.

The Boldt decree's construction of the treaty phrase "usual and accustomed grounds and stations" has important implications. Above all, it places a key limitation on the area that any tribe can claim as its treaty-reserved U&A, thereby protecting other tribes from unlawful incursions. Unless a tribe can show, based on the evidence before Judge Boldt, that it regularly and customarily fished in a given area at treaty times, it cannot claim it reserved the right to fish (U&A) in that area. Evidence of mere travel through an area is not sufficient, even if the tribe can show that it engaged in occasional or incidental fishing along the way. In other words, to establish U&A along a marine travel route or thoroughfare, a tribe must do more than simply show that it used the route during treaty times to travel from one fishing area to another. It must *additionally* show that it engaged in regular and customary fishing sufficient to render the route part of its "usual and accustomed" tribal fishing grounds. If a tribe cannot make that additional showing, it cannot claim a travel route as part of its U&A.

The Ninth Circuit affirmed that portion of the Boldt decree, 520 F.2d 676, and it has never purported to formally abrogate Judge Boldt's construction of the "usual and accustomed" treaty language. Indeed, the Ninth Circuit has since reaffirmed that "general evidence" of travel through an area is not sufficient to establish U&A. *Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, 871 F.3d 844, 850 (9th Cir. 2017). And throughout this litigation, the Ninth Circuit has paid lip service to that precept, acknowledging "the oft-quoted principle that transit through an area does not, without more specific evidence of fishing, lead to inclusion of an area in a tribe's U&A." App.65. At the same time, however, the Ninth Circuit has steadily eroded that principle, ultimately adopting the *opposite* principle: that mere travel—indeed, mere *likely* travel—through an area is sufficient, without more, to establish U&A.

The Ninth Circuit began chipping away at the settled understanding of "usual and accustomed" fishing grounds in *Lummi I*. Perhaps seeking to do Solomonic justice, and seemingly unconscious of the implications of its decision, the Ninth Circuit casually included Admiralty Inlet within the Lummi U&A based on nothing more than the panel's observation that the Inlet "would *likely* be a passage through which the Lummi would have traveled" from the tribe's U&A around the San Juan Islands to its U&A near present-day Seattle. App.50 (emphasis added). Notably, the panel did not identify any evidence that the Lummi actually engaged in regular and customary—as distinct from occasional and incidental—fishing along that travel route. Instead, the court seemed to adopt, *sub silentio*, a new

interpretation of U&A fishing grounded in mere "likely" travel through an area.

Lummi II latched onto that new interpretation and gave it more expansive life by suggesting it could be applied to give the Lummi mere travel-based U&A in additional waters immediately west of northern Whidbey Island. *See* App.65. To its credit, the *Lummi II* panel saw the tension between that suggestion and the settled understanding that U&A fishing does not include incidental fishing during travel. *See* App.65. But instead of correcting course, the *Lummi II* panel doubled down, adopting a revisionist reading of *Lummi I* and attributing to the earlier panel a sweeping "implicit" suggestion that appears nowhere in *Lummi I* itself: that the Lummi might possess "continuous and unbroken U&A" along their *entire travel path* from the Fraser River to present-day Seattle. App.66. *Lummi III* continued the Ninth Circuit's revisionist approach to precedent, inaccurately characterizing *Lummi II* as having "held" (rather than merely suggested) that the Lummi possess U&A along their entire travel path. App.81.

Finally, the *Lummi IV* panel discarded the settled understanding of U&A altogether. Without even addressing the "oft-quoted principle that transit through an area does not, without more specific evidence of fishing, lead to inclusion of an area in a tribe's U&A," App.65, the court recast *Lummi III* as standing for the rule that "general evidence of travel" between two areas suffices to establish U&A. App.4. *But see Upper Skagit*, 871 F.3d at 850 (rejecting "general evidence" of travel to establish U&A).

Thus, in a series of small steps culminating in *Lummi IV*, the Ninth Circuit has steadily undermined and finally abrogated the long-settled construction of a central treaty term. Under the Boldt decree, as affirmed by the Ninth Circuit, mere travel through an area is never sufficient to establish U&A. Yet under the Ninth Circuit's decision in *Lummi IV*, "general" evidence of "likely" travel through an area *is* sufficient to establish U&A. *Lummi IV* cannot be reconciled with the text and original understanding of the "usual and accustomed" treaty guarantee. With the stroke of a judicial pen, *Lummi IV* effectively rewrites the tribes' treaties, adopting an interpretation contrary to the treaties' promises.

B. The Ninth Circuit Adopted a Definition of U&A That Is Unmoored From Both District Court Fact-Finding and Recognized Geographic Definitions.

In addition to rewriting a central treaty term, the Ninth Circuit's decision in *Lummi IV* adopted a definition of Lummi U&A that is unmoored from both district court fact-finding and any recognized geographic definition of the relevant bodies of water. In effect, the Ninth Circuit engaged in its own ad hoc appellate "fact-finding" to expand the Lummi U&A far beyond anything supported by the evidentiary record before Judge Boldt.

To review, in the original proceeding before Judge Boldt, the Lummi tried to claim U&A in the Strait of Juan de Fuca and "in" Whidbey Island. *Washington*, 18 F.Supp.3d at 1161. The Boldt decree, however, did not include those areas in the Lummi U&A, *see id.* at 1162; *Washington*, 384 F.Supp. at 360-61, and the

district court later explicitly excluded both areas from the Lummi U&A, treating the waters west of northern Whidbey Island as a subset of the waters comprising the Strait of Juan de Fuca, *see United States v. Washington*, No. 70-cv-9213, 1998 WL 36014633, at *1, *3 (W.D. Wash. Sept. 1, 1998); App.63. That treatment was consistent not only with the evidence before Judge Boldt, but also with the U.S. Geological Survey definition of the Strait, as well as descriptions of the Strait in federal and state case law. *See* CA.JSER.186-87; *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 154 n.1 (1978); *McMillan v. Sims*, 231 P. 943, 944 (Wash. 1925).

When the *Lummi I* panel affirmed the district court's exclusion of the Strait of Juan de Fuca from the Lummi U&A, the panel seemingly also affirmed the district court's exclusion of the lesser-included waters west of northern Whidbey Island. *See* App.45-49; *see also* App.64-65. At the same time, however, the Ninth Circuit began to detach itself from the district court's fact-finding and embark on its own geographical guesswork when it decided in *Lummi I* to include Admiralty Inlet in the Lummi U&A. The panel based that conclusion not on any evidentiary findings about the Lummi's usual and accustomed fishing practices at treaty times, but rather on the panel's own sense that the "geography of the area" made it "likely" that the Lummi would have "traveled" through the Inlet. App.50-52. In other words, the panel effectively made an appellate "factual finding" under the guise of legal interpretation and opted to skip what should have been a remand to the district court. And in doing so, it laid the groundwork for future panels to engage in appellate fact-finding in other disputed areas.

The Ninth Circuit did just that in the arc from *Lummi II* to *Lummi IV*. Sweeping aside the difficulty that *Lummi I* seemingly affirmed the district court's exclusion of the waters west of northern Whidbey Island from the Lummi U&A, the *Lummi II* panel mused that *Lummi I* might have implicitly intended to *include* the waters "immediately" west of the Island as part of the tribe's "natural" travel path. App.66-67.

In *Lummi III*, that musing became a full-fledged holding—or, more accurately, appellate factual finding. No longer limiting itself to the waters "immediately" west of northern Whidbey Island, the Ninth Circuit began to refer more expansively to "the waters" west of the Island, and it concluded, based on "geographic indicators," that the Lummi must possess at least some undefined U&A along the "nautical path" that "cuts through" those waters. App.79-80. Puzzlingly, the *Lummi III* panel also stated that it "need not determine the outer reaches of the Strait of Juan de Fuca" in reaching that conclusion. App.82. Yet by including certain waters west of Whidbey Island in the Lummi U&A, the Ninth Circuit necessarily made an implicit factual finding about the eastern boundary of the Strait, which everyone agrees is *not* included in the Lummi U&A. Indeed, *Lummi III*'s appellate fact-finding on that point was more than implicit: Just a few paragraphs earlier, the panel casually stated that the Strait "lies further west" of the waters west of Whidbey Island—even though no district court had ever made such a finding, and recognized geographic definitions treated those waters as a subset of the Strait. App.76; *see* App.64-65; *infra* at 29-33.

In *Lummi IV*, the Ninth Circuit at last fully embraced appellate fact-finding. Evidently weary of the case and unwilling to remand it for actual evidentiary findings, the panel simply adopted the imaginary, self-serving line that the Lummi fishing commissioner had drawn across the Strait of Juan de Fuca and declared that line to be the western boundary of the Lummi U&A. App.3-4. Never mind that no previous panel decision had ever mentioned the Lummi's imaginary line, and that no record evidence supported it. The Ninth Circuit then disposed of the clear contradiction between *including* those waters in the Lummi U&A and *excluding* the Strait of Juan de Fuca from the Lummi U&A by nonchalantly declaring that the Lummi U&A and the Strait "do not necessarily share a boundary." App.4. In essence, the panel acted as fact-finder and geographer at once, not only expanding the Lummi U&A by more than 300 square miles, but also redefining water bodies at will.

Lummi IV is the Wild West. The Lummi have laid claim to an enormous area where they never previously possessed U&A, and the Ninth Circuit has rubber-stamped their claim and essentially set a treaty boundary without any evidentiary basis. The court has not grounded its conclusions in any district court fact-finding about traditional Lummi fishing areas or tribal boundaries, or evidence of historic Lummi incursions into S'Klallam fishing areas. It has not even grounded its conclusions in recognized geographic definitions. Instead, it has struck out on its own, consulting maps and speculating about "natural" travel paths. The result is a massive

expansion of Lummi U&A that is unmoored from evidentiary facts and ignores geographic reality.

II. The Ninth Circuit's Freewheeling Approach To Treaty Interpretation Sharply Conflicts With The Approach Of This Court And Other Circuits.

The Ninth Circuit's freewheeling and cavalier approach to treaty interpretation conflicts sharply with longstanding principles articulated by this Court and applied faithfully by other courts. By effectively rewriting a key treaty provision based on appellate map-reading and guesswork, the Ninth Circuit adopted a novel interpretive approach that licenses federal courts on a single side of the country to depart from the original language and longstanding interpretation of a treaty and redraw historic boundaries between sovereign entities.

The basic principles of treaty interpretation are well established in this Court's precedents. "A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Fishing Vessel*, 443 U.S. at 675. Treaty interpretation thus starts with the text, read in light of "the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943). Indian treaties "must be interpreted in light of the parties' intentions," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999), and "the words of a treaty must be construed 'in the sense in which they would naturally be understood by the Indians.'" *Herrera v.*

Wyoming, 139 S.Ct. 1686, 1699 (2019) (quoting *Fishing Vessel*, 443 U.S. at 676).

Courts are therefore bound by the understanding and intentions of the treaty negotiators and signatories. It is a court's "responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council." *Tulee v. State of Washington*, 315 U.S. 681, 684-85 (1942); *see also Mille Lacs*, 526 U.S. at 196 ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them."); *Ore. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (courts cannot "ignore plain language that, viewed in historical context," "clearly runs counter to a tribe's later claims"). Indeed, this Court has construed treaty provisions nearly identical to the "usual and accustomed" provisions at issue here, and "each time it has stressed that the language of the treaty should be understood as bearing the meaning" that the tribe "understood it to have" at the time the treaty was executed. *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S.Ct. 1000, 1011 (2019) (opinion of Breyer, J.); *see also id.* at 1016 (opinion of Gorsuch, J.) ("We are charged with adopting the interpretation most consistent with the treaty's original meaning.").

The Boldt decree applied those principles faithfully, interpreting the treaty provisions governing the tribes' "usual and accustomed" fishing grounds "in the sense in which they would naturally be understood by the Indians" and "in accordance with the meaning they were understood to have by the

tribal representatives at the treaty council." *Washington*, 384 F.Supp. at 331, 401. Having exhaustively examined the record evidence, Judge Boldt determined that the "authors of the treaty" "deliberately intended" to exclude fishing grounds "used infrequently or at long intervals" from tribal U&A. *Id.* at 332. To the treaty signatories, "occasional and incidental trolling" during travel "was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians." *Id.* at 353. Judge Boldt's interpretation thus flowed from a straightforward application of the principle that the treaty's original meaning governs the parties' rights and obligations today.

The Ninth Circuit radically departed from those bedrock principles by reinterpreting treaty language that was not ambiguous and already had a settled definition. The Ninth Circuit's new interpretation, which allows mere "general" evidence of "likely" travel through an area to establish U&A, cannot be squared with the treaty's text, context, or negotiating history, or with prior court orders. Instead, it represents a dynamic reworking of the treaty language to radically change historic tribal boundaries. This loose and easygoing approach to treaty interpretation risks becoming a pattern with the Ninth Circuit, which in a similar manner recently expanded the right to take "fish" to include the right to hunt *whales*, resulting in an enormous expansion of U&A for one tribe at the expense of another tribe. *See Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017), *cert. denied*, 139 S.Ct. 106 (2018).

This Court has warned against exactly that approach to treaty interpretation, admonishing that "Indian treaties cannot be rewritten or expanded beyond their clear terms," whether to "remedy a claimed injustice" or for any other reason that might strike the interpreting court as sensible. *Choctaw*, 318 U.S. at 431-32. And, apart from the Ninth Circuit, other courts faithfully take that admonition on board. In *Menominee Indian Tribe of Wisconsin v. Thompson*, for example, the Seventh Circuit rejected a tribe's "alleged expectation" that ran "counter to the express language of the treaty," observing that courts cannot, under the "guise" of interpretation, "rewrite" treaties "so as to make them mean something they obviously were not intended to mean." 161 F.3d 449, 457, 460 (7th Cir. 1998). Likewise, in *Absentee Shawnee Tribe of Indians of Oklahoma v. Kansas*, the Tenth Circuit carefully examined the "historical record" and "context" to construe a treaty term and reject a tribe's proffered latter-day interpretation. 862 F.2d 1415, 1420-21 (10th Cir. 1988). And in *Perkins v. Commissioner*, the Second Circuit refused to "expand" plain tribal treaty language "without any support in the historical record for doing so." 970 F.3d 148, 166 (2d Cir. 2020), *cert. denied*, 142 S.Ct. 310 (2021). *See also, e.g.*, *Shawnee Tribe v. United States*, 423 F.3d 1204, 1227 n.31 (10th Cir. 2005) ("operative language" of a treaty should not be ignored). Those decisions adhere to the principle that the judicial branch cannot simply rewrite treaties as the Ninth Circuit did here, erasing promises that protect tribes from territorial incursions by other tribes, and thereby interfering with a central purpose of the treaty.

Not only did the Ninth Circuit break with fundamental tenets of treaty interpretation, but it did so in a way that profoundly undermines this Court's consistent construction of the very treaty language at issue here. Over a century ago, the Court established that the "right of taking fish at all usual and accustomed places" was originally understood to be "not a *grant* of rights to the Indians," but rather a "*reservation*" by the Indians of rights they already possessed. *United States v. Winans*, 198 U.S. 371, 379, 381 (1905) (emphasis added). In another line of precedent, the Court determined that an explicit reservation of tribal rights necessarily implies the reservation of rights essential to the enjoyment of explicit rights. *Winters v. United States*, 207 U.S. 564, 576-77 (1908). The Court has repeatedly reaffirmed those principles, bringing the two strands together to establish that the "right" each tribe reserved was not merely an "opportunity" to try to catch fish, but rather a "right to take a share of each run of fish that passes through tribal fishing areas" as they existed when the treaties were executed. *Fishing Vessel*, 443 U.S. at 675-79, 686. In keeping with those principles, the Pacific Northwest tribal treaties at issue here have long been understood to embody the central purpose of "secur[ing]" the tribes "a means of supporting themselves." *United States v. Washington*, 853 F.3d 946, 964 (9th Cir. 2017), *aff'd*, 138 S.Ct. 1832 (2018).

The continued enjoyment of that right depends on maintaining the historic geographic boundaries between the tribes' U&A areas. After all, the tribes agreed to relinquish their right to forcibly protect their territory and instead to submit their disputes to the judiciary on the understanding that the courts would

enforce tribal U&A boundaries as they existed at treaty times—boundaries that allow each tribe to secure a livelihood in its traditional fishing grounds. If courts instead adopt an elastic and evolving understanding of tribal U&A, they necessarily allow one tribe to shrink another tribe's reserved treaty right, and displace their fishers, undermining the entire system of secured tribal livelihood and conflict resolution. That is exactly what happened here, where an elastic and ever-expanding definition of Lummi U&A allowed the "much larger Lummi Tribe" to "displace[]" S'Klallam fishers in the Strait and "reduce[]" their catch, "creating harm that is cultural as well as economic." CA.JSER.270. By endorsing a variable approach to treaty interpretation, the Ninth Circuit destabilized the interpretive framework this Court has applied to reserved tribal treaty rights for more than a century.

III. The Question Presented Is Important.

The correct interpretation of treaties formed between sovereign tribes and the United States is a perennially important issue, as reflected in this Court's frequent resolution of tribal treaty disputes—including disputes presenting the very reserved tribal fishing rights at issue here.[3] Beyond the general

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[3] *See, e.g.*, *Herrera*, 139 S.Ct. 1686 (treaty right to hunt); *Cougar Den*, 139 S.Ct. 1000 (treaty right to travel); *Mille Lacs*, 526 U.S. 172 (treaty right to hunt, fish, and gather); *Washington v. United States*, 138 S.Ct. 1832 (2018) (per curiam) (treaty right to take fish "at all usual and accustomed grounds and stations"); *Ore. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985) (treaty right to hunt and fish); *Fishing Vessel*, 443 U.S. at 662 (treaty right to take fish "at all usual and accustomed grounds and stations"); *Puyallup Tribe v. Dep't of Game*, 433 U.S.

importance of correctly interpreting treaties, however, the Ninth Circuit's decision has critical and far-reaching consequences in at least three distinct areas that call out for this Court's review.

1. To begin, the Ninth Circuit's decision will deeply impair, if not destroy, the S'Klallam's enjoyment of their treaty right to fish in their traditional tribal fishing grounds. This is not just an abstract dispute about imaginary lines on a map. The practical consequences of *Lummi IV* cannot be overstated. As the extensive record here shows, the S'Klallam are composed of relatively small tribes whose traditional fishing grounds and villages were located on the Strait of Juan de Fuca. *See, e.g.*, *Washington*, 626 F.Supp. at 1442-43; *Washington*, 459 F.Supp. at 1048-49. The Lummi is a much larger tribe whose traditional fishing grounds are concentrated further north and east, in the Bellingham Bay area, although the tribe also possesses some U&A further south. *See, e.g.*, *Washington*, 384 F.Supp. at 360-61; CA.JSER.270. Over the past 30-odd years, the Lummi have aggressively sought to expand their hefty commercial fishing operations further west into the Strait of Juan de Fuca. As they have encroached on the S'Klallam's traditional fishing grounds, the Lummi have displaced S'Klallam fishers and drastically reduced their catch, resulting in irreparable economic and cultural damage. *See, e.g.*, CA.JSER.167-68, 270, 278, 288.

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165 (1977) (same); *Dep't of Game v. Puyallup Tribe*, 414 U.S. 44, 45 (1973) (same); *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 394 (1968) (same); *Winans*, 198 U.S. 371 (same).

The Ninth Circuit's decision blithely sanctions that real and irreversible damage and allows the Lummi to dilute the S'Klallam's share of fish. CA.JSER.288. Under *Lummi IV*, the Lummi now have full freedom to displace S'Klallam fishers in a 300-square-mile area of the Strait that was never previously part of the Lummi U&A. For the S'Klallam, losing that area to the Lummi's larger fleets and heavier fishing is devastating enough, but the Ninth Circuit's decision does even more damage. By adopting the Lummi's ever-evolving and expanding definition of their U&A and effectively writing its own definition into the treaty, the Ninth Circuit has handed the Lummi (and other tribes) a blank check to expand their U&A throughout the case area. Indeed, the Lummi have already begun to capitalize on *Lummi IV*'s vague and freewheeling approach to treaty interpretation to claim additional "likely"-travel-based U&A in the waters *east* of Whidbey Island. Although the district court recently rejected that claim, the Lummi have appealed to the Ninth Circuit, presumably hoping to persuade that court to engage in further appellate fact-finding under the guise of legal interpretation. *See* Dkt.Nos.79-81, 84-86, *Swinomish Indian Tribal Cmty. v. Lummi Nation*, No. 19-sp-1 (W.D. Wash.).

In short, the Ninth Circuit's decision is already having, and will continue to have, devastating effects on the tribal fishing rights that the S'Klallam and other treaty tribes bargained for and were promised by the United States generations ago.

2. This Court's review is also imperative because the Ninth Circuit's decision effectively codifies an

erroneous geographic definition of an important body of water—the Strait of Juan de Fuca—that conflicts with the definition articulated in federal and state regulatory and case law, as well as in the treaty itself. If left undisturbed, that erroneous definition could cause regulatory chaos in an area where geographic certainty is needed.

Abundant authoritative and judicially noticeable sources define the Strait as being bounded on the east by Whidbey Island—*i.e.*, as encompassing the waters that lie east of the Lummi fishing commissioner's imaginary line from Trial Island to Point Wilson. *See* CA.JSER.215, 219, 221, 230, 329, 331.

The U.S. Geological Survey, for example, defines the eastern boundary of the Strait as following "a continuous line extending south from Rosario Head *along Whidbey Island* to Point Partridge and south to Point Wilson." CA.JSER.186-87, 329; CA.ER.224 (emphasis added). Maps produced by the National Oceanic and Atmospheric Administration (NOAA) likewise show Whidbey Island as the eastern boundary of the Strait. CA.JSER.198-221. Federal regulations similarly include the area east of the Lummi's imaginary line within the Strait. *See* 33 C.F.R. §334.1180(a) (defining restricted area within Strait as a circular area with a 1.25-mile radius from 48°19'11.0" north and 122°54'12.0" west). State regulatory definitions agree. For example, the Washington Department of Fish and Wildlife includes

the area east of the Lummi's line within "Marine Area 6," which is part of "East Juan de Fuca Strait."[4]

Before *Lummi IV*, that geographic definition of the Strait was also uniformly reflected in federal and state judicial decisions. This Court, for example, described Puget Sound as "connected to the Pacific Ocean by the Strait of Juan de Fuca," a description that necessarily excludes the possibility of some additional intervening body of water between the eastern edge of the Strait and the bodies of water comprising the Sound. *Ray*, 435 U.S. at 154 n.1. The Ninth Circuit itself has previously described the waters east of the Lummi's imaginary line as included within the Strait. *See, e.g.*, *United States v. Soriano*, 366 F.2d 699, 700 (9th Cir. 1966) (describing area around Smith Island as within the "eastern portion of the Straits of Juan de Fuca"). The many decisions implementing the Boldt decree and determining various tribes' U&A have invariably used a definition of the Strait that encompasses the waters lying east of the Lummi's imaginary line. *See, e.g.*, *Washington*, 626 F.Supp. at 1530 (assigning Tulalip tribe U&A in "the portion of the Strait of Juan de Fuca northeasterly of a line drawn from Trial Island (in Canada) to Protection Island"); *Washington*, 459 F.Supp. at 1049 (describing the Strait as running at least from Hoko River to the mouth of Hood Canal). And the Washington Supreme Court has likewise described the Strait as lying immediately beside Whidbey Island. *See McMillan*, 231 P. at 944.

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[4] Wash. Dep't Fish & Wildlife, East Juan de Fuca Strait - Marine Area 6 (Jul. 7, 2021), https://bit.ly/327Voll.

That geographic definition of the Strait is also consistent with the definition reflected in the treaty language itself and used at treaty times. *See* App.86 (describing Strait as lying immediately north of Admiralty Inlet and then extending west); App.83 (similar); CA.JSER.37 (1854 letter from treaty negotiator George Gibbs to Governor Stevens describing Strait as extending east to Port Townsend); *see also* CA.JSER.221 (1841 government map). Indeed, at an earlier stage of these proceedings, the Lummi themselves acknowledged that the area east of their imaginary line was included in the "open marine waters in the Strati [sic] of Juan de Fuca." CA.ER.154.

Put simply, there was never any doubt—before *Lummi IV*—that the Strait of Juan de Fuca extends all the way east to Whidbey Island, far past the Lummi's imaginary line from Trial Island to Point Wilson, and encompasses all 300 square miles of water that the Lummi now claim as part of their U&A.

Lummi IV shattered that definition of the Strait—and did so without so much as acknowledging what it was doing, let alone grappling with the implications for federal, state, and tribal regulation, or the effects on longstanding federal and state case law. Out of one side of its mouth, the Ninth Circuit affirmed that the Lummi possess *no* U&A in the Strait of Juan de Fuca. App.4, 33, 75-77. Out of the other side, the Ninth Circuit proclaimed that the Lummi *do* possess U&A in the waters east of the tribe's imaginary line from Trial Island to Point Wilson. App.3. Those two declarations are irreconcilable: On any recognized definition of the Strait, the waters east of the Lummi's line are *included in the Strait of Juan de Fuca.*

The only way for the Ninth Circuit to reconcile those two declarations would be for the court to adopt an entirely novel definition of the Strait—a move supported by neither the record nor any judicially noticeable geographic fact. Rather than address the contradiction head-on, the Ninth Circuit looked the other way, peremptorily announcing that it "need not determine the outer reaches of the Strait." App.82. Yet at the same time, the Ninth Circuit *did* in effect make (vague) appellate "findings" about the boundary of the Strait, declaring that it "lies further west" of the waters west of Whidbey Island, App.76, and that it "does not necessarily share a boundary" with the area east of the Lummi's imaginary line, App.4. Again, nothing in the record or any recognized geographic definition supports that appellate finding, and it ignores the factual findings of the district court, which rejected as "geographically unsupportable" the Lummi's attempt to move the eastern boundary of the Strait further west. CA.JSER.287-88.

The upshot is that *Lummi IV* creates disarray in an already complex regulatory environment. Federal and state regulatory and case law recognize the long-established definition of the Strait of Juan de Fuca; but *Lummi IV* now requires the tribes' own regulatory bodies to recognize the Ninth Circuit's novel definition. The need for uniformity on this issue across federal, state, and tribal definitions is imperative, and only this Court can correct the Ninth Circuit's aberration.

3. Finally, this Court should grant review to ensure that courts do not (re)interpret treaties between sovereign entities in the surreptitious and

procedurally irregular fashion that the Ninth Circuit used here. Like states and other sovereign entities, the S'Klallam relinquished their right to defend their territory—including their traditional fishing grounds—in exchange for having their rights guaranteed by treaty and peacefully adjudicated by the courts. The treaties here required the tribes to cease making war and submit their territorial disputes to the courts. App.84, 86-87; *United States v. Lower Elwha Tribe*, 642 F.2d 1141 (9th Cir. 1981) (preserving the pre-treaty right to exclude as part of the rights reserved). Like states and other sovereign entities, the S'Klallam count on the courts to adhere to settled principles of treaty interpretation, as well as the proper division of labor between trial courts and courts of appeal with respect to fact-finding. And like other treaty signatories, the S'Klallam and other tribes need finality, especially when it comes to critical U&A rights and boundaries. *Cf., e.g.*, *Arizona v. California*, 460 U.S. 605, 619-20 (1983) (1964 decree prevents re-litigation of water rights).

The Ninth Circuit, however, failed on all scores, sneaking factual findings on critical geographic questions into piecemeal legal determinations that gradually transformed the meaning of a central treaty term over the course of several increasingly spurious and contradictory panel decisions. After painting itself into a legally and factually indefensible corner—and authorizing incursions on tribal territory that would have been violently opposed at treaty times—the Ninth Circuit then escaped the predicament it created by ignoring it, peremptorily disposing of the voluminous briefing and record in a cursory decision. Absent this Court's review, nothing prevents the

Ninth Circuit (or other courts) from handling future treaty disputes—tribal or otherwise—in the same cavalier fashion. Just as the Ninth Circuit's actions here are for the S'Klallam, that result would be disastrous for tribes, states, and other sovereign entities alike.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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December 17, 2021