Nos. 16-1424, 16-1435, 16-1474, 16-1482

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PENOBSCOT NATION; UNITED STATES OF AMERICA, on its own behalf, and for the benefit of the Penobscot Nation,

Plaintiffs-Appellants/Cross-Appellees,

v.

AARON M. FREY, Attorney General for the State of Maine; JUDY A. CAMUSO, Commissioner for the Maine Department of Inland Fisheries and Wildlife; JOEL T. WILKINSON, Colonel for the Maine Warden Service; STATE OF MAINE; TOWN OF HOWLAND; TRUE TEXTILES, INC.; GUILDFORD-SANGERVILLE SANITARY DISTRICT; CITY OF BREWER; TOWN OF MILLINOCKET; KRUGER ENERGY (USA) INC.; VEAZIE SEWER DISTRICT; TOWN OF MATTAWAMKEAG; COVANTA MAINE LLC; LINCOLN SANITARY DISTRICT; TOWN OF EAST MILLINOCKET; TOWN OF LINCOLN; VERSO PAPER CORPORATION,

Defendants-Appellees/Cross-Appellants,

EXPERA OLD TOWN; TOWN OF BUCKSPORT; LINCOLN PAPER AND TISSUE LLC; GREAT NORTHERN PAPER COMPANY LLC,

Defendants-Appellees,

TOWN OF ORONO,
Defendant.

On Appeal from the United States District Court for the District of Maine

BRIEF *AMICI CURIAE* OF CURRENT AND FORMER CO-CHAIRS AND VICE-CHAIRS OF THE BIPARTISAN CONGRESSIONAL NATIVE AMERICAN CAUCUS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are current or former Co-Chairs and Vice-Chairs of the Congressional Native American Caucus, a bipartisan coalition of Members of Congress working to improve nation-to-nation relationships between the United States and the 574 sovereign tribal nations.[1] For over 20 years, the Caucus has worked to protect tribal sovereignty, satisfy federal trust obligations, and improve the lives of American Indians, Alaska Natives, and Native Hawaiians. *Amici* are committed to ensuring that the United States fulfills its trust responsibilities and protects tribal sovereignty as set forth in the U.S. Constitution and treaties.

As current or former leaders of the Caucus representing both political parties, *amici* have focused their legislative efforts on supporting the sovereign rights of, and federal obligations to, tribal nations and villages. A particular focus has been the growth of Native American communities through policies that support tribal political self-determination and economic self-sufficiency. *Amici* therefore seek to strengthen the relationships between the United States and Indian tribes

[1] Amici are Tom Cole, Member of the U.S. House of Representatives and Co-Chair of the Congressional Native American Caucus; Deb Haaland, Member of the U.S. House of Representatives and Co-Chair of the Congressional Native American Caucus; Betty McCollum, Member of the U.S. House of Representatives and Co-Chair Emeritus of the Congressional Native American Caucus; Sharice Davids, Member of the U.S. House of Representatives and Vice Chair of the Congressional Native American Caucus; and Raúl M. Grijalva, Member of the U.S. House of Representatives and Vice Chair of the Congressional Native American Caucus.

through legislation that secures the vital sovereign interests of tribal governments, including the implementation of federal statutes such as the Maine Indian Claims Settlement Act, which was enacted to protect the boundaries of the Penobscot Nation reservation and the rights of the Nation's members to sustenance fishing, hunting, and trapping within its reservation without interference from the State of Maine.

Amici are uniquely positioned to provide this Court with guidance when faced with the task of interpreting statutes enacted on behalf of Indian tribes. When enacting such statutes, Congress relies upon longstanding principles of federal Indian law to fulfill the trust responsibility of the United States to Indian tribes and to further the congressional policy of tribal self-determination. In this matter, *amici* are committed to ensuring fidelity to those principles and the text, history, and purpose of the Maine Indian Claims Settlement Act. Accordingly, in response to this Court's April 8, 2020 order granting en banc review and welcoming *amici* participation, *amici* focus on the first four supplemental questions posed by this Court.[2]

[2] Counsel for the Plaintiffs-Appellants and Counsel for the Defendants-Appellees have no objections to the filing of the proposed *amici* brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made any monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Amici contend that Congress, in passing the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721 *et. seq.* (the "Settlement Act"),[3] intended to protect the Penobscot Nation's (the "Nation") sustenance fishing, hunting, and trapping rights, along with all related regulatory and enforcement authority, in the Main Stem of the Penobscot River. It did that by confirming the existence of those prerogatives "within the boundaries of [the Nation's] Indian reservation[]." 30 M.R.S.A. § 6207(4). *Amici*'s objective in this brief is to highlight Congress's plain intent by briefly summarizing the backdrop that Congress takes for granted when drafting statutes regulating tribal governments, including the federal trust relationship and the Indian canon of statutory construction.

The sovereign Indian tribes of this country share a unique trust relationship with the United States, recognized in the Constitution, implemented in countless treaties, statutes, executive orders, and regulations, upheld in innumerable judicial opinions, and sustained by Congress's Indian Self-Determination Policy. As trustee for Indian tribes, the United States recognizes tribal governments as sovereign within their reserved territories and has an obligation to protect that sovereignty. Congress drafts statutes reserving Indian lands to tribes—and

[3] This brief refers to the Settlement Act as it was formerly codified at 25 U.S.C. §§ 1721-1735. *See generally* 25 U.S.C. Supp. IV (Sep. 2016) (removing Settlement Act from United States Code for organizational reasons).

protecting their reserved hunting and fishing rights—in light of these principles of federal Indian law. It expects courts to construe these statutes accordingly.

First, Congress reserves Indian lands to assist and protect Indian tribes and intends that reservation to be interpreted to favor and protect Indians. Second, Congress drafts against the backdrop of the longstanding Indian canon of construction, which requires courts to construe ambiguities in Indian-related legislation in favor of Indians. Third, when the United States acts as a trustee to settle a dispute over an Indian tribe's aboriginal property and fishing rights, Congress expects the federal courts to act as a partner in fulfilling the United States' solemn trust responsibilities by giving full effect to its actions. Congress drafted the Settlement Act against this backdrop and, accordingly, these three principles must inform interpretation of the Act.

Congress plainly intended to include the Penobscot River within the Penobscot Reservation when it ratified Maine's Act to Implement the Maine Indian Claims Settlement, 30 M.R.S.A. §§ 6201 *et seq.* (the "Implementing Act"), through the Settlement Act. Until recently, Maine itself adhered to this interpretation of the Settlement Act and the Implementing Act, an interpretation shared consistently by the United States and the Penobscot Nation. *See Penobscot Nation v. Mills*, 861 F.3d 324, 343-44 (1st Cir. 2017) (Torruella, J., dissenting). The panel's opinion to the contrary cannot be squared with Congress's intent to

draft a statute that fulfills its trust responsibilities to the Penobscot Nation. Nor can it be squared with the Supreme Court's opinion in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87-89 (1918), which construed "'lands'" and "'[i]slands'" within a congressional statute to reserve not only the "upland of the islands" but also "the adjacent waters and submerged land." Congress enacted the Settlement Act against the backdrop of *Alaska Pacific Fisheries* and plainly intended to include the Main Stem of the Penobscot River itself within the Penobscot Reservation.

Even if this Court should find Congress's intent to be ambiguous, which it is not, the Indian canon of construction confirms that Congress meant to include the Main Stem of the Penobscot River within the Penobscot Reservation to protect the Tribe's fishing, trapping, and hunting rights. Congress has repeatedly recognized that when a court is "faced with . . . two possible constructions" of a statute, the Indian canon requires that it "be construed liberally in favor of the Indians." *Cnty. of Yakima v. Conf. Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (internal quotation marks omitted). Only one construction of the statute is consistent with this canon: The Penobscot Reservation includes the Penobscot River.

ARGUMENT

I. CONGRESS RESERVES INDIAN LANDS IN ORDER TO ASSIST AND PROTECT INDIAN TRIBES AND EXPECTS COURTS TO INTERPRET ITS ACTIONS IN FAVOR OF INDIANS IN ORDER TO ACCOMPLISH THAT PURPOSE

As the Supreme Court has long recognized, Congress reserves Indian lands in order "to encourage, assist and protect the Indians." *Alaska Pac. Fisheries*, 248 U.S. at 89. Thus, for example, when Congress reserved the "'the body of lands known as Annette Islands'" for the Metlakahtla Indians in 1891, the Supreme Court reasoned that Congress intended to reserve not only the "upland of the islands" but also "the adjacent waters and submerged land." *Id.* at 87. It did so because its purpose was to support the Metlakahtla's efforts to "become self-sustaining." *Id.* at 89.

Congress similarly reserved the Penobscot Nation's "islands" in order to protect the Tribe's hunting and fishing rights. By ratifying the Implementing Act, Congress confirmed that "Indian Island . . . and all islands in [the Penobscot River] northward thereof that existed on June 29, 1818" are part of the "Penobscot Indian Reservation." *See* 30 M.R.S.A. § 6203(8), ratified by 25 U.S.C. § 1725(b)(1). Congress, moreover, plainly intended to protect the Penobscot Nation's fishing rights "within the boundaries of [the Nation's] Indian reservation[]." 30 M.R.S.A. § 6207(4). It did so while expressly referring to the agreements between the Penobscot Nation and the States of Massachusetts and Maine, which reflected the

Nation's understanding that its ownership and sustenance fishing rights would be reserved and respected. *See* 30 M.R.S.A. § 6203(8). These statutory sections must be read together in light of the background principles of *Alaska Pacific Fisheries.* As was true of the Metlakahtla Indians, the Penobscot Nation "could not sustain themselves from the use of the upland alone." *Alaska Pac. Fisheries Co.*, 248 U.S. at 89. And as in *Alaska Pacific Fisheries*, Congress used the geographical name of the islands "in a sense embracing the intervening and surrounding waters as well as the upland—in other words, as descriptive of the area comprising the islands." *Id.*

Acting as trustee for the Penobscot Nation, Congress ratified the Implementing Act in order to resolve a land dispute between the Penobscot Nation and the State of Maine arising out of the unlawful acquisition of Indian lands. *See* 25 U.S.C. § 1721(a)(1); S. Rep. No. 96-957, at 11-13 (1980); H.R. Rep. No. 96-1353, at 11-13 (1980). Congress intended to provide the Penobscot Nation with a "fair and just settlement" when extinguishing its land claims. 25 U.S.C. § 1721(a)(7); *see id.* § 1723. Thus it expected the federal courts to construe the Act in favor of the Nation, just as the Supreme Court had interpreted the 1891 Act in order to accomplish the same purpose in *Alaska Pacific Fisheries*.

The panel opinion distinguished *Alaska Pacific Fisheries* because the Settlement Act (incorporating the Implementing Act's definition) uses the word "solely" in referring to "islands." *Penobscot Nation*, 861 F.3d at 334. But the

statutory term "solely" does not unambiguously exclude the Main Stem from the Reservation. To the contrary, it plainly "serves to specify which islands in the Penobscot River are included in the Reservation, and which are not." *Id.* at 345 n.26 (Torruella, J., dissenting). In *Alaska Pacific Fisheries*, as in this case, the federal courts had to determine what Congress meant when it reserved "'lands'" that consisted of "'[i]slands.'" *See* 248 U.S. at 87; *cf.* 25 U.S.C. § 1722(i) (defining "Penobscot Indian Reservation" to include "those lands as defined in the Maine Implementing Act"); 30 M.R.S.A. § 6203(8) (defining Penobscot Reservation by reference to "islands in the Penobscot River"). And as in that case, Congress here meant to reserve adjacent waters and submerged land, not simply the upland of the islands, when it reserved "lands" that consisted of "islands." *See* 248 U.S. at 87. As this Court itself has recognized with respect to the Penobscot Nation's Reservation, references to Indian "lands" may encompass "waters." *Maine v. Johnson*, 498 F.3d 37, 47 (1st Cir. 2007). Thus, this Court has "accepted that the Penobscot Reservation included at least a part of the Penobscot River." *Penobscot Nation*, 861 F.3d at 344 (Torruella, J., dissenting).

II. CONGRESS EXPECTS COURTS TO CONSTRUE ANY AMBIGUITY IN ITS INDIAN-RELATED LEGISLATION IN FAVOR OF INDIANS, AS REQUIRED BY THE LONGSTANDING INDIAN CANON OF CONSTRUCTION

In light of *Alaska Pacific Fisheries*, there are no material ambiguities in the relevant provisions of the Settlement Act. But even if this Court finds the Settlement Act to be ambiguous, the Indian canon of construction confirms that Congress intended to include the waters of the Penobscot River within the Reservation's boundaries. The "standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). In particular, the Indian canon of construction requires a different approach to Indian-related legislation. Under this canon, ambiguous statutes "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Conf. Tribes & Bands of Yakima Indian Nation*, 502 U.S. at 269 (internal quotation marks omitted)). Accordingly, tribal property rights and sovereignty are preserved unless Congress's intent to abrogate them is "unambiguous," "clear[,] and plain." *United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R.*, 314 U.S. 339, 346, 353 (1941). Congress legislates against the backdrop of this longstanding canon of construction, expecting that courts will construe its Indian-related legislation to favor Indians, particularly where statutes concern Indian sovereignty and rights accompanying a tribe's aboriginal territory. As this Court has held, the Indian

canon applies to the interpretation of the Settlement and Implementing Acts and "obligate[s] [a court] to construe acts diminishing the sovereign rights of Indian tribes . . . strictly, with ambiguous provisions interpreted to the [Indians'] benefit." *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999) (internal quotation marks and citations omitted).

A. The Indian Canon Of Construction Requires Courts To Construe Statutes In Favor Of Indian Tribes' Sovereignty And Property Rights

The Indian canon of construction was "first developed in the context of treaty interpretation" but applies also to statutes as well as executive orders and agreements and regulations. *Cohen's Handbook of Federal Indian Law* § 2.02[1], at 114-15 (Nell Jessup Newton ed., 2012) [hereinafter "Cohen"]. The Supreme Court long ago recognized the Indian canon and has since reaffirmed it again and again. *See, e.g.*, *Winters v. United States*, 207 U.S. 564, 576 (1908) (holding that under "rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians"); *Pigeon River Improvement, Slide & Boom Co. v. Cox Co.*, 291 U.S. 138, 160 (1934) (explaining that "intention to abrogate or modify a treaty is not to be lightly imputed to the Congress"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978) (holding that courts must interpret federal statutes to preserve "tribal autonomy and self-government" unless there are "clear indications of legislative intent" to contrary); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S.

172, 202 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."); *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring in the judgment) ("When we're dealing with a tribal treaty, too, we must 'give effect to the terms as the Indians themselves would have understood them.'" (quoting *Mille Lacs Band*, 526 U.S. at 196)); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) ("Indian treaties 'must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians." (quoting *Mille Lacs Band*, 526 U.S. at 206)). Recently the Court explained that the Indian canon of construction "reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). Congress relies upon this enduring canon of construction when legislating in Indian affairs. *See, e.g.*, S. Rep. No. 90-841, at 8 (1967) (discussing, in context of Indian Civil Rights of Act of 1968, that under the canon Indian tribes enjoy "full powers of internal sovereignty" unless Congress has "expressly" legislated otherwise); H.R. Rep. No. 101-877, at 24 (1990) (discussing "established rule of construction of the law that Congress's actions towards Indians are to be interpreted in light of the special relationship and special responsibilities of the Government towards the Indians").

The Indian canon may displace competing canons in cases where they clash. *See generally* Cohen, *supra*, § 2.02[3], at 119 ("the Indian law canons, which are rooted in structural, normative values, usually should displace other competing canons"). That includes the presumption favoring state ownership of submerged lands under navigable waters. For example, in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), the Court held that the State of Oklahoma did not have title to the Arkansas Riverbed notwithstanding the typical presumption that states own submerged lands under navigable waters. Instead, the Indian canon of construction controlled. *See id.* at 631, 634. In particular, the Court in *Choctaw Nation* rejected the argument that its prior opinion in *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926), necessarily required that the presumption against conveyance of land under navigable waters trump the Indian canon. *See id.* at 634. The Court hewed to these principles concerning the Indian canon in the *Idaho v. United States* litigation when it held that the United States held title, in trust for the Coeur d'Alene Tribe, to a portion of the bed of Lake Coeur d'Alene. *See Idaho v. United States*, 533 U.S. 262, 280-81 (2001) (holding, without expressly invoking the Indian canon, that United States held title in trust for Tribe); *cf. Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 284, 287 (1997) (addressing question of state sovereign immunity, not merits of competing claims to title, while noting "strong presumption" that states have title to submerged lands under navigable waters). In

some cases, of course, the evidence shows that nothing in the federal government's historical dealings with an Indian tribe "would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States." *Montana v. United States*, 450 U.S. 544, 556 (1981). Otherwise, the Indian canon requires that ambiguities in the relevant treaties, statutes, or executive orders be construed to favor Indians, even where the presumption concerning state ownership of navigable waters might otherwise apply.

The Indian canon of construction is "rooted in the unique trust relationship between the United States and the Indians." *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). By construing ambiguous treaties and statutes to favor Indians, the federal courts "counterpoise the inequality" arising from the unjust and unlawful dispossession of Indians from Indian lands. *United States v. Winans*, 198 U.S. 371, 380 (1905). As Justice Blackmun explained, the canon "is not simply a method of breaking ties; it reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage" Indian Nations. *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 520 (1986) (Blackmun, J., dissenting). Moreover, the Indian canon is rooted in the ongoing government-to-government relationship between the United States and tribes and "mediate[s] the problems presented by the nonconsensual inclusion of Indian nations into the United States." Cohen, *supra*, § 2.02[2], at 117.

To the extent the Settlement Act and the state Implementing Act are ambiguous, the Indian canon of construction requires they be construed as the Penobscot Nation—and the United States—understand them: as a reservation of the Nation's aboriginal rights to the uplands of the islands and waters and submerged lands adjacent to them. In ratifying the settlement as a trustee for Indian tribes, Congress intended to "'strengthen[] the sovereignty of the Maine Tribes'" by "'recognizing their power to control their internal affairs.'" *Akins v. Penobscot Nation*, 130 F.3d 482, 489 (1st Cir. 1997) (quoting S. Rep. No. 96-957, at 14). Congress did not intend to leave Maine with the discretion to ignore the Nation's waterways and subsistence fishing rights, much less to divest the Nation of its sovereign control and aboriginal rights. Rather, any statutory ambiguity simply reflects the unique circumstances of the enactment of the federal and state statutes.

Under the Trade and Nonintercourse Act, which the First Congress enacted in 1790, no sale of Indian lands was "valid" without the consent of the United States. Act of July 22, 1790, §4, 1 Stat. 137, 138; *see* 25 U.S.C. § 177. In 1796 and 1818 the state of Massachusetts purported to purchase lands from the Penobscot Nation by treaties that violated the Trade and Nonintercourse Act. Add. 160-161; J.A. 184-187. Notwithstanding these illegal transfers, the Penobscot Nation retained its aboriginal claims to the Penobscot River. Add. 164.

In the early 1970s the Department of Justice brought land claims on behalf of the Penobscot Nation and Passamaquoddy Tribe, resulting in what the DOJ called "'potentially the most complex litigation ever brought in the federal courts.'" William H. Rodgers, Jr., *Treatment As Tribe, Treatment As State: The Penobscot Indians and the Clean Water Act*, 55 Ala. L. Rev. 815, 831 (2004). In 1979, the Department of Interior, Bureau of Indian Affairs, recognized the Penobscot Nation as an Indian tribal sovereign enjoying a trust relationship with the United States. 44 Fed. Reg. 7235, 7236 (Jan. 31, 1979); *see also* S. Rep. No. 96-957, at 12-13 (discussing judicial recognition of trust relationship); H.R. Rep. No. 96-1353, at 13 (same). In that same year, the Supreme Judicial Court of Maine described the trust relationship in striking terms, explaining that "*the dependency of each [Indian] tribe* on the United States was recognized as in need of protection in the most primal aspect of the tribe's existence," namely, tribal rights to aboriginal lands. *State v. Dana*, 404 A.2d 551, 561 (1979). When Congress acted on the Penobscot Nation's behalf in enacting the Settlement Act, it did so based upon this contemporaneous understanding of the Maine tribes' trust relationship with the United States.

Congress's ratification of the Settlement Act was the result of its concerted, but hurried, effort to work with the Executive Branch, the Tribes, and the State to reach an equitable solution to the unlawful expropriation of the Tribes' lands by

Maine and Massachusetts. Although the settlement process began in March 1977, the Maine legislature adopted its Implementing Act only one month after the agreement was announced in March 1980. H.R. Rep. No. 96-1353, at 13. The process was also hurried at the federal level. Senators William Cohen and George Mitchell introduced federal legislation in the Senate in June 1980. *Id.* In the House, Congressman David Emery and Congresswoman Olympia Snowe introduced a companion bill in August 1980. *Id.* The House passed the bill on September 22, 1980, and the Senate passed the bill on September 23, 1980. *See* 126 Cong. Rec. H. 9275-9285 (daily ed., Sept. 22, 1980); 126 Cong. Rec. S. 13198-13202 (daily ed. Sept. 23, 1980). On October 10, 1980, President Carter signed the Settlement Act into law. Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785. Thus, the Settlement Act moved quickly from its introduction in Congress to the President's signature. *See id.*

Despite a hurried drafting, throughout the legislative process, Congress' explicit intent was to reach a "fair and just settlement" of the Penobscot Nation's "land claims," 25 U.S.C. § 1721(a)(7), which the Settlement Act extinguished, *id.* § 1723. The Senate Report concluded the "settlement strengthens the sovereignty of the Maine Tribes," and confirmed the Penobscot Nation's "permanent right to control hunting and fishing . . . within [its] reservation[]." S. Rep. No. 96-957, at 14, 16. To the extent the Act is ambiguous, the State's interpretation is flatly

inconsistent with Congress's purpose and the Indian canon of construction. Congress's reservation of "islands" within the Penobscot River must be construed as the Penobscot Nation reasonably understood it: as a reservation of the Penobscot Nation's aboriginal rights to the uplands of the islands and the waters and submerged lands adjacent to them in the River's Main Stem, bank-to-bank.

B. Congress Cannot Cede Indian Tribal Sovereignty Or Property Rights Over Resources Through Inadvertent Or Implied Abrogation

Congress recognizes that Indian tribes' control over tribal lands and natural resources is of paramount importance to tribes and tribal peoples. *See, e.g.*, Indian Financing Act of 1974, 25 U.S.C. § 1451 (recognizing importance of tribal control over "utilization and management of their own resources"). Congress, therefore, regularly supports Indian tribes' hunting and fishing activities. *See, e.g.*, 26 U.S.C. § 7873(a) (removing federal income and employment taxation from tribal members who engage in "fishing rights-related activity" under statutory authority). As the Court put it in *United States v. Winans*, hunting and fishing "were not much less necessary to the existence of the Indians than the atmosphere they breathed." 198 U.S. at 381.

Congress therefore does not seek to abrogate Indian tribal sovereignty or Indian hunting and fishing rights lightly. Instead, it understands that the Indian canon of construction preserves "tribal property rights and sovereignty . . . unless Congress's intent to the contrary is clear and unambiguous." Cohen, *supra*, §

2.02[1], at 114 (citing, among others, *Mille Lacs Band*, 526 U.S. at 202). To overcome the canon of construction favoring Indians, the State of Maine "faces an uphill battle. Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Mille Lacs Band*, 526 U.S. at 202.

Because the State has pointed to no clear statement—or even an ambiguous one—suggesting Congress intended to diminish the Penobscot Nation's reservation or extinguish its historic fishing, hunting, and trapping rights in the Penobscot River, this Court must interpret the statute to recognize those hallmarks of tribal sovereignty and protect them from conflicting state law. Congress did not explicitly abrogate the Penobscot Nation's control over sustenance activities by tribal members in the Penobscot River. To the contrary, Congress preserved explicitly the tribal members' sustenance-fishing rights "within . . . [the Penobscot Nation's] reservation[]," 30 M.R.S.A. § 6207(4), and, accordingly, preserved also the tribal sovereignty necessary to engage in those sustenance practices in the River—the only place the Nation's members can fish.

III. WHEN THE UNITED STATES ACTS AS TRUSTEE TO SETTLE AN INDIAN TRIBE'S LAND CLAIMS, CONGRESS EXPECTS THE FEDERAL COURTS TO GIVE FULL EFFECT TO THE TERMS OF THE SETTLEMENT IN LIGHT OF THE UNITED STATES' SOLEMN TRUST DUTIES

When it enacted the Settlement Act, Congress acted as a trustee for the Penobscot Nation. Accordingly, Congress expected the federal courts to interpret the Act to give effect to the United States' duties as trustee.

The federal government bears a special trust obligation to protect the interests of Indian tribes, including by protecting tribal sovereignty and property. In acting as a trustee, the government "has charged itself with moral obligations of the highest responsibility and trust," and its actions are held to the most exacting fiduciary standards. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). Congress has the paramount constitutional authority to structure the federal government's trust relationship with Indian tribes. Congress expects, however, that the federal courts will play an important role in fulfilling the United States' trust obligations, including by applying the Indian canon of construction. *See Oneida Indian Nation*, 470 U.S. at 247 (explaining that Indian canon is "rooted in the unique trust relationship between the United States and the Indians").

Application of the canon is particularly appropriate where Congress acts as a trustee in fact for tribal interests. The canon requires courts to "presume a benevolent intent on the part of Congress and other federal actors when they

exercise their trust responsibilities." Cohen, *supra*, § 2.02[2], at 116-17. Here, Congress settled a dispute over a specific *res*—the Penobscot Nation's aboriginal property—and had the power to do so under federal law only by virtue of the United States' responsibility to treat Indians with the care and faithfulness of a fiduciary. Congress discharged this responsibility based upon its understanding that "[t]he settlement . . . provides that . . . the Penobscot Nation will retain as reservation[] those lands and natural resources which were reserved to [it] in [its] treaties with Massachusetts and not subsequently transferred by [it]." H.R. Rep. 96-1353, at 18; S. Rep. 96-957, at 18. As a settlement of the Penobscot Nation's aboriginal claims, the Settlement Act must be construed in favor of the Indians it was designed to benefit and in light of the Indians' understandings. *See Conf. Tribes & Bands of the Yakima Indian Nation*, 502 U.S. at 269 (explaining that Indian canon applies to statutory interpretation).

Moreover, when the 96th Congress ratified the Settlement Act, it acted against the backdrop of its trust responsibility as described by its recently-enacted Indian Self-Determination Policy. First announced in the Indian Self-Determination and Education Assistance Act of 1975, the policy provides that "the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments." 25 U.S.C. § 5302(b). Every Congress since has adhered to this policy, which is a direct repudiation of

prior policies to terminate tribal governments and tribal property rights over aboriginal resources. Instead, the Self-Determination Policy supports Indian self-government and tribal control over tribal resources and economic development. Congress's decision to enact the Settlement Act (and ratify the Implementing Act and underlying settlement agreement) implemented this Self-Determination Policy by "strengthen[ing] the sovereignty of the Maine Tribes." S. Rep. No. 96-957, at 14.

Interpreting "islands" to include the uplands, adjacent waters, and submerged lands of the Main Stem would preserve the Penobscot Nation's sustenance-fishing rights and thus would be consistent with the canon favoring Indians. No other reading of the statute would give effect to Congress's explicit preservation of the right of the Nation's members to fish for their sustenance "within . . . [its] reservation[]." 30 M.R.S.A. § 6207(4). The Nation's only fisheries are in the Penobscot River. *See* Penobscot Nation Supp. Br. 9. Thus, the only "anadromous" fish available to the Nation are in the Penobscot River. *See generally* 30 M.R.S.A. § 6207(9). By protecting the members' specific right to fish for anadromous fish, Congress plainly intended to protect their right to fish in the River and the Nation's regulatory authority necessary to govern and preserve those vital sustenance practices. Congress did so, thereby fulfilling its trust responsibilities, by including the Main Stem of the Penobscot River within the

Reservation's boundaries and thus securing the Tribe's authority over its members' aboriginal fishing and hunting rights.

CONCLUSION

For the reasons set forth herein, this Court should hold that the Penobscot Nation's Reservation encompasses the Main Stem of the Penobscot River.

Dated this 15th of July, 2020

Respectfully submitted,

*/s/*David W.S. Lieberman_____

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CERTIFICATE OF COMPLIANCE

I certify that: (i) this *amici* brief complies with the type-volume limitation prescribed by Federal Rules of Appellate Procedure 29(a)(5) because it contains 4,955 words, excluding the parts of the *amici* brief exempted by Federal Rule of Appellate Procedure 32(f); and (ii) this *amici* brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this *amici* brief has been prepared using Microsoft Word in 14-point Times New Roman.

*/s/*David W.S. Lieberman_____
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July 2020, I electronically filed the foregoing Brief *Amici Curiae* of Current and Former Co-Chairs and Vice-Chairs of the Bipartisan Congressional Native American Caucus in Support of Plaintiffs-Appellants using the CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: July 15, 2020

*/s/*David W.S. Lieberman_____
Attorney for *Amici Curiae*