No. 21-838

In The Supreme Court of the United States

PENOBSCOT NATION,

Petitioner,

v.

AARON M. FREY, ATTORNEY GENERAL FOR THE STATE OF MAINE, *et al.*

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

REPLY BRIEF FOR PETITIONER

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The Penobscot Nation joins the United States in seeking this Court's review of the en banc First Circuit's divided decision. That decision both warps established principles of statutory construction enshrined in this Court's precedents and strikes a "dramatic and potentially devastating" blow to the Penobscot Nation's congressionally ratified Reservation. Two sovereigns (United States and Penobscot Nation) have explained why the State's reneging on the long-settled status of the Main Stem of the Penobscot River—the largest in Maine—warrants this Court's intervention, and all three sovereigns (United States, Penobscot Nation, and the State) agree that "this case presents an issue of significance." BIO 34. If that were not enough, the en banc decision calls into question the reliance of other Indian tribes, both in Maine and throughout the country, on settlement acts—the modern-day substitute for Indian treaties.

Beyond the significant sovereign interests underlying the question presented, the en banc decision is legally indefensible—as the 70-page dissent painstakingly explains. The State has no coherent response to the text and structure of the Settlement Acts or to the context and principles under which those Acts were ratified. The Acts define the Penobscot Reservation with respect to a specific set of islands in the Main Stem, and a key neighboring provision (section 6207(4)) unequivocally vests the Penobscot Nation with fishing rights *within that Reservation*. Yet, because it is undisputed that the upland surfaces of the islands lack any fishing waters, the State (and the First Circuit) would rob that provision of any meaning. The only reading that gives effect to the

Acts' critical terms—and that comports with the history, the parties' pre- and post-Acts positions (until this litigation), and the Court's construction of materially similar language in *Alaska Pacific Fisheries*—is that the Reservation encompasses the submerged lands and waters of the Main Stem. Indeed, the Maine Indian Tribal-State Commission, which the State itself acknowledges as the authority established to regulate fishing in tribal territories, agrees that the Main Stem falls (as it always has) within the Penobscot Reservation. Amicus Br. of Maine Indian Tribal-State Commission 3-12 ("MITSC Br.").

If any doubt remains, the Indian canons compel that construction. Most notably, this Court's precedents requiring that agreements be construed as the tribes would have understood them refute the en banc majority's insistence on predicate ambiguity (which, in any event, is present here in spades). The First Circuit now "stands alone"—in contravention of this Court's jurisprudence—"in adopting a distinct doctrine for agreements that are not formal treaties." Amicus Br. of Members of the Congressional Native American Caucus 8 ("Congress Br."). The decision below compounds that conflict by refusing to follow this Court's precedents requiring clear intent before curtailing tribal boundaries. Amicus Br. of National Congress of American Indians 6-10, 21-23 ("NCAI Br.").

This Court should grant review.

I. THE EN BANC DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS

A. The Decision Below Disregards This Court's Instruction That Statutory Terms Be Considered In Context.

1. The State doubles down on the en banc majority's extreme conclusion: the Settlement Acts are "clear and unambiguous" that the Penobscot Reservation "does not include the waters or bed of the Main Stem." BIO 15. And the State embraces the en banc majority's extreme approach: it focuses on the dictionary definition of "island" and other isolated words in section 6203(8). BIO 14-15. The State's argument thus reinforces the conflict between the en banc majority's interpretation and this Court's commands: "when deciding whether the language is plain, [courts] must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 576 U.S. 473, 486 (2015) (citation omitted); *see* Pet. 17-18.

Beyond violating that "fundamental canon of statutory construction" generally, *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (plurality), the State (like the decision below) flouts its specific application in this Court's precedents interpreting "island" reservations, *e.g., Alaska Pac. Fisheries Co. v. United States*, 248 U.S. 78, 86-89 (1918); *see* Pet. 18-20. The State dismisses that line of precedent as confined to "the unique circumstances surrounding the establishment of each reservation." BIO 17. But that proves the point: "only an inquiry into sources beyond those that would merely disclose the ordinary meaning of the words 'lands' or 'islands' could reveal

the intended meaning of the larger phrase in which those words were embedded" to construe the Penobscot Reservation. Pet.App.61a (Barron, J., dissenting).

The parties negotiated and drafted the Settlement Acts against that backdrop. Congress Br. 23-24. "As with the statute at issue in *Alaska Pacific Fisheries*, Congress acted here to support tribal self-sufficiency" under the United States' "trust responsibility." *Id.* And as in *Alaska Pacific Fisheries*, "[t]he [Nation] naturally look[s] on the fishing grounds as part of the islands," and those "essential" waters give "to the islands a value for settlement and inhabitance which otherwise they would not have." 248 U.S. at 88-89.

The State also contends that "the language analyzed in *Alaska Pacific Fisheries* and *Hynes* [*v. Grimes Packing Co.*, 337 U.S. 86 (1949),] bears no resemblance to the language defining the Reservation" because the latter "does not contain a colloquial description of a region." BIO 17. But the State's recitation of section 6203(8) omits the key description—*i.e.*, that the "islands" comprise those "*reserved* to the Penobscot Nation by agreement with the States of Massachusetts and Maine." 30 M.R.S.A. § 6203(8) (emphasis added). That statutory phrase refutes the State's new assertion—at odds with its prior acknowledgments, *see* Pet.App.65a—that "[t]he definition of the Reservation does not incorporate the Nation's prior agreements." BIO 18. The agreements undisputedly ceded only "lands on both sides of the River Penobscot," thereby reserving to the Nation the Main Stem in between. Pet.App.319a, 323a; *see* Pet. 4-6, 20.

The State mischaracterizes the context in another material way: the Settlement Acts arose not from any dispute about the Nation's entitlement to the Main Stem, but from the Nation's lawsuit (alongside the United States as trustee) to invalidate other "land *transfers* that [the Nation] had made" in the prior agreements—*i.e.*, lands *not reserved*—because they lacked congressional authorization. Pet.App.53a-54a (Barron, J., dissenting) (emphasis added). Following a series of favorable court rulings, the Nation and neighboring tribes had secured federal recognition and held claims to "up to two-thirds of the area of what is now the State of Maine." *Id.* at 102a-103a. Accordingly, not "all parties faced significant risk." BIO 2. It would have made no sense for the Nation to cede even more of its Reservation—indeed, the remaining core tied to its riverine identity—to settle its far-reaching land claims. *Contra* BIO 18-19, 26-31.

2. The State's absurd treatment of section 6207(4) further refutes the en banc majority's "plain meaning" construction. Far from "ancillary" (BIO 22-23), that provision confirming the Nation's *on-Reservation* fishing rights addresses a "special issue[]" of "particular cultural importance" and "inherent sovereignty" that was front-and-center in the Settlement Act negotiations. Pet.App.106a (Barron, J., dissenting); S. REP. NO. 96-957, at 14-17, 37 (1980); H. REP. NO. 96-1353, at 14-17 (1980). Rather than "alter the meaning of section 6203(8)" (BIO 23), section 6207(4) elucidates it. *See United Sav. Ass'n of Tex. v. Timbers of Inwood Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (language in one provision "is often clarified by the remainder of the statutory scheme," *e.g.*, "because the same terminology is used elsewhere in a context

that makes its meaning clear" or gives it "substantive effect").

The State now concedes, consistent with this Court's precedents, that "references to the Reservation can and should mean the same thing throughout the [Settlement Acts]." BIO 24; *but see* State C.A. En Banc Br. 35 (arguing "no occasion for the Court to address whether 'reservation' in §6207(4) has the same meaning as §6203(8)"). And the State does not dispute the finding below that section 6207(4) preserves "the Nation['s] sustenance fishing rights in the Main Stem." Pet.App.45a. Because that provision confirms the Nation's rights "*within the boundaries of [its] *** reservation[]*," 30 M.R.S.A. § 6207(4) (emphasis added), the en banc majority's construction of the Reservation as excluding the Main Stem is unquestionably wrong: as "[t]he State Defendants have admitted" and the district court found, none of the island uplands "contains a body of water in which fish live." Pet.App.42a n.21, 196a; *see* Pet. 22-23.

The State tries to downplay that conclusion by claiming that the Nation's members nevertheless "may fish for their individual sustenance" in the Main Stem. BIO 23-24. But the State's promise to permit such fishing as a matter of grace is obviously not the same as section 6207(4)'s explicit guarantee of an on-Reservation fishing right. Underscoring that fact, the State asserts that section 6207(4) limits the Nation's members' rights to fishing "from the island shores." BIO 24. That "untenable" proposition would deprive section 6207(4) of any "practical meaning as to the Penobscot Nation," given the "long-accepted practice of Penobscot Nation members sustenance fishing [from

boats] in the Main Stem." Pet.App.74a-75a (Barron, J., dissenting) (alteration in original).

The State's other attempts at misdirection (BIO 19-22, 26-30) fall flat. For example, the State identifies provisions concerning MITSC's authority "to regulate fishing in rivers in tribal territory" as "illustrat[ing]" that "the Reservation does not include the Penobscot River." BIO 20. But MITSC, an "entity comprised in part of State representatives" (*id.*), unanimously *rejects* the State's position: "MITSC has consistently recognized that the Main Stem of the Penobscot River is part of the Penobscot Indian Reservation." MITSC Br. 2; *see id.* at 8 ("And, until this dispute arose in 2012, the State of Maine agreed."). The State's reliance on other tangential provisions is equally baseless. *Compare* BIO 20-22, 28-30, *with* Pet.App.56a, 80a-83a (Barron, J., dissenting).

B. The Decision Below Disregards The Indian Canons.

The State (like the en banc majority) also misunderstands the Indian canons of construction. Application of the canons does not turn just on the existence of a predicate "ambiguity" (which, at a minimum, exists here anyway). *Contra* BIO 24-26. Rather, the decision below contradicts this Court's jurisprudence on tribal agreements by refusing to consider the relevant terms "in the sense in which they would naturally be understood by the Indians," *before* rejecting the existence of ambiguity. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (citation omitted).

The State does not defend the en banc majority's holding that "[t]he treaty canon has no bearing on [the Settlement Acts'] interpretation" because "[t]hey are statutes," "not treaties." Pet.App.38a. For good reason: this canon "jumped *** from the interpretation of treaties to the interpretation of statutes" when "[t]reaty making with the Indians ceased in 1871," and there are "powerful arguments as to why the 'difference in form should not *** substantially alter judicial methodology.'" Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 151-152 & n.206 (2010) (ellipsis in original) (citation omitted). The en banc majority's refusal to apply the canon "absent a formal treaty conflicts with decisions of this Court and other courts of appeal." Congress Br. 6-15; *see* NCAI Br. 14-17 (discussing "treaty substitutes"); Pet. 24-26.

Compounding that conflict, the State embraces the en banc majority's refusal to apply this Court's clear-intent rule before diminishing a tribe's boundaries. The reason? Because the Settlement Acts purportedly "first established the Reservation." BIO 32-33. But as a factual matter, far from "creating" a reservation (BIO 33), Congress merely "confirmed what it (and the parties) understood to be the Nation's '*existing* reservation.'" BIO 31 (emphasis added); *see, e.g.*, Pet.App.106a (State official's contemporaneous acknowledgment of Nation's "existing reservation"). Even when a tribe's claim to its "ancestral home" is not "based upon a treaty, statute, or other formal government action," it still "would take plain and unambiguous action" by Congress to diminish the boundaries. *United States v. Sante Fe Pac. R.R. Co.*, 314 U.S. 339, 345-346 (1941). The en banc majority's

contrary understanding not only disregards section 6203(8)'s "reserved *** by agreement" language, but also tramples this Court's "reserved rights doctrine." NCAI Br. 6-10, 21-23.

This case is not a close call under a faithful application of the Indian canons. The en banc majority could support its flawed construction only by paring down the Indian canons beyond recognition—a result this Court cannot countenance.[1]

II. THIS CASE CLEARLY WARRANTS REVIEW

1. Two sovereigns (United States and Penobscot Nation) have exercised their independent judgment to petition for certiorari. And all three sovereigns (United States, Penobscot Nation, and the State) agree that this case "presents an issue of significance" to each. BIO 34. The State's only response is that this Court should limit its review to "cases involving *** importance to the public," not just to the parties. *Id.* (quoting *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955)). But these three sovereigns inherently represent "public" interests. *Cf. South Carolina v. North Carolina*, 558 U.S. 256, 274 (2010) ("sovereign interest" concerning "share of an interstate river's water is precisely the type of interest that [a sovereign party] *** represents on behalf of its citizens"); *Nken v. Holder*, 556 U.S. 418, 435 (2009) ("harm to the opposing party and weighing the public

[1] No judge was willing to adopt the fringe theories about application of this Court's Indian law precedents that the State nests in footnotes. BIO 25-26 nn.11-12; *see* Pet.App.36a n.20; Pet.App.120a-122a & nn.53-54 (Barron, J., dissenting); Pet.App.134a n.4 (panel).

interest *** merge when the Government is the opposing party"); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (Indian tribes "are a good deal more than 'private, voluntary organizations'"). This decade-long case concerning the "inherent sovereignty" the Nation "retain[ed]," and that the United States sought to protect through a congressionally ratified sovereign-to-sovereign agreement, S. REP. NO. 96-957, at 13-15, 37; H. REP. NO. 96-1353, at 13-15, hardly resembles the breach-of-contract "private litigation" this Court declined to consider in *Rice*, where "corrective legislation" had "already rectified" any public impact, 349 U.S. at 75-77.

The immense stakes of determining the proper status of "the largest river running through the heart of the [S]tate" and the Penobscot Nation are undeniable. Pet.App.34a n.18. As trustee, the United States intended the "settlement [to] strengthen[] the sovereignty of the Maine Tribes." S. REP. NO. 96-957, at 14. No sovereign feature is more fundamental to the Nation's history, economy, culture, and spiritual beliefs than its sacred and immemorial home on the Main Stem. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) ("[T]here is a significant geographical component to tribal sovereignty."). The State's desire to "exercise[] pervasive and exclusive sovereign control over the Main Stem" (BIO 1)—now blessed by the en banc majority—inflicts existential and irreparable damage on the Nation's identity and the United States' trust responsibility.

Beyond the assault on the Penobscot Nation's sovereignty, the State does not dispute the cascade of practical consequences that will flow from the en banc

majority's holding. If allowed to stand, the decision will decimate the Nation's longstanding and federally backed regulatory and enforcement actions critical to preserving natural resources and its way of life, including daily patrols on the Main Stem to uphold tribal laws governing hunting, trapping, and fishing. Pet. 32-33. The decision will deprive tribal courts of essential jurisdiction over the criminal and civil matters regularly adjudicated there. Pet. 33. It will "improperly trammel[] upon MITSC's statutory authority" "to regulate fishing in waters within or bordering Maine Indian territory." MITSC Br. 1, 12; *see* Pet. 34. And it will hamstring the federal government's (and the Nation's) vital protection of water-quality standards in the Main Stem. Pet. 33-34; *see* Pet.App.243a-244a, 252a-255a.[2]

2. Although all that is plainly enough to warrant review, the State's contention that the en banc decision is limited "to the four corners of this case" (BIO 34) overlooks the broader ramifications. The State dismisses the most proximate reverberations by asserting that the en banc majority's "construction of 'land'" is "specific to *** what constitutes 'land' in and around the Main Stem," and thus would not affect other Maine tribes. BIO 34. Not so. The decision below is unsound because the majority's analysis is *not* "specific to" this context, and instead turns on dictionary suggestions that "land is ordinarily defined in opposition to water." Pet.App.13a. The same

[2] At the same time, the State misstates the consequences of a return to the pre-2012 status quo. The record lacks any corroboration of the State's inflammatory (and false) allegations of the Nation's harassment of non-members on the Main Stem. BIO 7-8.

blinkered construction of "the identically worded" Settlement Act provision concerning the Passamaquoddy Reservation threatens to diminish its scope too. Pet.App.75a-76a n.37 (Barron, J., dissenting).

The State points out there is no circuit split over the interpretation of these particular Settlement Acts. That is obviously true: As the United States explains (Pet. 32), absent this Court's intervention, the First Circuit has the final word on tribes located within Maine. But the legal reasoning underlying the decision below threatens the countless tribes in other states and circuits that rely on settlement acts and the Indian canons to protect negotiated terms designed to remedy historic wrongs. NCAI Br. 14-17, 23-25.

By contravening established Supreme Court precedents, moreover, the decision below necessarily conflicts with decisions of other circuits faithfully applying those precedents to other settlement acts. *See, e.g.*, *Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior*, 228 F.3d 82, 91 n.3, 92-93 (2d Cir. 2000); *see also* Congress Br. 8-15. Any "critical distinctions" (BIO 35) between these Settlement Acts and the settlement acts modeled on them had zero bearing on the application of the canons in other cases. Nor did the en banc majority's disregard of the treaty canon or the diminishment canon turn on the Settlement Acts' "unique terms." BIO 36. Instead, the decision below eschews this Court's precedents because the Settlement Acts "are statutes" resolving disputes arising from the absence of prior "Congressional action[]," Pet.App.38a; BIO 32—common features of most settlement acts involving tribes nationwide.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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