No. 21-840

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

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

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Maine Indian Claims Settlement Acts stripped the State of Maine of its long-standing, exclusive jurisdiction over the waters of the Main Stem of the Penobscot River.

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STATEMENT OF THE CASE

A. Factual and Legal Background

1. The Main Stem of the Penobscot River is a non-tidal, navigable river that stretches sixty miles from Indian Island, the Penobscot Nation's tribal seat, north to the confluence of the River's East and West Branches. Pet. App. 2a, 4a. Although the Nation's reservation is located on the islands in the Main Stem of the Penobscot River, "[t]he waters of the Penobscot" River "are of common right, a public highway, for the use of all the citizens." *French v. Camp*, 18 Me. 433, 434 (Me. 1841).

Since its separation from Massachusetts and statehood in 1820, the State of Maine has exercised pervasive and exclusive sovereign control over the Main Stem. "The record reflects a long history of Penobscot Nation members and other residents looking to the State government to regulate the many activities occurring in the Penobscot River, including the Main Stem." Pet. App. 218a. The Maine Legislature authorized and regulated the construction of log booms, piers, canals, and dams in the Main Stem; authorized log drives, which sometimes interfered with fishing, navigation, and other uses of the river; and regulated navigation on the Main Stem. Pet. App. 24a-25a, 219a, 221a; J.A.1422-25. Maine, and Massachusetts before it, have continually regulated fishing on the Main Stem since 1789. Pet. App. 24a-25a; J.A.1435-37, J.A.1439-41. And, acting as proprietor, both Maine and Massachusetts conveyed to private parties riverfront parcels

along the Main Stem together with adjacent submerged lands, all in publicly recorded deeds. Pet. App. 25a; J.A.1464-74.

None of these actions were seriously questioned or challenged, including by Petitioner, until the 1970s.[1] During the 1970s, the Penobscot Nation and the Passamaquoddy Tribe pursued claims to nearly two-thirds of the landmass of the State of Maine that the tribes claimed was transferred in violation of the Indian Trade and Intercourse Act of 1790 (TIA), ch. 33, 1 Stat. 137 (1790). *See generally Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me. 1975), *aff'd*, 528 F.2d 370 (1st Cir. 1975); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979). As the case progressed, all parties faced significant risk.[2]

In 1980, after "years of strife" and many months of intense negotiation, the State of Maine, the Penobscot Nation, and the Passamaquoddy Tribe reached a comprehensive settlement "designed to transform the legal

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[1] "Prior to 1975 the Federal Government did not acknowledge any responsibility for the[ ] [Nation. The Departments of] Interior and Justice took the position that the[ ] [Nation was] not entitled to federal recognition but were 'State Indians.'" S. REP. NO. 96-957, at 55 (1980) (Senate Report); *see also Hearings before the Senate Select Committee on Indian Affairs: Hearings on S. 2829 to Provide for the Settlement of the Maine Indian Land Claims*, 96th Cong. 799-1137 (1980) (detailing how Petitioner disregarded the eastern tribes) ("*Senate Hearing*").

[2] *Compare Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667-68 (1979) (suggesting the term "Indian country" in the TIA did not apply to existing States), *with Maine v. Dana*, 404 A.2d 551 *passim* (Me. 1979) (questioning whether the State had criminal jurisdiction on either reservation).

status of [these tribes] and to create a unique relationship between state and tribal authority." *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 787 (1st Cir. 1996). That settlement was embodied in two negotiated legislative enactments: the Maine Implementing Act (MIA), Me. Rev. Stat. Ann. tit. 30, §§ 6201-14 (2011 & Supp. 2021), and the Maine Indian Claims Settlement Act (MICSA), 25 U.S.C. §§ 1721-35 (former codification), which ratified MIA (collectively, "Settlement Acts" or "Acts").

2. The Settlement Acts, which Petitioner evaluated and approved as trustee for the Nation, accomplished three primary goals. First, the Acts resolved all current and potential land claims by Nation and all other tribes in the State of Maine. Second, the Acts, in recognition of the Nation's lost aboriginal territory, provided a process and funds for the Nation to acquire up to 150,000 acres of additional land. Third, the Acts set forth the jurisdictional relationship between the Nation and Maine going forward. *See* MICSA § 1721(b) (stating purposes of MICSA).

a. Three features of the Settlement Acts operate to resolve and extinguish all actual or theoretical tribal claims to lands and natural resources in Maine. First, the Settlement Acts carefully defined the lands that would comprise the Penobscot Indian Reservation (Reservation) and the Nation's territory. The Nation's existing island Reservation was defined, in pertinent part, as "the islands in the Penobscot River . . . consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof

that existed on June 29, 1818." MIA § 6203(8); *see also id.* §§ 6203(9) & 6205(2) (defining Penobscot Indian Territory); MICSA §§ 1722(i)-(j) (adopting MIA's definitions of Penobscot Indian Reservation and Penobscot Indian Territory). Second, the Acts ratified all prior tribal "transfers" of land or natural resources and declared them to be in accordance with federal and state law. MICSA § 1723(a)(1); MIA § 6213. And third, the Acts extinguished the Nation's aboriginal title to, and all claims regarding, land or natural resources so transferred (effective as of the date of the transfer). MICSA §§ 1723(b)-(c).

The sum of these provisions accomplished two of the stated goals of the Settlement Acts: "to remove the cloud on the titles to land in the State of Maine resulting from Indian claims" and "to clarify the status of lands and natural resources in the State of Maine." MICSA §§ 1721(b)(1)-(2). In this way, MIA and MICSA "effectively and completely extinguish[ed] the Maine Indian land claims and all related tribal claims" in Maine. Senate Report at 22.

b. The Settlement Acts established a process by which the Secretary of Interior could acquire up to 150,000 additional acres of land and natural resources for the benefit of the Nation. MICSA § 1724(d). The land eligible to be taken into trust by the Secretary are the areas described in MIA as Penobscot Indian Territory. *Id.*; MIA § 6205(2) (defining Penobscot Indian Territory as the Reservation and up to 150,000 acres taken into trust from designated parcels). The Secretary could expend the principal and any accruing

income from the Nation's share of the land acquisition fund, which was initially seeded with $26,800,000. MICSA § 1724(d). MICSA also established a $13,500,000 settlement fund, also held in trust by the Secretary for the benefit of the Nation, which pays income quarterly. MICSA §§ 1724(a)-(b).

c. The Settlement Acts also "define[] the relationship between the State of Maine and the . . . Nation." MICSA § 1721(b)(3). This relationship is nationally unique. As part of the parties' efforts "to achieve a just and fair resolution of their disagreement over jurisdiction on the present . . . Penobscot Indian reservation[]," the Nation "agreed to adopt the laws of the State as their own to the extent provided in" MIA. MIA § 6202.

MICSA provides that the Nation and its "members, and the land and natural resources held owned by, or held in trust for the benefit of the" Nation or its members are "subject to the jurisdiction of the State of Maine to the extent and in the manner provided in" MIA. MICSA § 1725(b)(1). MIA, in turn, provides:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

MIA § 6204; *accord Maine v. Johnson*, 498 F.3d 37, 43 (1st Cir. 2007) (affirming Maine's environmental regulatory authority in the Penobscot River).

The Acts also recognize and safeguard the sovereignty of the Nation. In large part, MIA vests control over Penobscot Indian Territory with the Nation and precludes Maine from interfering with the Nation's internal tribal matters, such as tribal membership, organization, and elections. MIA §§ 6206(1), 6207(1); *see also* 1979 Me. Pub. Law, ch. 732, § 16 (repealing state statutes regarding Nation's internal governance). MIA and MICSA recognize the Nation's sovereign authority to establish tribal courts and exercise jurisdiction over Indian child custody proceedings. MIA § 6209-B; MICSA § 1727. All land or natural resources within Penobscot Indian Territory are subject to a restraint on alienation. MICSA § 1724(g)(2).

The Nation also has authority to enact ordinances governing hunting and trapping within its territory but not to adopt fishing regulations on any river or stream. MIA § 6207(1). The authority to enact fishing ordinances on rivers and streams within the Nation's Territory and water bodies with shared tribal-state boundaries lies with the Maine Indian Tribal State Commission (Commission). *Id.* § 6207(3). Nevertheless, MIA also provides that "[n]otwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian

reservations, for their individual sustenance." MIA § 6207(4).

B. Procedural History

1. In the wake of the First Circuit's decision in *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007), the Nation took a series of actions premised on its assertion that the Main Stem was its exclusive domain. The Nation's wardens confronted non-tribal members at public boat launches and demanded payment of $40 for "access permits" to be on the Main Stem for any reason. J.A.1427-28, J.A.1460-61. A Nation official wrote to state agency commissioners demanding that regulators obtain permits from the Nation before monitoring water quality on the Penobscot River. J.A.1432. In 2011, the Nation directed its wardens to cease cooperative patrols with Maine wardens and announced that the Nation had exclusive jurisdiction over the Main Stem. J.A.1427-28, J.A.1430-32. These increasing tensions climaxed in July of 2012, when Maine game wardens who were patrolling the Main Stem conducted a boat safety check of three Nation members; the Nation's game wardens challenged the Maine wardens' jurisdiction to do so. J.A.1429-32.

In response, Joel Wilkinson, the then-Colonel of the Maine Warden Service, and Chandler Woodcock, the then-Commissioner of the Maine Department of Inland Fisheries and Wildlife, requested an opinion from the Maine Attorney General regarding the Nation's and the State's respective jurisdictions. Pet. App.

122a, 184a. In 2012, Maine Attorney General William Schneider issued an opinion (Schneider Opinion) explaining that the Reservation consists of the islands but not the waters of the Main Stem, and that jurisdiction over fishing, hunting, and other recreational activities occurring on the river lies with the State. Pet. App. 5a; D. Ct. Doc. 8-2. The Schneider Opinion does not address tribal sustenance fishing rights. *Id.*

2. Twelve days after issuance of the Schneider Opinion, the Nation filed suit against Maine's Attorney General, the Maine Commissioner of Inland Fisheries and Wildlife, and the Colonel of the Maine Warden Service. Pet. App. 5a. The Nation sought a declaration that it has exclusive regulatory authority over the Main Stem and that Maine had infringed on Penobscot tribal members' right to take fish for their individual sustenance free from interference by the State. Pet. App. 6a. State Respondents answered and counterclaimed, seeking a declaratory judgment that the waters of the Main Stem are not within the Reservation. Pet. App. 6a.

Several municipalities and private parties that use the Penobscot River for discharges and other purposes intervened in support of State Respondents. Pet. App. 6a. Over State Respondents' objection,[3] Petitioner was permitted to intervene and join the State of Maine as a defendant. Pet. App. 6a. State Respondents

[3] State Respondents continue to challenge Petitioner's participation as barred by section 1723(a)(2) of MICSA.

answered Petitioner's complaint and counterclaimed. Pet. App. 123a.

All parties moved for summary judgment or judgment on the pleadings. Pet. App. 6a. In the district court, the parties' positions on the scope of the Reservation were as follows:

- Petitioner contended that the Reservation included the waters of the Main Stem, or in the alternative, included at least the waters and bed of the Main Stem to the thread of the Penobscot River. Pet. App. 124a, 248a-249a.
- The Nation contended it had "retained aboriginal title to the waters and river bed of the Main Stem" and the "boundaries of the . . . Reservation are actually the river banks found on either side of the Main Stem." Pet. App. 247a. The Nation also contended that the public's right to use the Main Stem was based on language in its 1818 agreement with Massachusetts. Pet. App. 247a-248a.
- State Respondents and State Intervenors contended that the Reservation was limited to the islands and did not include the bed, waters, or banks of the Main Stem. Pet. App. 250a.

The district court granted summary judgment in favor of State Defendants and judgment on the pleadings in favor of State Intervenors because "the plain language of the Settlement Acts is not ambiguous. The Settlement Acts clearly define the Penobscot Indian Reservation to include the delineated islands of the Main

Stem, but do not suggest that any waters of the Main Stem fall within the" Reservation. Pet. App. 253a. The district court also granted summary judgment in favor of the Nation and Petitioner, declaring that "the sustenance fishing rights provided in [] § 6207(4) allow[] the Penobscot Nation to take fish for individual sustenance in the entirety of the Main Stem section of the Penobscot River."[4] Pet. App. 264a.

3. All parties appealed. Pet. App. 7a. A panel of the First Circuit affirmed in part and vacated in part the district court's decision. The panel affirmed the district court's conclusion that the Reservation did not include the bed, waters, or banks of the Main Stem based on the Acts' plain language. Pet. App. 125a-139a. With respect to the Nation's sustenance fishing claim, the panel concluded the claim was not justiciable because Maine had never interfered with any Penobscot tribal member fishing for sustenance in the Main Stem. Pet. App. 139a-144a.

On Petitioner's and the Nation's motions, the First Circuit granted en banc review, vacating the panel decision. Pet. App. 3a. The en banc court again affirmed in part and vacated in part the district court's decision.[5] *Id.* The en banc First Circuit, like the panel, determined that the plain language of the Settlement Acts controlled. Pet. App. 7a-24a. The en banc court

[4] The district court declined to reach the merits of State Respondents' other claims. Pet. App. 246a-247a.

[5] Judge Torruella participated in oral argument but did not participate in the issuance of the en banc opinion. Pet. App. 2a n.*.

considered the text, structure, and purposes of the Settlement Acts and concluded that the definition of Reservation in section 6203(8) excluded the Main Stem. Pet. App. 37a-44a. In the event that the plain language did not control, the en banc court examined the Acts' extensive legislative history and found no evidence to support an intent by Congress or the drafters to alter Maine's long-standing control over the Main Stem. Pet. App. 24a-33a. The en banc First Circuit, like the panel, concluded that there was no current case or controversy with respect to Penobscot tribal members' sustenance fishing rights in section 6207(4). Pet. App. 44a-48a. Nevertheless, in dicta, the en banc court wrote that it "agree[d] with the Nation and the United States that 'Indian reservations' as used in § 6207(4) is itself ambiguous and that § 6207(4) grants the Nation sustenance fishing rights in the Main Stem." Pet. App. 41a-42a.

4. Petitioner (along with the Nation) now seeks certiorari. Petitioner does not challenge the First Circuit's holding with respect to the justiciability of its claim regarding Penobscot tribal members' sustenance fishing rights under section 6207(4) of MIA. And Petitioner no longer claims that the Reservation includes any portion of the bed of the Main Stem. Petitioner maintains, however, that the en banc First Circuit erred in holding the Nation does not have jurisdiction over the Main Stem, except with respect to the regulation of sustenance fishing.

REASONS FOR DENYING THE PETITION

I. The First Circuit Correctly Applied this Court's Precedents.

The Settlement Acts cannot be should not be understood to include the Main Stem of the Penobscot River in the Reservation. Petitioner criticizes the First Circuit for failing to apply a preferential canon of construction as part of its statutory analysis and reasoning. But as this Court has explained, the Indian canons of construction do "not permit reliance on ambiguities that do not exist; nor [do they] permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). Nor does a one-hundred-year old case from this Court, *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), "establish a special rule of construction" that governs this case. Pet. App. 14a.

Petitioner's preferred methodologies of statutory interpretation invert the Court's settled precedent, which the First Circuit correctly applied. The Settlement Acts unambiguously define the Reservation as the stated islands in the Main Stem of the Penobscot River, and nothing more. Although artfully constructed, Petitioner's arguments require the Court to ignore the Acts' text and stretch their meaning beyond what that text or the history of the Acts can bear in order to realize a result the Nation could not have achieved in 1980.

A. The Settlement Acts Unambiguously Define the Reservation as Including only Certain Islands.

1. As the First Circuit recognized, statutory construction "begin[s] with the text itself." Pet. App. 8a. MIA carefully defines the Reservation as follows:

> "Penobscot Indian Reservation" means the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818, and prior to the effective date of this Act. If any land within Nicatow Island is hereafter acquired by the Penobscot Nation, or the secretary on its behalf, that land must be included within the Penobscot Indian Reservation.

MIA § 6203(8).

Under "settled principles of statutory construction," the Court "must first determine whether the statutory text is plain and unambiguous." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). "If it is," then the Court "appl[ies] the statute according to its terms." *Id.* Words used in the statute must be given their "ordinary meaning" as understood when enacted. *Id.* at 388; *see also Yellen v. Confederated Tribes of Chehalis*

Reservation, 141 S. Ct. 2434, 2441 (2021) (starting analysis with statute's "plain meaning").

Beginning with "islands," the First Circuit gave that word its ordinary meaning as a piece of land completely surrounded by water. Pet. App. 10a. Surveying a variety of contemporaneous sources, *see Carcieri*, 555 U.S. at 388-89, the First Circuit properly concluded that the ordinary meaning of island is "a piece of land"—not "land *and* water" because "[t]he surrounding water is not itself part of an island." Pet. App. 10a-11a. The court then analyzed the phrase "in the Penobscot River" with respect to the islands; that phrase located the islands on the face of the earth and "reinforced" that "islands" did not include the surrounding water. Pet. App. 11a-12a. Turning to "solely," the court correctly recognized it as a powerful word of limitation that means "alone," Pet. App. 12a (quoting *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018)), and "leaves no leeway" for anything not stated, *id.* (quoting *Helvering v. Sw. Consol. Corp.*, 315.U.S. 194, 198 (1942)). The First Circuit also extensively analyzed the reference to "agreements" and the date June 29, 1818, in section 6203(8) and concluded that both the reference to prior agreements and the date identified limit which islands are included in the Reservation. Pet. App. 18a-24a. In sum, the language of section 6203(8) is clear and unambiguous. The Reservation is limited to certain islands and does not include the waters (or bed) of the Main Stem.

2. Petitioner fails to engage with the words used in the text of the statute to define the Reservation.

Instead, Petitioner, like the en banc dissent, repackages the definition into a description: "a specific group of islands in which the Nation may exercise sovereign rights." Pet. 20 (cleaned up). Having then paraphrased the text of the definition, Petitioner claims that it "resembles" the legislation that this Court analyzed in *Alaska Pacific Fisheries* and argues, at length, that *Alaska Pacific Fisheries* controls this case as well. Pet. 20-24. This method of analysis is incorrect, and Petitioner's claim that *Alaska Pacific Fisheries* controls the meaning of section 6203(8) is wrong.

Alaska Pacific Fisheries examined the language establishing the Metlakahtlan reservation, which is described by statute as "the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska." Act of March 3, 1891, ch. 561, § 15, 26 Stat. 1095, 1101 (1891). As this Court later explained, the phrase "body of lands known as Annette Islands" was ambiguous and had "no plain meaning." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 547 n.14 (1987). That key phrase "did not have precise geographic/political meaning[] which would have been commonly understood, without further inquiry, to exclude the waters" because "[t]here is no plain meaning to 'the body of lands' of an island group." *Id.* Instead, it was a colloquial description of a region generally. The Court then looked to legislative history and the Indian canons to conclude that the Metlakahtlan reservation encompassed three thousand feet of water

surrounding the islands and not just the islands. *Alaska Pac. Fisheries*, 248 U.S. at 88-89.

Alaska Pacific Fisheries stands for the standard, but inapplicable, principle that "doubtful expressions" in statute are resolved in favor of Indians. *Id.* at 89-90. The Settlement Acts, on the other hand, unambiguously define the Reservation to "mean[] the islands in the Penobscot River . . . consisting solely of Indian Island . . . and all islands in that river northward. . . ." MIA § 6203(8). MIA's technical definition leaves no room for the surrounding waters. *Alaska Pacific Fisheries*, which "interpreted different language in a different statute that was not a settlement act to reach a different result[,] cannot be used to create ambiguity in this statute." Pet. App. 15a.

Petitioner claims that sections 6203(8) and 6207(4) reflect "clearer" intent to include the surrounding waters than the language analyzed in *Alaska Pacific Fisheries*, Pet. 22, but the history shows otherwise. On April 28, 1916, President Wilson issued a Proclamation declaring that "the waters within three thousand feet from the shore lines" of the Annette Islands were "reserved for the benefit of the Metlakahtans . . . to be used by them under the general fisheries laws and regulations of the United States." Proclamation, 39 Stat. 1777, 1777-78 (1916). Although this Court did not reference the Proclamation in *Alaska Pacific Fisheries*, that the President had the authority to reserve these waters in the Alaska territory is unquestioned. *Grisar v. McDowell*, 73 U.S. 363, 381 (1867). An express reservation of waters through Presidential

proclamation could hardly be clearer, and Petitioner's comparison is unpersuasive.[6]

Petitioner criticizes the First Circuit's plain meaning interpretation of "islands,"[7] "solely," and "in the Penobscot River" as failing to give meaning to the phrase "reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine." MIA § 6203(8): Pet. 21-24, 26. But the First Circuit extensively analyzed the reference to "agreements" in section 6203(8), Pet. App. 18a-24a, and concluded the reference to these agreements limits which islands are included in the Reservation.

Moreover, Petitioner is wrong to suggest that the reference to these "agreements" requires an inquiry into what the Nation subjectively understood in 1980 to be its rights based on those ancient agreements. Pet. 23-24. Whatever rights the Nation claimed based on those agreements "no longer have any meaning independent of the Settlement Acts, and MICSA is clear that Maine no longer has any responsibilities to the

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[6] In addition, the United States's purpose was to establish a commercial salmon fishery and cannery for the benefit of the Metlakahtans. *Metlakatla Indian Cmty., Annette Islands Reserve v. Egan*, 369 U.S. 45, 48-49 (1962). In contrast, MIA provides that individual Nation members may fish for their individual sustenance, but that does not include "fishing to maintain a livelihood or other commercial purpose." *Senate Hearing* at 345; Senate Report at 45.

[7] Petitioner also claims that an island cannot serve as a legal boundary without specifying whether the boundary is the high or low water mark, Pet. 25, but Petitioner failed to preserve this argument below.

Nation under" those agreements. Pet. App. 24a. The Acts "constitute a general discharge and release of all obligations of the State of Maine . . . from any treaty, or agreement with, or on behalf of" the Nation. MICSA § 1731. Petitioner also incorrectly claims that the Nation would never have given up "lands that it *reserved* in those agreements" in 1980 to settle its claims. Pet. 23-24. But the Nation settled its land claims without any provision to recover the four townships that it reserved in the 1818 agreement with Massachusetts and later sold to Maine. The Nation also gave up all islands in the Penobscot River that had been transferred between 1818 and 1980. MIA § 6203(8). Thus, in 1980 the Nation not only would have, but did in fact give up lands that it had previously reserved.

B. The Settlement Acts as a Whole Confirm that the Reservation is Limited to the Islands.

1. Considering "the language [of section 6203(8)] itself, the specific context in which that language is used, and the broader context of the statute as a whole," the decision below is correct. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The First Circuit correctly analyzed numerous other MIA and MICSA provisions to confirm that the Reservation does not include the waters of the Penobscot River, in line with this Court's precedent. *See Carcieri*, 555 U.S. at 389-90 (examining statutory framework to confirm plain meaning of term controls).

Section 6207(1) is illustrative. That provision addresses the jurisdictional division of fishing regulation between the State, the Nation, and the Commission. MIA §§ 6207(1), (3). The Commission is made up of six State representatives, six tribal representatives, and a chair. *Id.* § 6212(1). MIA vests "exclusive authority" in the Commission to adopt fishing regulations in water bodies of shared boundary and all qualifying rivers. *Id.* § 6207(3). The Nation has authority to issue fishing regulations on ponds within its Territory—not *any* river. *Id.* § 6207(1)(B). The fact that the Commission is vested with exclusive authority to regulate fishing in rivers in tribal territory supports that the Reservation does not include the Penobscot River. If it were otherwise, it would make little sense for an entity comprised in part of state representatives to be able to influence fishing regulations within what the Nation claims to be wholly its Reservation.

Reading the Main Stem into the definition of the Reservation is at odds with how the Acts use different language to address land, water, and water rights. *See Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) ("Atextual judicial supplementation is particularly inappropriate when" the legislature "has shown that it knows how to adopt the omitted language"). The phrase "land or natural resources" is a defined term that includes not only real property, but also, among other rights, hunting rights, fishing rights, and water and water rights. MICSA § 1722(b); MIA § 6203(3). The Acts use "land or natural resources" when the drafters intended to encompass both land and water or water rights. *See*,

e.g., MICSA § 1723 (ratifying prior transfers of land or natural resources and extinguishing aboriginal title and claims as to those transfers); MIA § 6204 (establishing Maine's general jurisdiction over land and other natural resources). Elsewhere, the Acts refer only to "waters" or "river." MIA §§ 6207(3), (5). MIA describes the Commission's jurisdiction as over "land and waters," or on a qualifying "river or stream." MIA §§ 6207(3), (5)-(6). "This Court generally presumes that when Congress includes particular language in one section of a statute but omits it in another, Congress intended a difference in meaning." *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (cleaned up). Had the parties to and drafters of the Settlement Acts intended the Reservation to include any waters, they would have said so.

Interpreting the Reservation to include the Main Stem would also render other language superfluous. Section 6205(3) of MIA, which deals with regulatory takings within the reservations, states: "For purposes of this section, land along and adjacent to the Penobscot River shall be deemed to be contiguous to the Penobscot Indian Reservation." MIA § 6205(3); *accord* MICSA § 1724(i) (confirming condemnation of Reservation for public purposes permitted as stated in MIA). As the First Circuit reasoned, this provision makes clear that "land along and adjacent to the Penobscot River is *not* contiguous to the Reservation," and, therefore, "the Reservation cannot possibly include the River itself." Pet. App. 37a. This language would be

superfluous if the Reservation included the River.[8] *Me. Cmty. Health Options*, 140 S. Ct. at 1323 (preferring "interpretation of a congressional enactment which" does not render "another portion of that same law" superfluous (quotation marks omitted)).

2. Instead of examining the structure of the Settlement Acts, Petitioner myopically focuses on section 6207(4) as if it was the key to understanding of the Acts. Contrary to Petitioner's contention, section 6207(4) does not require that any portion of the Main Stem to be included in the Reservation. This Court has warned against construing vague or ancillary provisions as altering the fundamental terms of a statute. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001); *see also King v. Burwell*, 576 U.S. 473, 496-97 (2015) (rejecting interpretation of sub-sub-sub section of Tax Code that would threaten viability of Affordable Care Act). MIA provides that "'Penobscot Indian Reservation' *means* the islands in the Penobscot River. . . ." MIA § 6203(8) (emphasis added). "As a rule, a definition which declares what a term 'means' excludes any

[8] The language immediately preceding the sentence deeming "land along and adjacent to the Penobscot River" contiguous to the Reservation in section 6205 also states that property acquired as a replacement for land taken by eminent domain must be both "contiguous to the affected Indian reservation[ ] *and as nearly adjacent to the parcel taken as practicable*." MIA § 6205(3)(A) (emphasis added). The most natural reading of the statute is that section 6205(3)(A) makes land across the River from the Reservation, i.e., nearby land, "contiguous" to the Reservation for purposes of the takings analysis when it otherwise would not be contiguous.

meaning that is not stated." *Burgess v. United States*, 553 U.S. 124, 130 (2008) (cleaned up).

Petitioner's argument amounts to "the doubtful proposition that Congress sought to accomplish in a surpassingly strange manner what it could have accomplished in a much more straightforward way." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1813 (2019) (quotation marks omitted). Section 6207(4) is an ancillary provision. If Congress had intended any portion of the Main Stem to be included in the Reservation, it would have done so in section 6203(8), which is a fundamental term. But section 6207(4) should not and cannot dramatically alter the meaning of section 6203(8).[9]

C. The Settlement Acts' Purpose and Legislative History Confirm that the Reservation does not Include the Penobscot River.

"There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2469 (2020). Nevertheless, any ambiguity as to whether the Main Stem is included in the Reservation can be "clear[ed] up" by the Acts' legislative history and the surrounding

[9] This result does not leave the Nation without any place to exercise its sustenance fishing rights. There is no present dispute over where Nation members may fish for their individual sustenance—an issue on which the Petitioner does not seek certiorari.

circumstances. *Id.* "When construing" even "arguably ambiguous provisions," the court's "duty is to remain faithful to the central congressional purposes underlying the enactment of the" relevant statute. *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 794 (1985) (quotation marks omitted); *DeCoteau v. Dist. Cnty. Court*, 420 U.S. 425, 447 (1975) ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.").

1. In MICSA, Congress plainly stated its purposes and thus its intent:

> It is the purpose of this subchapter—
>
> **(1)** to remove the cloud on the titles to land in the State of Maine resulting from Indian claims;
>
> **(2)** to clarify the status of other land and natural resources in the State of Maine;
>
> **(3)** to ratify [MIA], which defines the relationship between the State of Maine and the . . . Penobscot Nation, and
>
> **(4)** to confirm that all other Indians, Indian nations and bands of Indians now or hereafter existing or recognized in the State of Maine are and shall be subject to all laws of the State of Maine as provided herein.

MICSA § 1721(b). Regardless of any alleged ambiguity in the Settlement Acts, they must be construed with these express purposes in mind.

As Congress made clear in § 1721(b), MICSA was primarily intended to put to rest, once and for all, any doubts as to ownership of land and jurisdiction land and natural resources in Maine. Considering that Congress's highest priority was to bring clarity to these issues, the argument that the Settlement Acts impliedly incorporated the Nation's understanding of its rights under prior agreements, carrying forward all of the inherent ambiguities and disputed interpretations associated with them, cannot prevail. *Azar*, 139 S. Ct. at 1813 (rejecting "a most unlikely reading" advanced by government in favor of obvious, plain meaning).

2. Key to the resolution of the land claims was the Acts' approval of prior transfers. Importantly, the term "transfer" includes far more than traditional land transactions. "Transfer" is broadly defined and

> includes but is not limited to any voluntary or involuntary sale, grant, lease, allotment, partition, or other conveyance; any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance; and any act, event, or circumstance that resulted in a change in title to, possession of, dominion over, or control of land or natural resources.

MICSA § 1722(n); MIA § 6203(13). The striking breadth of this language was intentional: transfer "is intended to have a comprehensive meaning and to cover all conceivable events and circumstances under which title, possession, dominion or control of land or natural resources can pass from one person or group of

persons to another person or group of persons." Senate Report at 21. The term "land or natural resources" is likewise comprehensively defined to mean "any real property or natural resources, or any interest in or right involving any real property or natural resources, including but without limitation minerals and mineral rights, timber and timber rights, water and water rights, and hunting and fishing rights." MICSA § 1722(b); MIA § 6203(3).

Therefore, the "transfer" provision does far more than merely confirm the validity of prior property transactions. It extinguishes any rights or claims of any kind that the Nation (or any other tribe) may have had prior to the effective date of the Acts that were transferred through "any act, event or circumstance that . . . resulted in a change in . . . control of or dominion over" "land or natural resources" including "water and water rights, and hunting and fishing rights." MICSA §§ 1722(b), (n) & 1723; MIA § 6213. As a result, all claims to land or natural resources over which the Nation lost dominion, possession, or control, including those based on aboriginal title, have been extinguished. *Accord Senate Hearing* at 89-93 (Interior opinion on Acts' extinguishment of Maine Indian land claims).

These provisions were enacted against a backdrop where Maine, rightly or wrongly, had exercised its sovereign authority over the waters and bed of the Main Stem since its statehood. Since 1820, Maine exercised sovereignty over the Main Stem by dictating whether and to what extent any given activity could take place

there, including fishing. Pet. App. 24a-25a, 218a-221a; J.A.1422-27, J.A.1435-37, J.A.1439-41. And acting as proprietor, Maine conveyed to private parties the riverfront parcels along the Main Stem together with adjacent submerged lands, all in publicly recorded deeds. Pet. App. 25a; J.A.1464-74. Through the express provisions of the Settlement Acts, any claim the Nation had to aboriginal title over any land or natural resources located in the State of Maine, including any claim to water rights, was extinguished not just in land or natural resources previously sold or transferred by treaty, but also in all land or natural resources over which Maine, its predecessors, or successors had exercised dominion or control—including the Penobscot River.

Thus, by the 1970s, the Reservation was understood to be only the islands in the Main Stem, and not the Penobscot River itself. Abundant confirmation is found in the legislative history of the Acts. In materials provided to the House, a background document describes the Reservation as "a 4,000-acre reservation on a hundred islands in the Penobscot River north of Bangor." Pet. App. 30a. The acreage of the entire Main Stem, both river and islands, is 13,760 acres.[10] Pet. App. 31a; *see Idaho v. United States*, 533 U.S. 262, 267, 274 (2001) (previously published acreage calculations

[10] In addition, the Senate was provided a map depicting lands affected by the settlement as it considered the legislation. The key on that map indicates that the Reservation is colored in red, and only the islands in the river are colored in red. Pet. App. 212a, 266a. The legislative record contains no map indicating the Main Stem would be part of the Reservation.

was evidence of whether submerged lands were included in reservation). Other historical documents in the Congressional hearing record describe the Reservation as: an "island reserve"; "a chain of islands lying in the river from Oldtown northward"; "the islands which they now own and occupy"; an "island reservation"; "the island across from" Old Town and "a chain of islands lying in the river from Old Town northward"; "consist[ing] of approximately 140 islands in the Penobscot River between Old Town and Mattawamkeag, totaling around 4500 acres"; "Indian Island Penobscot Reservation"; and "consist[ing] of 146 islands in the Penobscot River." *Senate Hearing* at 1021, 1078, 1082, 1121, 1145, 1149, 1156 & 1209.

Congress confirmed what it (and the parties) understood to be the Nation's existing reservation in 1980, which consisted solely of the islands in the Main Stem. The House and Senate Reports are entirely consistent with the statutory text, the descriptions above, and the conclusion that the Reservation includes the islands but excludes the river. Senate Report at 18; H.R. REP. NO. 96-1383, at 18 (1980) (House Report). Both Reports explain the tribes "will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts *and not subsequently transferred by them*." Senate Report at 18 (emphasis added); House Report at 18 (emphasis added). The legislative history also reflects that in 1980 the Nation and Maine understood that the "jurisdictional rights granted by [MIA] are coextensive and coterminous with land ownership," *Senate*

Hearing at 346, and that the Nation would not own "the bed of any Great Pond or any waters of a Great Pond or river or stream, all of which are owned by the State in trust for all citizens," Pet. App. 197a.

Petitioner tries to undercut this history through a recitation of isolated events that ultimately do not support its argument. Petitioner claims that Maine's regulation of fish passage in the nineteenth century is consistent with the Nation's claim based on a distinction between the Main Stem and the tidal portion of the Penobscot River. Pet. 27. But Petitioner fails to acknowledge that Maine (and Massachusetts before it) regulated the entire Main Stem, not just the tidal downstream stretch. Pet. App. 24a-25a; J.A.1439-41. Petitioner points out that Massachusetts regulated the Penobscot River before its 1818 agreement with the Nation, which Petitioner asserts means that the regulatory authority did not derive from the Nation. This argument misses the mark. Those laws set regulations for waters below and above the town of Orono, a town along the Penobscot River only several miles from Indian Island. Moreover, the broad transfer provisions in MIA and MICSA mean that the source of regulatory authority is immaterial—only the fact that it was exercised.

Petitioner also takes umbrage with the First Circuit's reliance on Maine's conveyance of upland parcels along the Main Stem and the construction of dams on the riverbed. Pet. 27. But Petitioner is no longer claiming that the Reservation includes any portion of the submerged lands adjacent to the Reservation's islands,

so it is hard to see how these arguments further Petitioner's cause.[11] Petitioner alleges that the Nation "signed leases for *other* uses of the River," Pet. 28, but those leases were entered into in accordance with Maine law. Maine enacted legislation appointing an agent to the Nation and authorized the agent to enter into leases, 1826 Me. Laws ch. 323 (Feb. 23, 1826); 1821 Me. Laws ch. 175 (Mar. 5, 1821), which laws are referenced in the leases themselves, D. Ct. Doc. 110-41 & 141-9.

And, contrary to Petitioner's argument, Pet. 28-29, the most conspicuous aspect of this legislative history is that it wholly fails to support the import of Petitioner's claim: that the Acts stripped the State of its long-standing, exclusive jurisdiction over the waters of the Main Stem of the Penobscot River. To the contrary, taken as a whole, the text, context, and history of the Acts confirm that the Reservation is only the islands in the Main Stem.

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[11] Petitioner's arguments are also incorrect on this point. Petitioner claims the First Circuit simply parroted Maine's allegations, without further analysis. Pet. 27. Under Maine law, "a deed which describes a line along a nontidal river as running 'with' or 'along' the stream, or as running 'by' or 'on' the stream or 'up' or 'down' the stream, carries the title to the center of the stream, unless the contrary appears." *Charles C. Wilson & Son v. Harrisburg*, 107 Me. 207, 77 A. 787, 789 (1910). The undisputed record includes evidence of transfers of land bordering the Penobscot River from the States of Massachusetts and Maine to private parties that include language that would also convey the adjacent submerged lands, such as "by said River," "bounded westerly on Penobscot River," "thence southwesterly by said River," "by the river," and "northerly by the river." J.A.1523-28.

D. The Indian Canons of Construction do not Apply.

Petitioner argues that the First Circuit's decision "deprive[s] the Indian canons of construction of nearly all their substantive force." Pet. 18. But this Court has routinely rejected application of the "rule of statutory construction that doubtful expressions must be resolved in favor of" tribes when "[t]here is no ambiguity" "which requires interpretation." *Amoco Prod. Co.*, 480 U.S. at 555. While the Indian canon is an interpretive tool, it is not "a license to disregard clear expressions of tribal and congressional intent." *DeCoteau*, 420 U.S. at 447; *accord Catawba Indian Tribe*¸ 476 U.S. at 506 (canon does not "permit disregard of the clearly expressed intent of Congress"). If the statutory text, its legislative history, and the surrounding circumstances, can demonstrate congressional intent and purpose, there is no need to apply these preferential canons. *See Catawba Indian Tribe*, 476 U.S. at 506-07; *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985); *Rice v. Rehner*, 463 U.S. 713, 732-33 (1983).

The text of the provisions at issue, and MIA and MICSA as a whole, resolve this case without any need to apply the various Indian canons. *See e.g.*, *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 532-34 (1998) (resolving case based on plain language and structure of Alaska Native Claims Settlement Act). And, as shown above, the legislative history of MIA and MICSA confirm that the Reservation does not include the waters of the Main Stem. Finally, the text and legislative history of MICSA make clear that any

such generally applicable federal Indian law,[12] including the Indian canons, does not apply to the Settlement Acts if it would affect or preempt Maine's jurisdiction. MICSA §§ 1725(h), 1735(b).

II. The Question Presented is not of Exceptional National Importance.

A. In addition to its error correction arguments addressed above, Petitioner proffers a series of additional reasons that this Court's review is warranted. Pet. 29-32. First, Petitioner argues that it "has significant interests in the appropriate construction of the Settlement Acts in this case," which is a part of a broader "federal policy of promoting tribal self-sufficiency and encouraging tribal independence." Pet. 30. Second, Petitioner argues that the federal government has recognized the importance of the Nation's authority to regulate hunting and fishing within its Reservation through the allocation of funding for Penobscot Nation game wardens to patrol "Reservation lands and waterways." Pet. 31. Third, it argues that the First Circuit's decision would diminish the jurisdiction of the Penobscot Nation Tribal Court. Pet. 31. Fourth, Petitioner argues that the First Circuit's decision "will likely disrupt other regulatory bodies as well,"

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[12] "[S]hould questions arise in the future over the legal status of Indians and Indian lands in Maine, those questions can be answered in the context of the [Acts] rather than using general principles of Indian law." *Senate Hearing* at 149.

particularly the Commission. Pet. 31. None of these arguments moves the needle.

Each of these issues was briefed below and carefully considered by the First Circuit. *See*, *e.g.*, Pet. App. 123a n.1 (discussing Petitioner's successful motion to intervene over the objection of Maine); Pet. App. 107a n.50 ("And, in 2007 and 2010, the Nation again received funding for game warden patrols . . . "); Pet. App. 33a, 73a (discussing the Penobscot Nation Tribal Court's jurisdictional relationship to the matters presented in this case); Pet. App. 155a (discussing the Commission's relationship to Acts). That Petitioner disagrees with the First Circuit's ultimate decision as it relates to these matters is insufficient for this Court to grant review.

Petitioner's argument that the decision below "also cast[s] substantial doubt on the authority of the Passamaquoddy Tribe" is unpersuasive. Pet. 32. First, the language regarding the Passamaquoddy Indian Reservation constitutes dicta that would not bind the First Circuit or the Passamaquoddy Tribe in future suits. Second, the First Circuit's reasoning is accurate. The First Circuit explained that section 6203(5) of MIA defines the Passamaquoddy Indian Reservation as a geographic area that is more limited than what was initially agreed to in its treaty with the Commonwealth of Massachusetts. Pet. App. 23a-24a. A simple reading of section 6203(5) confirms the same: " 'Passamaquoddy Indian Reservation' means those lands reserved to the Passamaquoddy Tribe by agreement with the State of Massachusetts dated September 19, 1794,

excepting any parcel within such lands transferred to a person or entity other than a member of the Passamaquoddy Tribe subsequent to such agreement and prior to the effective date of this Act." (Emphasis added).

B. Nor does this case present an issue of exceptional national importance or any issue that would extend beyond the borders of the State of Maine. The First Circuit's decision applies only to the four corners of the Acts and the specific issue litigated in this suit. Petitioner concedes as much. Pet. 32 ("There is no prospect of a division among the courts of appeals here because the Settlement Acts apply only to petitioner Penobscot Nation and other tribes located in Maine.").

Attempting to sidestep this fact, Petitioner argues that this case is akin to a number of recent cases where this Court has reviewed "statutes or treaties particular to one or a small subset of Indian tribes." Pet. 32-33. But the four cases cited by Petitioner presented issues of greater consequence than the issues presented here. For example, *Ysleta del Sur Pueblo v. Texas*, cert. granted, No. 20-493 (Oct. 18, 2021), touches upon both the proper interpretation of the Indian Gaming Regulatory Act and the breadth of this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), both issues that affect many tribal nations across the country. Likewise, although the holding of this Court's opinion in *McGirt*, 140 S. Ct. 2452, was applied specifically to the Creek Nation, the Court's disestablishment analysis—in addition to the Court's analysis of the text of the Major Crimes Act—unquestionably reached beyond the parties in that

case. And the holding of *Washington State Department of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019)—that a treaty between a tribal nation may preempt generally applicable state taxation laws—can be applied to states laws and tribal nations across the United States more broadly. *Accord Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019) (repudiating prior precedent that held "treaty rights can be impliedly extinguished at statehood").

Unlike the cases cited by Petitioner, this case involves ordinary rules of statutory interpretation of two statutes that apply only to Maine and one of four tribal nations located within Maine's borders. This Court does not grant "the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70 (1955) (quotation marks omitted). The First Circuit's meticulous panel and en banc decisions do not meet this standard.

For each of these reasons, this case is not an appropriate matter to impose upon this Court's limited resources for review.

CONCLUSION

Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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